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**

LOWER COLORADO RIVER AUTHORITY'S
MOTION FOR REHEARING

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

COMES NOW, the Lower Colorado River Authority (LCRA), and files this its Motion for Rehearing.

I. Introduction

LCRA's applications, filed in early 2019, requested operating and transport permits for 8 wells to produce up to 25,000 acre-feet per year of groundwater from the Simsboro aquifer that it owns beneath the Griffith League Ranch in Bastrop County. LCRA proposed to phase in production over time as actual demand grew, and, as a condition of phased-increases in pumping, accepted that monitoring of aquifer conditions may be requested, consistent with Board precedent in other large permits.

LCRA's applications were ***fully litigated*** over the course of 16 months (December 2018 – June 2020), including several rounds of written discovery, multiple depositions of experts, thousands of pages of pre-filed written direct and rebuttal testimony and exhibits, a 6-day in-person hearing before two State Office of Administrative Hearings (SOAH) administrative law judges (ALJs) who applied the rules of evidence and assessed the credibility of witnesses. As "disinterested hearing officer[s]", the ALJs are "better suited"

to evaluate "conflicting evidence as to adjudicative facts . . . and determine how much weight to give each side's evidence" and to make "credibility determinations" than the Board of Directors of the District. *See Hyundai Motor America v. New World Car Nissan*, Inc., 581 S.W.3d 831, 838 (Tex. App. – Austin 2019, no pet.); *Flores v. Employees Ret. Sys.,* 74 S.W.3d 532, 539-40 (Tex. App. – Austin 2002, pet. denied). The ALJs concluded that LCRA had met its burden of proof by demonstrating that the phased permits to produce and transport up to 25,000 acre-feet per year of groundwater complied with state law, and the district rules, policies, and precedent. Specifically, the ALJs found that LCRA's production of the full 25,000 acre-feet per year of groundwater would not have an unreasonable effect on groundwater or surface water resources or existing permit holders, and that the conditions and limitations in the proposed permits would prevent waste, achieve conservation, minimize as far as practicable drawdown or lessen interference between wells. The ALJs' Proposal for Decision (PFD) and response to Exceptions were presented to the Board in late July 2020 and then LCRA waited over 15 months for the Board to reach a decision that departs substantially, and illegally, from the ALJ's recommendations.

The authority of the Board of Directors to modify the ALJs' PFD and their Findings of Fact and Conclusions of Law is limited by Texas Water Code § 36.4165, which provides in part:

> (b) A board may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, **only if the board determines**:
>
> (1) that the administrative law judge did not properly apply or interpret applicable law, district rules, written policies provided under Section 36.416(e), or prior administrative decisions;

(2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or

(3) that a technical error in a finding of fact should be changed.

(Emphasis added).

Thus, broadly speaking, before a board can modify any of the ALJ's findings of fact and conclusions of law (and thereafter depart from the PFD's recommendations), the Board must determine that the ALJs made a legal error, relied upon prior incorrect administrative decisions, or made technical errors in order.

However, the Board of Directors did none of this. Instead, the Board chose to ignore the ALJs' findings and conclusions and re-weighed the evidence in contravention of state law to reach a different decision. Specifically, the Board adopted a Final Decision and issued Operating Permits ("Permits") that limit LCRA's production to 8,000 acre-feet per year of groundwater, subject to special permit conditions requiring groundwater and surface water monitoring. In so doing, the Board wholly failed to comply with or make any determinations required by Texas Water Code § 36.4156. These actions violate state law, the District's rules and policies, and are arbitrary and capricious. Accordingly. the Board's modification of the PFD's findings and conclusion, including its proposed Permits, and its Final Order issuing the Permits, were made in error and will not withstand judicial review.

II. Point of Error 1: The District erred when it changed the Final Decision and its Findings and Conclusions in violation of Texas Water Code § 36.4165.

The Final Decision's changes to the PFD's Findings of Fact and Conclusions of Law are erroneous, directly contravened by Texas Water Code § 36.4165, and must be reversed. Specifically, the Board erred by changing the PFD, including the proposed

Findings of Fact and Conclusions of Law, because it failed to make any determination that the ALJs improperly applied or interpreted applicable law, district rules, written policies, or prior administrative decisions in violation of Texas Water Code § 36.4165. Moreover, the Board's addition of entirely new Findings of Fact contravenes the authority granted to the Board under § 36.4165. The Board also failed to make a determination about the exceptions filed by the parties, and the ALJs' recommendations regarding those exceptions.

This point of error addresses all of the Findings of Fact and Conclusions of Law in the PFD's proposed order, and sections of the PFD that were added, deleted, and modified in the Final Decision and Permits.

III. Point of Error 2: 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.

The Board of Directors failed to make any determination in open session regarding the basis on which it was voting to modify the Findings of Fact and Conclusions of Law. On October 12, 2021, Board convened in closed session at 6:33 p.m. to consult with its attorney. The Board reconvened in open session at 7:59 p.m. Without discussion, Board member Melissa Cole made a motion, which was seconded by Billy Sherrill. Sheril Smith called for any discussion or deliberation, but there was none. *See* Transcript Excerpts of the Board Meeting, Tuesday, October 12, 2021 attached hereto as Exhibit 1. If the Board had reasons for changing the PFD's recommended Findings of Fact and Conclusions of Law or for accepting or rejecting of the exceptions filed by the parties, it is evident those

could have only been discussed and agreed upon in closed session, which is a violation of the Open Meetings Act.

IV. Point of Error 3: 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.

The Board erred when it issued Permits to produce only 8,000 acre-feet per year of groundwater, which reflected only the first phase of LCRA's requested operating permits, instead of issuing the phased permits recommended by the ALJs that would have authorized LCRA to produce up to 25,000 acre-feet of water to be phased-in over time as demand grows and subject to several special conditions. The Board's actions to limit LCRA's pumping to only 8,000 acre-feet per year and eliminate phased-in production are contrary to the Findings of Fact and Conclusions of Law made by the ALJs in their PFD, who specifically found that LCRA's pumping of 25,000 acre-feet per year of groundwater subject to special conditions would not have an unreasonable effect on groundwater resources, existing permit holders, or surface water resources. This point of error addresses changes, deletions, and additions to Sections IV.A.4., IV.G.1., IV.G.2., and IV.G.3 of the PFD, PFD Findings of Fact 41, 45, 46, 47, 48, 49, 50, 51, 54, 55, 56, 57, 60, 61, 62, 63, 64, 65, 66, and 78; and PFD Conclusions of Law 4 and 13.

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

Texas Water Code § 36.122(c) prohibits a district from "imposing more restrictive permit conditions on transporters than the district imposes on in-district users." In

violation of this requirement, the District's Final Decision imposes more restrictive permit conditions on LCRA, as a transporter, than the District has imposed on existing in-district permittees. Specially, the Permits require: (1) the construction and maintenance of a Monitoring Well System and the execution of a monitoring well agreement; (2) that the Monitoring Well System include wells, gages, or any scientifically supported tool to monitor surface water; (3) LCRA to submit data from the Monitoring Well System to the General Manager prior to the filing of a permit renewal application so that the General Manager may determine whether to renew or modify the Permits based on the monitoring results; and (4) LCRA to conduct a 36-hour pump test for each of the 8 wells in the well-field (as opposed to a single test well), the results of which may allow the General Manager to reduce the authorized withdrawal rate. These requirements are not imposed on in-district permittees (or, for that matter, not uniformly imposed on permittees who transport water out of the district). This point of error applies to Sections IV.B, IV.H., and IV.I of the Final Order, as well as the Final Order's Findings of Fact 20, 29, 32, 45, 46, 51, 59, and 60; and Permit Special Conditions (1), (3), (9).

VI. Point of Error 5: The District erred by including Special Condition (3) in the Operating Permits in violation of Texas Water Code § 36.1145.

Special Condition (3) in the Permits issued by the District requires LCRA to submit data to the General Manager before any renewal application that will allow evaluation of whether LCRA's pumping has resulted in substantially different impacts to groundwater resources than those predicted by the modeling relied upon by the District when the Permits were issued. This requirement violates Texas Water Code § 36.1145(a), which states that the District shall automatically approve the renewal of an operating permit if

the permit holder is not requesting a change related to the renewal that would require a permit amendment. LCRA had agreed to the language included in Special Condition (3) only insofar as LCRA had agreed to monitor aquifer conditions as part of its phased-in production of the full 25,000 acre-feet/year. The language was devised to recognize that it may be appropriate at some future date to revise the phasing formula in the Revised Draft Permit, if retained. Absent phased-in production whatsoever, LCRA does not voluntarily agree to this special condition. Under Section 36.1145, the District may not refuse to renew a permit on these grounds. This point of error addresses Final Order Finding of Fact 51.

VII. Point of Error 6: The District erred by requiring LCRA to enter into a monitoring well agreement and to construct and maintain a Monitoring Well System.

Special Condition (1) of the Permits issued by the District requires LCRA and the District to enter into a monitoring well agreement and requires LCRA to construct and maintain a Monitoring Well System. This requirement violates state law, and applicable District rules.[1] Significantly, the Final Decision even acknowledges that the District may not impose such a condition without the agreement of the permittee. *See* Final Decision at p. 47. LCRA's prior acquiescence to inclusion of the monitoring well requirements was specifically linked to LCRA's request for permits to phase-in production of groundwater over time up to 25,000 acre-feet per year, *not* for permits that cap production at 8,000 acre-feet per year. In other words, LCRA has not agreed to construct and maintain a

[1] Although the District's current rules have a monitoring well requirement, the District's April 20, 2016 Rules do not and it is the April 16, 2016 rules that apply to LCRA's permit applications.

Monitoring Well System as a permit condition for a permit that is less than what LCRA requested. Additionally, requiring a Monitoring Well System to monitor the production of 8,000 acre-feet of groundwater is not supported by the record evidence in this case, which only addressed this requirement in connection with permits that authorized the phased-in production of up to 25,000 acre-foot per year. This point of error addresses Final Order Findings of Fact 20, 29, 32, 46, 51, 59, and 60, and the deleted PFD Findings of Fact 46, 60, 61, 62, and 63.

VIII. Point of Error 7: The District erred by requiring LCRA to monitor surface water.

Requiring LCRA to include wells, gages, and any scientifically supported tools to monitor surface water as part of the Monitoring Well System violates state law, and District rules and policies. It is arbitrary and capricious. As detailed in LCRA's exceptions to the PFD's recommendations on surface water monitoring, nothing in Texas Water Code Chapter 36, Texas Special District Local Laws Code Chapter 8849, or the District's applicable rules or policies provides the District with authority to require a permittee to monitor surface water. Additionally, imposition of the permit condition was improper because it was premised on the cumulative impacts of all pumping in the District, not just the pumping of LCRA, when in fact, the ALJs found that LCRA's proposed production alone would not unreasonably affect surface water resources. Moreover, the monitoring requirement is not supported by the evidence in the case. The ALJs' analysis and ultimate conclusions regarding surface water monitoring and impacts, while flawed in some respects, were based on permits that allowed for the production of up to 25,000 acre-feet per year of groundwater. Finally, the permit condition is vague as it is unclear what are

"scientifically supported tools," making compliance with such a condition unreasonable. This point of error addresses Final Order Finding of Fact 32 and Permit Special Condition (1).

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

By not granting LCRA's applications for phased-in permits for production of the amounts requested by LCRA and recommended by the ALJs in the PFD, the District acted arbitrarily and capriciously. The District granted phased operating permits to Recharge and Gatehouse for amounts of groundwater that exceed that which is requested by LCRA, in some cases substantially. Indeed, just the first phase of Recharge's operating permits is equal to the full amount of production requested by LCRA, and they ultimately allow production of up to 46,000 acre-feet per year. Both Recharge and Gatehouse operating permits included similar special conditions on phasing as proposed by the ALJs for LCRA, with agreed-upon corrections and clarifications between LCRA and the General Manager. The District's prejudicial treatment of LCRA compared to these two permittees is arbitrary and capricious, particularly in light of the findings of the ALJs that LCRA's proposed production of the full 25,000 acre-feet per year alone will not result in unreasonable impacts to existing groundwater or surface water resources or existing permittees.

X. Point of Error 9: 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.

If the District grants this motion for rehearing, it should issue the Operating and Transport Permits as recommended by the ALJs, but with the modifications sought by LCRA in its exceptions. To refuse to do so would be arbitrary and capricious. LCRA's remaining exceptions that have not been addressed include:

(1) Requiring LCRA to monitor the cumulative impacts of District-wide groundwater pumping on surface water resources is contrary to state law, the District's rules, and other findings and conclusions in the PFD;

(2) Requiring binding commitments for water sales in various special conditions throughout the permits recommended by the ALJ was unlawful. It was also unnecessary, as LCRA already has binding commitments that allow LCRA to provide water to any of its customers in Bastrop, Lee, and Travis counties;

(3) Regarding the phasing formula in the permits recommended by the ALJs, LCRA contends:

a. The formula is unnecessary and there are fundamental problems with the formula – the formula does not just measure the impacts of LCRA's pumping on the aquifer, it places a heightened burden of DFC compliance on LCRA when DFC's are actually a district-wide standard, the formula relies on limited and possibly unreliable data and assumptions, the formula relies on data from a random and arbitrary selection of monitoring well locations or improper averaging methods,

and the formula is being arbitrarily applied to only select "large" users. Therefore, including the formula in the Permits is arbitrary and capricious; or,

b. Alternatively, if the phasing formula is retained, because the term "Estimated DFC Year Drawdown" as defined in the ALJ's recommended permits is unreasonable and arbitrary and capricious, it should be revised as proposed by LCRA.

XI. Conclusion

For these reasons, LCRA respectfully requests that the Board grant LCRA's Motion for Rehearing, and adopt the Findings of Fact and Conclusions of Law and the permits recommended by the ALJ, as excepted to by LCRA.

LCRA's Motion for Rehearing provides the Board of Directors its one chance to remedy its error of failing to comply with the requirements of Texas Water Code § 36.4156 by failing to provide any explanations for its modifications of the PFD's Findings of Fact and Conclusions of Law and related permits. Should it fail to do so, LCRA will seek the reviewing court's determination that the Board's Final Decision is contrary to law, not supported by substantial evidence and that the Board's decision should be reversed by the court, effectively granting LCRA's applications as recommended by the ALJs, subject to LCRA's Exceptions.

Respectfully submitted,

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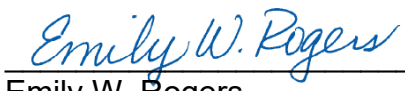
BY: 
Emily W. Rogers

Attorneys for Lower Colorado River Authority

CERTIFICATE OF SERVICE

I hereby certify by my signature below that on the 22nd day of November, 2021, 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.

Emily W. Rogers

Emily W. Rogers

SERVICE LIST

APPLICATION OF LCRA FOR OPERATING AND TRANSPORT PERMITS FOR EIGHT WELLS IN BASTROP COUNTY
SOAH DOCKET NO. 952-19-0705

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BEFORE THE

LOST PINES GROUNDWATER CONSERVATION DISTRICT

BASTROP, TEXAS

BOARD MEETING

TUESDAY, OCTOBER 12, 2021

HYBRID IN-PERSON / TELEPHONIC / VIDEOCONFERENCE MEETING

BE IT REMEMBERED THAT at 6:10 p.m, on Tuesday, the 12th day of October 2021, the above-entitled matter came on for hearing at the Bastrop Convention & Exhibit Center, 1408 Chestnut Street, Bastrop, Texas 78602; before SHERIL SMITH, President; LARRY SCHATTE, CARL STEINBACH, MICHAEL SIMMANG, HERBERT COOK, BILLY SHERRILL, MELISSA COLE, Members of the Board; and the following proceedings were reported by Lorrie A. Schnoor, Certified Shorthand Reporter, Registered Diplomate Reporter, and Certified Realtime Reporter.

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our neighboring county of what it's doing to the wells and everybody that's asked for water. It isn't pumping yet, and we don't know what that holds. But, again, please think about it. It's serious, very serious.

And I come back again, I told Billy a while ago, when I retire, please don't ask me to serve on this board because I know the tough job you guys got, and I commend you for it. And it's decisions that you've got to make sometimes are not popular. So please continue the work you're doing, and let's protect all water; but I understand we need to share. Thank y'all.

MS. SMITH: Thank you, Judge Fischer.

(Applause)

MS. SMITH: Do we have anybody remote that would like to make comments?

MR. TOTTEN: If they'll put their name in the chat, we'll unmute them. If you can say that over the mic, please.

MS. SMITH: Okay. If you are joining us remotely, if you would put your name in the chat room, then we will recognize you.

I'm not seeing any, so we'll go ahead and proceed.

AGENDA ITEM NO. 4

MS. SMITH: Agenda Item 4: Continued

final hearing from July 14th, 2021, on applications of the Lower Colorado River Authority for operating permits and transport permits for 8 wells located in Bastrop County, Texas, and the Administrative Law Judges' proposal for decision issued in the SOAH Docket No. 952-19-0705 recommending granting said permits in an aggregate amount of 25,000 acre-feet of water per year from the Simsboro aquifer along with terms and conditions.

At this time the board will be going into executive session. The board -- note on the -- we are going into the Executive Session to consult with our attorneys regarding any posted matter in which the board may seek advice of its attorneys under Government Code 551.071 or for any action on the agenda for which a closed session is permitted by law, and we will reconvene in open session for any appropriate action on any matter considered in executive session.

Okay. So we are leaving now at 6:33.

(Executive Session: 6:33 p.m. to 7:59 p.m.)

AGENDA ITEM NO. 5

MS. SMITH: Well, it looks like everybody's back, so we'll go ahead and begin. We're coming out of Executive Session at 7:59. No votes were

C E R T I F I C A T E

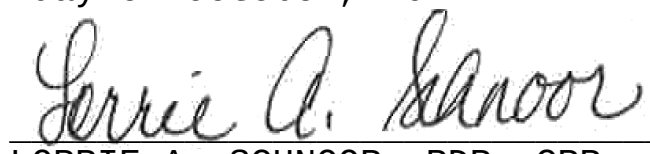
STATE OF TEXAS)

COUNTY OF TRAVIS)

I, Lorrie A. Schnoor, Certified Shorthand Reporter in and for the State of Texas, Registered Diplomate Reporter and Certified Realtime Reporter, do hereby certify that the above-mentioned matter occurred as hereinbefore set out.

I FURTHER CERTIFY THAT the proceedings of such were reported by me or under my supervision, later reduced to typewritten form under my supervision and control, and that the foregoing pages are a full, true, and correct transcription of the original notes.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 26th day of October, 2021.



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