CWIC
Colorado Water Issues Committee
of the
Texas Rice Producers Legislative Group

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February 10, 2014

Via Electronic Delivery to http://www.tceq.state.tx.us/about/comments.html

Ms. Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC 105
Austin, Texas 78711-3087

Re: Colorado Water Issues Committee's Public Comment and Motion to Modify or Overturn the Executive Director's Emergency Order Amending LCRA's 2010 Water Management Plan (Water Rights Permit No. 5838)

To The Honorable Commissioners:

The Texas Commission on Environmental Quality ("TCEQ") issued notice on January 31, 2014, of the Executive Director's order (the "Order") authorizing the Lower Colorado River Authority ("LCRA") to withhold water that LCRA otherwise is obligated to provide for downstream irrigation from the Highland Lakes, following the 2010 Water Management Plan ("WMP"). On the basis of Texas Water Code § 11.139 (Emergency Authorizations), the Order commences the third consecutive year that downstream irrigators have been subjected to serial emergency orders suspending LCRA's obligation to supply them with water. The record in this matter is an unconscionable abuse of the TCEQ's emergency authority.

By this letter, the Colorado Water Issues Committee ("CWIC") of the Texas Rice Producers Legislative Group submits public comment that includes a Motion to Modify or Overturn the Order of the Executive Director. My affidavit and the affidavits of Robert L. Cook, III, Haskell Simon, and Joseph F. Trungale will be submitted with a summary of necessary modifications to the Order as a supplement prior to hearing on February 12, 2014.

CWIC's motion explains that the Order is contrary to Water Code Chapter 11 as a whole, contrary to state policy regarding the beneficial use of water, in excess of narrow statutory authority under § 11.139, arbitrary and capricious, and factually and structurally insufficient. It departs unnecessarily from existing rights and principles under the 2010 Water Management Plan and fails to avoid unnecessary harm to downstream water users. The Order sets the bar dangerously low for future emergency relief statewide.

The Executive Director made a fundamental error by failing to show the Commission that the lower emergency curtailment triggers the Commission ordered during the last two years would be just as effective this year. Those orders prevented irrigation commitments that were likely to have been disrupted prior to harvest and were intended to retain water in storage for all customers (including the irrigators) for a subsequent year. The Executive Director also fails to order mandatory demand reduction by LCRA's other customers, which is inconsistent with emergency relief entered for other parts of the state.

It could not have been the intent of the Legislature that emergency authorizations be used to take water away from entitled users for extended periods without a fair process and compensation. CWIC is advised that Subsection (j) of Water Code § 11.139 addresses claims for damages and that there is a potential for takings claims in District Court.

In order to stop a continuing abuse of process, and to the extent that the Order is not modified consistently with CWIC's motion, CWIC requests that the Commission use its discretion to refer this matter on limited issues to the State Office of Administrative Hearings for a contested case hearing, pursuant to § 295.174 of the TCEQ's rules. To the extent necessary, lower trigger levels from previous orders could be authorized on an interim basis while a hearing proceeds. The Commission should designate a timetable for proceedings so that downstream irrigators will have a fair opportunity to contest the facts and law at issue before they face suspensions for a potential fourth consecutive year. Contested proceedings would need to conclude before the LCRA Board projects water availability for year-2015.

Thank you for your consideration of these comments and motion. We appreciate the efforts of the Commission, the Executive Director, and the Executive Director's staff to assist water users in the lower Colorado River basin during this challenging time.

Respectfully submitted,

Sincerely,

Ronald B. Gertson, Chair
Colorado Water Issues Committee

Cc via electronic transmission:
Ms. Anne Idsal, TCEQ General Counsel
Mr. Richard Hyde, TCEQ Executive Director
Mr. Blas Coy, TCEQ Public Interest Counsel
Ms. Stephanie Bergeron Perdue, TCEQ Deputy Executive Director
Ms. Caroline Sweeney, TCEQ Legal Division
Mr. Paul Sliva
Mr. Haskell Simon
Mr. Robby Cook
Ms. Carolyn Ahrens
Mr. Joe Trungale

LOWER COLORADO RIVER AUTHORITY'S APPLICATION FOR EMERGENCY ORDER TO AMEND ITS WATER MANAGEMENT PLAN	§ § § § § §	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

ON BEHALF OF THE COLORADO WATER ISSUES COMMITTEE OF THE TEXAS RICE PRODUCERS LEGISLATIVE GROUP

MOTION TO MODIFY OR OVERTURN THE ORDER OF THE EXECUTIVE DIRECTOR

February 10, 2014

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MOTION TO MODIFY OR OVERTURN
THE ORDER OF THE EXECUTIVE DIRECTOR

TO THE HONORABLE COMMISSION:

NOW COMES the Colorado Water Issues Committee ("CWIC") of the Texas Rice Producers Legislative Group and submits this Motion to Modify or Overturn the Order of the Executive Director to respectfully show the following.

Introduction

The Texas Commission on Environmental Quality ("TCEQ") issued notice on January 31, 2014, of the Executive Director's order (the "Order") authorizing the Lower Colorado River Authority ("LCRA") to withhold water that LCRA otherwise is obligated to provide for downstream irrigation from the Highland Lakes, following the 2010 Water Management Plan ("WMP").[1] On the basis of Water Code § 11.139 (Emergency Authorizations), the Order commences the third consecutive year that downstream irrigators have been subjected to serial emergency orders suspending LCRA's obligation to supply them with water.[2]

By withholding irrigation water in year-2014 on terms extraordinarily destructive to agriculture, the Executive Director's Order strikes a blow to downstream irrigation that is unprecedented in this basin. Approving the regime that LCRA proposed and the Executive Director granted in full extent will do irreparable and unjustified damage to the lower basin irrigators, to the agricultural infrastructure that they rely on, and to their communities at large. It is not simply the *fact* of a third consecutive year of suspension without procedural protections that is insupportable, but also LCRA's and the Executive Director's rationale and loose emergency standards.

The terms of this Order *do matter*. CWIC has consistently declined to object to more narrow emergency suspensions in light of prevailing drought and forecasted weather conditions. CWIC unquestionably has no intent to put human health and safety at risk. This Order, however, imposes irrationally elevated trigger levels and new, unjustifiable limitations on total irrigation water use even when the Highland Lakes are full. The Executive Director has abandoned the 2010 WMP completely, circumventing the process guaranteed by statute, rule, and specifically

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[1] The Order is styled "AN ORDER granting an emergency authorization to the Lower Colorado River Authority to amend its Water Management Plan, Permit No. 5838, pursuant to section 11.139 of the Texas Water Code."

[2] References to the "Water Code" are to TEX. WATER CODE (www.statutes.legis.state.tx.us).

[3] References to TCEQ Rules are to 30 TEX. ADMIN. CODE (info.sos.state.tx.us).

[4] *See also* Water Code § 11.139(c), which refers to such hearing as the Commission finds practicable under the circumstances.

[2] References to the "Water Code" are to TEX. WATER CODE (www.statutes.legis.state.tx.us).

[5] "Finding[s] of Fact" and "FOF" refer to findings of fact in the Order; "Conclusion[s] of Law" and "COL" refer to

by adjudication of the Highland Lakes water rights. That is LCRA's intent, apparent on page four of its application where LCRA states that "[r]egardless of combined storage content on March 1, 2014, the requested Emergency Order would never have LCRA revert to the 2010 WMP."

The price for proceeding as the Executive Director has is far too high. The damage being done in the lower basin is extreme and irreversible, both agricultural and non-agricultural businesses are shuttered, jobs are eliminated, and the State stands to lose a century-old agricultural heritage. (Affidavit of Ronald Gertson). The price also will be paid statewide. Finding that the Order does not have direct precedential value will not be effective on the ground to stop its ripple effect.

Hearing the Order, the Commissioners must call upon the Executive Director to publicly articulate and justify his standard for determining risk to human health and safety. It cannot mean one thing in the lower Colorado River basin and something different elsewhere. What obligations will the TCEQ place on drought applicants as a condition of relief? In this Order, the Executive Director completely fails to order mandatory demand reduction by LCRA's other customers, which is inconsistent with emergency relief entered for other parts of the state. The Executive Director also must be required to publicly articulate and justify what is his standard for determining that a risk is imminent. At what level of reliability must agricultural and industrial users essentially guarantee municipal supplies? Section 11.139, as so far applied in this matter, sets the bar *unconscionably low* for allowing drought applicants to use water committed to others and threatens to further undermine state water planning.

Texas property rights deserve more than the Order before you affords and owe a fair process to those from whom water is being withheld and their livelihoods taken. The fact that no one is satisfied except LCRA does not evidence a reasonable solution. Simply adopting the Executive Director's Order in its current form and substance, and on the one-sided record before the Commission, will establish that the State's policies and procedures for water supply in drought conditions are utterly broken.

The record in this matter is an unconscionable abuse of the TCEQ's emergency authority and denies CWIC's members statutory and constitutional due process. In order to stop a continuing abuse of process, and to the extent that the Order is not modified consistently with this motion or overturned, CWIC requests that the Commission refer this matter to the State Office of Administrative Hearings for a contested case hearing, pursuant to § 295.174 of the TCEQ's rules. That section authorizes such hearings as the Commissioners deem appropriate.[3,4]

[3] References to TCEQ Rules are to 30 TEX. ADMIN. CODE (info.sos.state.tx.us).

Contested proceedings would need to conclude before the LCRA Board projects water availability for year-2015.

As it stands, the Order subverts the clear intent of the Legislature that a transfer of water from one user to another under § 11.139 be available only for a limited time and be tempered by liability for damages. CWIC puts this agency and LCRA on notice that the Order subjects LCRA to claims for damages pursuant to Subsection (j) of Water Code § 11.139 as well as the potential for takings claims in District Court.

The Commission's Order should be modified in respects discussed below, or in the alternative, overturned.

Outline of Supporting Argument

1. LCRA is obligated to provide water for downstream irrigation under the 2010 WMP. Beyond the terms of that plan, the downstream irrigators are no more interruptible than any other LCRA customer.

2. The Order conflicts with Water Code Chapter 11, including provisions that specify a different approach to distributing water from a shared supply in time of shortage.

3. Provisions of the Order conflict with fundamental principles for beneficial use of water.

4. An Order based on Water Code § 11.139 must strictly and rationally apply all of the criteria required there and not exceed the purpose of the statute.

5. The drive to maintain lake levels higher than is necessary for the purpose of addressing imminent risk to human health and safety overreaches the TCEQ's emergency authority.

6. On human health and safety grounds, the record before the Commission cannot support the suspension of water for downstream agriculture beyond avoiding curtailment during the 2014 irrigation season.

7. Provisions in the Order are based on worse-than-worst case scenarios that are not credible and cannot rationally be considered "imminent." For this reason as well, the Order exceeds the TCEQ's authority.

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[4] *See also* Water Code § 11.139(c), which refers to such hearing as the Commission finds practicable under the circumstances.

8. The Executive Director made a fundamental error by failing to show the Commission that the lower emergency curtailment triggers the Commission ordered during the last two years would be just as effective this year.

9. The Commission should condition the Order on a higher or sooner level of firm demand reduction than is required in LCRA's current drought contingency plan. The Executive Director errs by dismissing such alternatives which, while incomplete solutions on their own, could be the difference between reaching curtailment levels or not.

10. Serial emergency orders to suspend water supply over an extended period of time are contrary to the clear intent of § 11.139. Circumstances no longer justify overriding the necessity to comply with established statutory procedures, if they ever did. The terms of this Order should not go forward without the opportunity for a contested, evidentiary proceeding.

11. In further support of its request that the Order be modified or overturned, CWIC offers specific challenges to the Executive Director's Findings of Fact, Conclusions of Law, and Ordering Provisions.

Supporting Argument

1. LCRA is obligated to provide water for downstream irrigation under the 2010 WMP. Beyond the terms of that plan, the downstream irrigators are no more interruptible than any other LCRA customer.

1.1 The LCRA application and the Executive Director's Order unequivocally establish that LCRA is obligated to provide water for the 2014 growing season in its four major irrigation operations, which include the Lakeside and Gulf Coast Divisions and Pierce Ranch. (*See, e.g.*, FOF 12). [5] The rights granted for the Highland Lakes are conditioned on water being made available for irrigation pursuant to a TCEQ-approved water management plan, and the irrigators have a right for contested case hearing on changes to the plan.

1.2 Following the 2010 WMP under prevailing conditions, LCRA would be expected to provide water for at least 60,000 acres of rice in 2014 with an additional opportunity for ratoon cropping (essentially a second harvest from first season plantings). The majority of water for downstream irrigation operations has most often been met with very senior run-of-river water rights that have supported these irrigation systems for a century, although the assurance of stored water is a critical consideration at the beginning of the planting season. It is a fiction in the Order that full irrigation demand would be served from stored water. Even in the worst flow

[5] "Finding[s] of Fact" and "FOF" refer to findings of fact in the Order; "Conclusion[s] of Law" and "COL" refer to the conclusion[s] of law in the Order; and "Ordering Provisions" refers to the Order's decretal provisions.

year on record, 2011, 96,329 acre-feet of water was available and utilized in irrigation diversions as run of river flows downstream. Being the "canal operator," as well as the applicant for emergency relief, LCRA also is basing its serviceable acreage calculations on higher than necessary minimum stored water assumptions, to the irrigators' disadvantage. (Affidavit of Ronald Gertson).

1.3 The Order that LCRA requested and received authorizes LCRA to serve *no* interruptible stored water to customers within the Gulf Coast and Lakeside Divisions until lake levels rebound to a combined storage level of 1.1 million acre-feet, although at that level LCRA may still provide stored water to the Garwood Irrigation Division and Pierce Ranch to the extent their contracts require. (FOF No. 54). Additionally, the order for the first time places a cap on total interruptible water for irrigation in Gulf Coast, Lakeside and Pierce Ranch even if the lakes have completely filled. Arbitrary limits on water for irrigation are unacceptable under any circumstances, and are blatantly contrary to state statute and policy for beneficial use. The limits illustrate that the Order takes an unnecessary departure from existing rights and have no place in an emergency order.

1.4 Rice is the crop of choice for the bulk of acreage within the irrigation service areas for several reasons explained more fully in Ronald Gertson's Affidavit. Key among them are the unique soil profiles and climate that are conducive to rice, but detrimental to other commercial crops. Much of the areas will revert to native pasture, or no productive use at all, if rice production becomes infeasible. Custom equipment and infrastructure for rice production will be essentially stranded. Very significant investments in water conservation in the lower basin all will be mooted, including for example permanent levees, permanent water control structures, multiple inlets, and precision graded ground that together cost upwards to $800 per acre. (Affidavit of Ronald Gertson).

1.5 A typical acre of rice production in the LCRA irrigation service area provides the food equivalent of 100% of the annual calorie needs of about 16 people. Given the amount of planted acreage lost to the Order, the calorie equivalent of 100% of the full annual food needs for about 830,000 people is being eliminated from the world's food supply. That is approximately the population of the city of Austin.

2. The Order conflicts with Water Code Chapter 11, including provisions that specify a different approach to distributing water from a shared supply in time of shortage.

2.1 On the basis of Water Code § 11.139, the Order singles out certain LCRA customers for curtailment: those farming land in the Lakeside and Gulf Coast Divisions and Pierce Ranch. CWIC does not dispute that these customers are subject to supply interruptions specifically pursuant to the terms of the 2010 WMP. However, under any *other* circumstance, their uses are

not interruptible, and their rights to contract supplies are not legally inferior to those of LCRA's other customers. Indeed, one could argue that the irrigators' rights are legally superior to those of other LCRA customers, based on the history of water supply in the lower Colorado River basin, development of the Highland lakes for power, flood control, and irrigation, guarantees by the terms of adjudication that water would be available under certain standards, and this State's historical legal protection of the rights of those with land adjoining irrigation canal systems. *See Affidavit* of Haskell Simon; *see also* Water Code § 11.038 (Rights of Owners of Land Adjoining Canal, Etc.).

2.2 In case of shortage in a shared supply, such as the Highland Lakes, Water Code § 11.039 (Distribution of Water During Shortage) applies. Section 11.039 requires that water be distributed pro rata amongst all customers, according to the amount to which each is entitled. Subject to acknowledging pre-existing conservation efforts, preference is given to no one and everyone suffers alike. If the irrigators were to be cut back even 20% beyond the terms of the 2010 WMP, the municipal customers also would be cut back 20%. If § 11.039 and § 11.139 cannot be reconciled, then § 11.039 prevails as the more specific provision.

2.3 It is a cornerstone of the State's appeal in the Texas Farm Bureau case that this agency's authority for emergency relief pursuant to Water Code § 11.053 (Emergency Order Concerning Water Rights) must not be read in isolation from other Chapter 11 provisions.[6] TCEQ cannot simply ignore § 11.039 here and maintain its argument in its other challenge. To reconcile § 11.139 with the provisions of § 11.039 and the balance of Chapter 11, the Commission must limit the emergency order only to the narrow purpose of avoiding curtailment of water during critical stages of the growing season, a result to which CWIC does not object under prevailing circumstances.

2.4 The 2010 WMP specifies conditions on which water for irrigation can be "interrupted" after it has been committed, without regard to the effect on crops that already have been planted. It is a wise application of water to agricultural uses to decline expending limited supplies on an unsuccessful crop if it can be reasonably avoided through predicting supply. (Affidavit of Ronald Gertson). Curtailment in that limited circumstance is not inconsistent with principles of beneficial use. The water saved remains in storage to better serve its availability for use by all LCRA customers (including irrigation customers) the following year. The approach has been used in water management planning for some time and should not be disturbed in an emergency order.

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[6] *See* Initial Brief of Appellant Texas Commission on Environmental Quality filed with the 13th District Court of Appeals, Docket No. 13-13-415-CA (*Texas Farm Bureau v. Texas Comm'n on Environmental Quality*) (the "Texas Farm Bureau case").

2.5 The Executive Director and the Commission also approved this approach as the foundation of previous emergency orders. LCRA's application, page 14, explains that "[t]he 850,000 acre-foot trigger in effect in 2012 and 2013 was based on avoiding the potential for dropping below [the point of curtailment] during the first crop irrigation season." There is no compelling reason to abandon the approach now. Indeed, as discussed below in Paragraph 8.3, the Executive Director implicitly agrees with the approach as a foundation for a reasonable alternative to this Order, he simply misapplies the concept to the facts.

3. Provisions of the Order conflict with fundamental principles for beneficial use of water.

3.1 Maximizing the beneficial use of water is a fundamental principal of Texas' prior appropriation system. See, for example, Water Code § 11.025 (Scope of Appropriative Right) (where "[a] right to use state water under a permit or a certified filing is limited not only to the amount specifically appropriated but also to the amount which is being or can be beneficially used for the purposes specified in the appropriation, and all water not so used is considered not appropriated") and Water Code § 11.053 (Emergency Order Concerning Water Rights) (stating that "[t]he Executive Director in ordering a suspension or adjustment under this section shall ensure that an action taken . . . maximizes the beneficial use of water").[7]

3.2 Although some findings of fact in the Order suggest otherwise, inadequate infrastructure must not define the limits of Texas' water availability. Water permits and water planning assume that the entire yield of our reservoirs will be *used*, and that the investment in infrastructure to accomplish that use will be made. It is inexplicable that essentially the same infrastructure arguments have been made for three years, with no expressed requirement for continuing accountability to the TCEQ for addressing the problem. The TCEQ should not grant serial emergency orders to the detriment of the irrigators so that LCRA can avoid implementing its drought contingency plan and some of its other customers can avoid incurring cost. Inadequate utility revenue models cannot justify avoiding demand reductions in extreme drought and at the expense of others.

3.3 Arguments to favor recreation use and aesthetic value also have no place whatsoever in consideration of an emergency application based on protecting human health and safety. Nevertheless, those considerations are deeply embedded in the Order's references to lake "rebound" or "recovery." References to those conditions in LCRA's application should be disregarded and inclusion of them in the Order should be struck. "Rebound" and "recovery" are constructs that were promoted by lake-recreation stakeholders for economic reasons during the

[7] *See also, e.g.*, Water Code §§ 11.085 (Interbasin Transfers), 11.134 (Action on Application), and 11.173 (Cancellation in Whole or in Part).

stakeholder process on the pending, regular application to amend the 2010 WMP. (Affidavit of Ronald Gertson). Elevated curtailment triggers do not serve a legitimate end in this Order for protecting human health and safety from an imminent threat.

3.4 It is indefensible that the Order also places a total limit on interruptible irrigation water even when the lakes are full, leaving water wasted to evaporation. Ordering Provision 1.e does that by limiting interruptible stored water to 172,000 acre-feet when combined storage is at any level between 1.4 million acre-feet and brim full. The Executive Director's only rationale for that provision is that LCRA requested it. (Ordering Provision No. 5 ("This order only addresses the specific relief requested from LCRA…."). There is no conceivable justification for adopting new, unconditional caps on irrigation water in the guise of an emergency order.

3.5 As Ronald Gertson's Affidavit discusses, the Ordering Provisions also embed an LCRA methodology that artificially limits the water available for irrigation to water from storage, dismissing the availability of downstream flow to support completion of crops and additional acreage. The intentional exclusion of downstream flows exaggerates the actual effect of irrigation supply on lake levels. Supplemental run of river water should be considered in determining how much water would need to be provided from storage to support a serviceable planting cycle. The irrigators are put in a lose/lose situation. If they cannot plant in the first place, they cannot put downstream flow to maximum beneficial use either. Denying plantable acreage based on insufficient lake levels is a way of also denying access to very senior run of river water rights. It enables LCRA to enhance lake levels by storing water that otherwise was perfected for irrigation use.

4. An Order based on Water Code § 11.139 must strictly and rationally apply all of the criteria required there and not exceed the purpose of the statute.

4.1 Section 11.139 states in pertinent part that:

> [T]he commission may grant an emergency permit, order, or amendment . . . for an initial period of not more than 120 days if the commission finds that emergency conditions exist which present an imminent threat to the public health and safety and which override the necessity to comply with established statutory procedures and there are no feasible practicable alternatives to the emergency authorization. Such emergency action may be renewed once for not longer than 60 days.

4.2 The TCEQ's rules to implement § 11.139 are inadequate to guide reasoned and consistent decisions. Nevertheless, in considering the Order, the Commission must ask and answer each statutory question:

- When does a shortage of water become a *threat*?

- What uses of water must be affected in order for a shortage of water to threaten *human health and safety?*
- When does a threat become *imminent?*
- When is an alternative *feasible* and *practicable*?
- Are there *any* feasible, practicable alternatives?
- To what extent do circumstances *justify* overriding procedures?

The burden is not on the affected parties to disprove any of the required elements. It is on the applicant to prove them all and the Executive Director to determine on credible evidence that each element is satisfied.[8] For example, with regard to § 11.139 standards related to feasible, practicable alternatives, the record must be credible that there are *no* such alternatives, not just that there are no "better" alternatives. The point is not that the action ordered is the best option for the applicant. There will always be better alternatives for the applicant right up to the point that competing uses are perpetually suspended. (Plenty of people have made it known that they would welcome that result here.) The point of § 11.139, however, is that TCEQ must not allow the applicant to disrupt other water users except to the extent absolutely necessary, as when there are *no* alternatives.

4.3 There also is an inherent limit on the agency's authority under § 11.139. The Commission may not legally order relief that imposes additional burdens or conditions in excess of its narrow emergency authority.[9] The Order must not depart from the terms of existing rights to water further than is necessary to *address* an imminent risk. An order may not exceed the purpose of the statute or impose additional burdens. If transferring 100 acre feet from one user to another will render a threat no longer imminent, for example, ordering a transfer of 200 acre-feet would be insupportable. In this case, it is equally insupportable to impose steeper curtailment triggers and harsher limitations than are necessary.

4.4 The standards for granting an emergency order must *not* be confused with the standards that apply to long-term, stakeholder-driven water management planning intended to function in a

[8] The agency's general powers would be unconstitutionally vague and broad if applied to supplant more specific provisions in Chapter 11. "The separation of powers clause [Tex. Const. art. I] requires that the standards of delegation be 'reasonably clear and hence acceptable as a standard of measurement.'" *Edgewood Independent Sch. Dist. V. Meno,* 917 S.W.2d 717, 740-741 (Tex. 1995) *(quoting Jordan v. State Bd. Of Ins.,* 160 Tex. 506, 334 S.W.2d 278, 280 (1960).

[9] *See, e.g.*, *Tex. Natural Res. Conservation Comm'n v. Lakeshore Util. Co.,* 164 S.W. 3rd 368, 377 (Tex. 2005); City *of Corpus Christi v. Public Util. Comm'n*, 188 S.W.3d 681 (Tex. App.–Austin 2005, pet. denied (the agency may not contravene specific statutory language, run counter to the general objectives of the statute, or impose additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions).

wider range of hydrologic conditions, overseen by the agency under the terms of adjudication, and with full process rights.

5. The drive to maintain lake levels higher than is necessary for the purpose of addressing imminent risk to human health and safety overreaches the TCEQ's emergency authority.

5.1 At what level does public health and safety begin to be threatened by a water shortage? Does protecting public health and safety require supporting the continuation of non-essential uses of water? It is arbitrary and capricious that the Executive Director finds a threat to human health and safety exists when he cannot or will not explain to affected parties what it means. The State's briefing and affidavits submitted on appeal of the successful Texas Farm Bureau lawsuit speak to drinking water and hygiene, and "water supplies and power supplies needed for members of the public to carry on their daily lives." Whatever human and health and safety means to the Commission, it cannot be one thing in the Colorado River basin and another in the Brazos River basin, or any other basin of this state.

5.2 LCRA has failed to prove, by any reasonable definition, that human health and safety is at imminent risk if combined storage is not maintained above 600,000 acre-feet through the conclusion of the 2014 crop season and on until spring 2015. The implications of lake levels falling further must be kept in perspective.

- Reaching 600,000 is not a surrogate for finding a true "threat to human health and safety. That amount of water in storage is a very conservative, planning-oriented number. By LCRA's own evidence, at 600,000 acre-feet combined storage, there is significant, usable water remaining in storage, even assuming very extreme drought of 99.5% exceedance to even zero inflows. (See also Affidavit of Joseph F. Trungale). Supplies would extend even further with more conservation efforts.
- For more than ten years and through multiple revisions, the various water management plans have contemplated operations that would lower combined storage to 325,000 acre-feet while continuing to provide some interruptible water for irrigation. (Affidavit of Joseph F. Trungale).
- Combined storage of 600,000 acre-feet of water level does take on a particular consequence under current conditions because it is the third of three factors that would trigger LCRA declaring a drought-worse-than-drought-of-record ("DWDR") under the 2010 WMP and the drought contingency plan incorporated in it.
- DWDR is not a surrogate for threat to human health and safety either, although it is a threat to irrigation. LCRA interprets DWDR in the 2010 WMP to allow it to

immediately curtail irrigation supplies without regard to where the irrigators might be in the crop cycle.

- Declaring DWDR does trigger LCRA's curtailment of firm customers in due course under Commission-approved plans for responding to a drought. It is unfortunately ironic to have a reasoned plan for extending supply in a DWDR but to take water away from other users to avoid implementing it.

5.3 The Order explains that declaring DWDR commences a period of 20% reduction from the adjusted historical water usage of firm customers. It is not reasonable to conclude, however, that a 20% reduction imminently threatens human health and safety within the meaning of § 11.139. To the contrary, 20% is just the *first* step of LCRA's mandatory conservation in response to a worse drought and even non-essential water uses are allowed to continue. It would be highly surprising if when LCRA brought the TCEQ its drought contingency plan for approval it presented to the Commission a probability that human health and safety would be compromised by a 20% reduction.

5.4 Obviously, LCRA also does not believe that human health and safety is at imminent risk when levels fall below some municipal intakes or some systems haul water. Finding of Fact No. 31 indicates that lake levels are or have been below some intakes, even after consecutive years of irrigation suspensions. Yet, LCRA has not requested emergency changes to its drought contingency plan in order to institute pro rata curtailment of firm customers, either two years ago or now, in order to relieve the pressure on those systems. No supplier is prepared to operate their reservoirs for a yield that is based on the least adaptive diversion infrastructure of its firm customers, but the Order sets that example for LCRA's reservoirs and reservoir supplies across the state in the future. LCRA's larger municipal customers would not likely accept a curtailment of their own supplies on that basis.

6. On human health and safety grounds, the record before the Commission cannot support the suspension of water for downstream agriculture beyond avoiding curtailment during the 2014 irrigation season.

6.1 It is uncomfortable but undeniable that human health and safety is not put at risk because contract claims might be made against LCRA, water utilities may lose revenue, utilities may need to spend money to improve their infrastructure, recreation-based businesses suffer, lawn watering or even some manufacturing uses might be interrupted, recreational and aesthetic interests will not be satisfied, nor even because some property values may decline.[10] Because this Order is based on less than a rigorous application of human health and safety standards, it

[10] See, for example, Finding of Fact No. 47 that in the case of a DWDR, most industrial customers would need to implement reductions more immediately and "this likely means a curtailment in annual production."

becomes a transfer of economic benefit from one region to another, and an impermissible taking of private rights and property.

6.2 The apparent standard for human health and safety that the Order implements is so liberal that it compromises the security of non-municipal water rights and uses statewide. It proves the statewide concern that if municipal users can shift the risk of inadequate infrastructure to other users, some will fail to do the right thing when it comes to improving the reliability of their own supplies or increasing their rates. The emergency authority of § 11.139 is not meant to be used to transfer economic benefits from one group to another, and not meant to be exercised without the checks and balances of compensation to affected users.

6.3 To justify curtailing irrigation for a third year, LCRA makes allegations that are the same or similar to those in previous years. The Order includes findings such as that a 20% reduction in water use by firm customers will require "some difficult measures." (FOF No. 47).[11] CWIC understands that through diligent efforts the City of Austin may already be close to satisfying its initial firm conservation requirements for DWDR, if they haven't already done so even while its residents continued to water their lawns under the city's schedules.

6.4 Although the Order includes findings that reflect pertinent shortcomings with regard to some alternatives, those shortcomings lose their appeal with three years to address them. The Order reflects an indifference to whether or not progress has been made during the pendency of the previous orders to secure water supply and infrastructure, for example by providing different lake intake access. LCRA and its customers should be required to pursue infrastructure improvements and other alternatives diligently and report to the TCEQ *as a condition of the Order*.

7. Provisions in the Order are based on worse-than-worst case scenarios that are not credible and cannot rationally be considered "imminent." For this reason as well, the Order exceeds the TCEQ's authority.

7.1 There is no question that drought continues to be serious concern throughout the lower Colorado River basin. The lower basin counties to which the Order denies water also are in the Governor's declared state of emergency—Matagorda County, Wharton County, and Colorado County. The general fact of an emergency declaration, however, does not absolve LCRA from identifying a particular threat that can be addressed appropriately by the relief sought.

[11] With regard to the imminence of a risk, see also Finding of Fact No. 28 that "if LCRA follows the 2010 WMP and if the drought continues, some customers "may need" to acquire alternative supplies. Pro rata sharing of water in storage pursuant to § 11.039 is presumably one such alternative, although that is not mentioned in the Order.

7.2 An exercise of Water Code § 11.139 authority requires findings that identify and address a threat that is imminent. A threat is imminent when it is "certain and very near."[12]

7.3 CWIC agrees that the likelihood of LCRA making a mid-crop curtailment in 2014 should be evaluated prior to planting, and that before March 1 of this year is an appropriate date relevant to the Order. However, the Order goes much further in reliance on untenable assumptions. In stark departure from previous orders that were designed to prevent a mid-irrigation declaration of DWDR, this Order uses a 1.1 million acre-feet curtailment trigger, and a limitation on the total quantity of irrigation water available, developed to propel DWDR beyond the spring of 2015. The Order fails to provide any rationale as to why spring 2015 is used as a threshold. That threshold appears to assume that the irrigators are denied water again for a fourth year, well outside the statutory term constraints of an emergency order.

7.4 The ordering provisions are based irrationally on an assumed precipitous rise in storage to 1.1 million acre-feet followed by an immediate and precipitous reduction to the 1 percentile low flow. The persistence inherent in meteorological conditions (a fundamental component of LCRA's stochastic model upon which much of the emergency order is based) puts the odds against such a reversal. (Affidavit of Joseph F. Trungale). Measuring risk by the 1 percentile also is unreasonable to begin with. It means there is a 99% probability that inflows after March 1 would be *higher* than assumed as the basis for the Order. The Order also provides no basis for using a 99% exceedance level to demonstrate an imminent threat, when a range of exceedance levels would be more reasonable for framing the issue. By no stretch of the imagination are such assumptions truly reflective of an "imminent" risk.

7.5 It is even more far-fetched that any risk remains imminent as lake levels climb even higher such that *human health and safety* requires limiting irrigation water to a fraction of that required for normal croppage, even when the lakes are brim full. Again, that is exactly what the Order does. See, for example, Ordering Provision No. 1.b, that at combined storage *above* 1.4 million acre-feet, LCRA will supply no more than 172,000 acre-feet of interruptible stored water.

8. The Executive Director made a fundamental error by failing to show the Commission that the lower emergency curtailment triggers the Commission ordered during the last two years would be just as effective this year.

8.1 Emergency orders effective in 2012 and 2013 prevented irrigation commitments that were likely to have been disrupted prior to the end of the irrigation season and were intended to retain water in storage for all customers (including the irrigators) for a subsequent year. The 2012 emergency order suspended interruptible water in 2012 to the extent combined storage was

[12] A DICTIONARY OF MODERN LEGAL USAGE, 2d Ed. (Oxford University Press, 1995). In the absence of any statutory or regulatory standard for determining what is imminent, the common meaning of the word prevails.

below 850,000 acre-feet on March 1 of that year. If combined storage was between 850,000 and 920,000, the order obligated LCRA to provide no more than 125,000 acre-feet to Lakeside, Gulf Coast, Pierce Ranch and Garwood customers.[13] LCRA would revert to the 2010 WMP if combined storage exceeded 920,000 acre-feet on the target date.

8.2 Although CWIC does not generally endorse the previous emergency curtailment levels under all circumstances, they are far less objectionable than those in this Order. They also better preserve the underlying foundation of the 2010 WMP, which is legally necessary to avoid going beyond the purposes of the emergency statute. During the most recent stakeholder process for developing the proposed regular amendment to the 2010 WMP, certain principles were laid down as guidelines for development of the plan. For curtailment scenarios, the stakeholders agreed that it was a reasonable boundary on modeling outcomes that irrigation water releases should not be allowed to lead to declaring DWDR during the course of the main rice crop irrigation season. (Affidavit of Ronald Gertson).

8.3 There are clear shortcomings to using imprecise models to generate the basis for determining risks with a few percentage points difference. Considering a reasonable range of difference would make sense. However, because LCRA used its stochastic modeling to support the application, CWIC joins the issue on that ground. Based on LCRA's own methodologies and assumptions, *if* combined storage reached 850,000 by March 1, and the irrigators received water, it remains far more likely than not that DWDR would not be reached during the main crop irrigation season.[14] (Affidavit of Joeseph F. Trungale).

8.4 Just as significantly, the Order's higher trigger level of 1.1 million acre-feet provides no more significant benefit for decreasing the risk of meeting conditions for declaring DWDR prior to the end of August than a trigger level of 850,000 acre-feet would provide. The supplemental affidavit of Ron Anderson from January 23, 2014, reports the likelihood of meeting conditions to declare a DWDR by August 31, 2014, assuming a 1.1 million trigger level, as 5%. Using the same model and methodology, the likelihood of meeting DWDR by August 31, 2014, assuming an 850,000 trigger level, is 6%. (Affidavit of Joseph F. Trungale). LCRA's stochastic model is consistent within +/- 2 percent. *The new, higher trigger levels, then, offer no meaningful advantage regarding the risk of declaring a DWDR during the main crop irrigation season.* The difference in performance between the trigger levels reduces even further when you use a more realistic end date for the irrigation season.

[13] Ordering provisions include particular conditions for Garwood and Pierce Ranch customers.

[14] LCRA presented a number of graphs with its application to support its 1 percentile scenario, but they give the wrong impression about the imminence of extreme drought by failing to include other conditions. Joe Trungale's affidavit includes a more complete depiction of the graph.

8.5 All of LCRA's assumptions about suspending irrigation use are compromised by a failure to adjust the irrigation season to reflect fewer acres planted under partial curtailment. Considering the acreage that LCRA would support at 850,000 acre-feet combined storage, it is most likely that irrigation would be completed no later than the first week of July, significantly earlier than LCRA assumed in its modeling (and, therefore, the Executive Director assumed in the Order). (Affidavit of Ronald Gertson). Also some downstream flows would be expected, including from return flows discharged to waters of the state upstream.

8.6 If you make adjustments to reflect completing irrigation by even July 31, 2014, (again, several weeks *later* than the most likely end of the season), the modeling gives a more relevant prediction. Then, assuming a beginning point of 850,000, there is a 96.8% likelihood of avoiding DWDR during the main crop irrigation season. If the model is further corrected to account for the fact that reaching the combined storage of 850,000 by March will require very high flows in February, which the stochastic model would see as a shift in antecedent hydrologic conditions (from average to wet) then the model prediction of the combined storage falling from 850,000 to 600,000 by July 31, 2014 is zero. (Affidavit of Joseph F. Trungale).

8.7 CWIC specifically controverts the Executive Director's weak dismissal of lower trigger levels as an alternative in Finding of Fact No. 49, including in the following respects.[15]

- Finding of Fact No. 49 begins that a trigger level of 850,000 is not reasonable at this time *because* of the prolonged nature and persistence of the drought and the fact that the lakes have not "recovered." (Emphasis added). Obviously, though, ordering *higher* than necessary trigger levels will do nothing to shorten the drought. And, there is no rational relationship between LCRA's concept of "recovery" or "rebound" lake levels and the legitimate application of human health and safety standards, as discussed above.
- The finding goes on to describe a situation where storage reaches 850,000 on March 1 and then severe drought returns. No one has come forward to allege that such a rainfall pattern is more likely than not to occur anytime soon. Again, it is very *un*likely.
- Finding of Fact No. 49 assumes in that scenario that if combined storage reached 850,000 acre-feet by March 1 it "could" fall to 600,000 by the end of the first crop

[15] Finding of Fact No. 49 states that:

> The emergency relief LCRA obtained in 2013 with an emergency order setting forth a trigger of 850,000 is not a reasonable alternative at this time *because* of the prolonged nature and persistence of the drought and the fact that the lakes have not recovered from this drought. If combined storage of the lakes recovers to 850,000 AF on March 1 and severe drought conditions return, combined storage could fall to 600,000 AF by the end of the first crop irrigation system [sic] requiring declaration of a DWDR. (Emphasis added).

irrigation system [sic].[16] That something "could" happen does not mean that it is imminent, however. The Affidavit of Joseph F. Trungale explains that even using LCRA's stochastic methodology, it is much more likely that the circumstance would *not* occur.

- Contrary to Finding of Fact No. 49, curtailment at the *end* of the season, is *not* likely to prevent a successful harvest. In addition to the earlier end of irrigation under limited acreage, some run of river flows would be expected, including from return flows discharged to waters of the state upstream.

After stripping away the incidental inaccuracies and non sequiturs in Finding of Fact 49, we are left with the Executive Director's implicit *concurrence* that an alternative which *is* likely, or as least *as* likely, to avoid declaration of a DWDR before the end of the irrigation season *is a practicable alternative*.

8.8 The Commission's orders in 2012 and 2013 effectively avoided mid-irrigation curtailment, and also adequately avoided any potentially imminent risk to human health and safety. The Order finds that weather patterns this year are closer to normal than they were in 2011, for example referencing ENSO-neutral conditions. (FOF No. 20) It follows that instituting the lower trigger levels from those orders would be even more conservative than they were originally. Piling on higher and higher trigger levels and lower acreage allotments would have served no legitimate purpose in those orders, and do not do so in this Order. There is no room for doubt that the show for 1.1 million acre-feet is driven by desires other than alleviating an imminent risk to human health and safety.

8.9 The curtailment curves in the Commissions 2012 and 2013 orders are no less likely to prevent curtailment during the irrigation season than are the steeply elevated curtailment curves in the Order. In other words, 850,000 is a practicable alternative to the Ordering Provisions, is more consistent with the purposes of the emergency statute and is less likely to create unnecessary burdens on those whose water use is affected. The fact that there is a practicable, less invasive alternative literally bars the current ordering provisions under the terms of § 11.139. The findings of fact are not credible to support a conclusion by the Commission that there are *no* practicable alternatives to the relief that LCRA requested and so cannot affirm the Order under § 11.139. The existence of a practicable alternative curtailment schedule negates a necessary Conclusion of Law in the Order.

[16] The Order may have intended to refer to the irrigation "season."

9. The Commission should condition the Order on a higher or sooner level of firm demand reduction than is required in LCRA's current drought contingency plan. The Executive Director errs by dismissing such alternatives which, while incomplete solutions on their own, could be the difference between reaching curtailment levels or not.

9.1 Existing water rights and uses must be preserved as completely as possibly under emergency orders that transfer water to other users. One essential way of doing that is to require those who benefit from the order first to do *all* they can do to reduce their demand. Alternatives that reduce the amount of water that is transferred in an emergency are alternatives within the meaning of Water Code § 11.139, even if none alone is a complete remedy.

9.2 Consistency with agency action in the Brazos River basin during emergency suspension requires mandatory conservation here. Defending curtailment in the Texas Farm Bureau case, the TCEQ strenuously argues that those Brazos River basin municipals which would benefit from the suspension of other users were required to institute *higher* mandatory conservation restrictions than were required under their own drought contingency plans.[17] It is arbitrary and capricious to grant municipal users in the lower Colorado River basin special privileges that were denied in the Brazos River basin.

9.3 Any suggestion that significant and mandatory conservation cannot or should not be required as part of this Order is not credible. A few acre-feet more water in storage could be all the difference in applying a trigger level or calculating the amount of acreage that may be planted in 2015, whether LCRA is operating under the 2010 WMP or yet another emergency order.

9.4 To the extent that there is any palpable risk to human health and safety at issue, LCRA's other customers certainly should bear some of the burden of securing the shared supply. Texas Water Code § 11.039 and common logic both require it. How can the Commissioners justify denying downstream users the right to plant crops in reliance on water that is obligated to them so long as lawns still are watered upstream, swimming pools are filled, car washes are operating and golf courses are kept green? How can the TCEQ condone suspending water to some LCRA customers while some others report unusually high per capita water consumption?

9.5 In fact, the Order does *not* consider minimizing downstream damage. It is based on LCRA's application alone. Because LCRA wholly failed to acknowledge the burden its

[17] *See* Initial Brief of Appellant Texas Commission on Environmental Quality filed with the 13th District Court of Appeals, Docket No. 13-13-415-CA (*Texas Farm Bureau v. Texas Comm'n on Environmental Quality*) (in which the State explains that that TCEQ required the cities that benefitted from the suspension of other users to show that they had implemented "higher level mandatory water use restrictions than may otherwise be required by [their] drought contingency plan[s]."

application places on downstream users, the Order wholly fails to acknowledge it. No less than seven findings of fact specifically address the circumstances facing LCRA's firm customers. None address the circumstances facing the downstream irrigators whose use is being suspended.

9.6 Finding of Fact No. 42 gives only one reason for not addressing enhanced conservation or demand reduction–that LCRA did not request it.[18] The LCRA Board can reverse its decision to require conservation with no repercussions under this Order. If the Commission does not modify the Order to affirmatively require demand reduction, it becomes the Commission's standard to suspend water use with no *obligation* on those benefitted to conserve. Any argument that the TCEQ is not authorized to order conservation by LCRA's other customers is simply additional evidence that the provisions of Water Code § 11.039 for pro rata reductions from a shared supply are more appropriate to the issues being considered here.

10. Serial emergency orders to suspend water supply over an extended period of time are contrary to the clear intent of § 11.139. Circumstances no longer justify overriding the necessity to comply with established statutory procedures, if they ever did. The terms of this Order should not go forward without the opportunity for a contested, evidentiary proceeding.

10.1 The Order omits a conclusion of law that is necessary to a § 11.139 emergency authorization. The Commission must find affirmatively that the conditions which present an imminent threat to the public health and safety also override the necessity to comply with established statutory procedures. Without that conclusion, the Order fails. The Commission cannot simply write it in, there must be a credible basis for the conclusion.

10.2 Section 11.139 does not support serial emergency orders that together extend over a long time. The plain language of the statute says that the initial period of an emergency authorization must be no more than 120 days and that there may be one renewal for up to 60 days. Consecutive applications and renewals that together suspend water use for three years extend beyond reason and fly in the face of obvious statutory intent.

10.3 CWIC has never urged that firm water supply users be subjected to unreasonable risk. However, the point has been reached that despite continuing drought and the paperwork for new applications, conditions no longer warrant a denial of process. Serial emergency orders to suspend water supply for three consecutive years without a meaningful opportunity to discover and contest the basis of those orders is the administrative equivalent of being subject to a judicially imposed civil

[18] Finding of Fact No. 42 states that:

> The LCRA Board approved a no more than once a week watering restriction that would take effect in March 2014 if combined storage is below 1.1 million AF and interruptible stored water has been cut off. LCRA has not requested TCEQ approval of this action and this order does not address such action.

restraining order on a perpetual basis with no opportunity to discover and challenge the foundation of the order. No judicial tribunal in this country would allow that. Emergency action on the record before the Commission, and certainly when taken together with previous orders, is both a statutory and a constitutional denial of due process.

10.4 In order to stop a continuing abuse of process, and to the extent that the Order is not modified consistently with this motion or overturned, CWIC requests that the Commission refer this matter on limited factual and legal issues to the State Office of Administrative Hearings for a contested case hearing, pursuant to § 295.174 of the TCEQ's rules. That section authorizes such hearings as the Commissioners deem appropriate.

10.5 Among other things, CWIC expects to establish through contested case proceedings that LCRA's proposal does not meet appropriate standards for such extraordinary relief and that the agency is acting in excess of its authority in ordering it. The agency's interpretation of imminent risk to human health and safety will be challenged, and CWIC will have a fair opportunity to correct inadequacies and insufficiencies in the otherwise lop-sided record [19]

10.6 CWIC would not object to the Commission ordering the curtailment triggers used in previous emergency orders on an interim basis while a hearing proceeds. However, the Commission also should designate a timetable for proceedings so that downstream irrigators will have a fair opportunity to contest the facts and law at issue before they face suspensions for a potential fourth consecutive year. Contested proceedings would need to conclude before the LCRA Board projects water availability for year-2015. This is a reasonable request.

10.7 CWIC represents interests directly affected by the Order in ways not common to the general public. Members of CWIC and the Texas Rice Producers Legislative Group are holders in agricultural lands and farming operations that put surface water of the lower Colorado River basin to beneficial use for growing rice as a food crop. These members stand on the shoulders of individuals, families and businesses that developed farmlands and contributed to the construction of extensive irrigation canals as early as the 1880's. CWIC's right to participate in a contested case hearing in a representational capacity is discussed further in the Affidavit of Robert L. Cook, III.

[19] Consider the issue of alternatives, for example. If LCRA did not raise and address a particular alternative in its application, then there is no evidence of it at all in the Order. CWIC presented several viable alternatives for LCRA's consideration. None of those alternatives were developed by the LCRA staff for the LCRA Board's consideration, nor were they made part of LCRA's application even though they had considerable merit for avoiding imminent threat to human health and safety. (Affidavit of Ronald Gertson). Only a contested proceeding will allow CWIC to pursue its issues effectively.

11. In further support of its request that the Order be modified or overturned CWIC offers specific challenges to the Executive Director's Findings of Fact, Conclusions of Law, and Ordering Provisions.

The Order is contrary to Water Code Chapter 11 as a whole, contrary to state policy regarding the beneficial use of water, in excess of narrow statutory authority under § 11.139, arbitrary and capricious, and factually and structurally insufficient. It overreaches the inherent limitation that emergency authorizations must leave existing rights undisturbed to the greatest extent possible and avoid unnecessary impacts. If the Order is not modified, it must be overturned as unlawful and unfounded. In further support, specific challenges to the Executive Director's Findings of Fact, Conclusions of Law, and Ordering Provisions follow.

11.1 Findings of Fact Nos. 13-25 reciting current conditions are insufficient to demonstrate a particularized imminent risk that supports the Ordering Provisions.

11.2 Reference in Finding of Fact No. 22 to lake "recovery" is inappropriately vague and irrelevant to imminent risk to human health and safety. Any conclusion based on that finding is arbitrary and capricious and runs counter to the general objectives of Water Code § 11.139.

11.3 Findings of Fact Nos. 25-32, and the findings as a whole, are insufficient to establish as a conclusion of law that an imminent threat exists to human health and safety. Any conclusion based on those findings is arbitrary and capricious and runs counter to the general objectives of Water Code § 11.139.

11.4 CWIC directly controverts Finding of Fact No. 29(a) as being not credible. That finding assumes that a cut-off of stored water necessarily ruins crops that are already planted, disregarding the probability that run of the river flows will be available to supplement irrigation.

11.5 Findings of Fact Nos. 43-50 are insufficient to establish that there are no practicable alternatives to the Ordering Provisions. They also are arbitrary and capricious to the extent that they dismiss alternatives that while incomplete by themselves would be practicable in tandem. Any conclusion based on those finding is arbitrary and capricious and runs counter to the general objectives of Water Code § 11.139.

11.6 Finding of Fact No. 49 is directly controverted. Reference in that finding to lake "recovery" is inappropriately vague and irrelevant to imminent risk to human health and safety. The finding also is based on a factually incorrect assumption regarding the irrigation season.

11.7 Taken as a whole, the Findings of Fact are insufficient to identify a particularized imminent threat to human health and safety that supports the Ordering Provisions. In this regard, Conclusion of Law No. 2 also is insufficient to support the Order. With a lack of clarity

regarding particularized threat, it is impossible to determine that there are no practicable alternatives to the Ordering Provisions.

11.8 Conclusion of Law No. 3 is incorrect. The Executive Director does not have the authority to issue an emergency order based on §11.139 when to do so contravenes Water Code § 11.039. Conclusion of Law No. 3 runs counter to the general objectives of Water Code Chapter 11.

11.9 The Ordering Provisions are not supported by credible evidence and findings. They run counter to the general objectives of the statute, and impose additional burdens, conditions, and restrictions in excess of or inconsistent with the relevant statutory provisions.

11.10 The Order as a whole is legally insufficient because it fails to include a fundamental conclusion of law required under § 11.139 related to whether conditions justify overriding statutory procedures.

Prayer

Upon consideration, CWIC prays that the Commission will modify the Order consistently with this motion or, in the alternative, that it will either refer this matter for contested case proceedings or overturn the Order in its entirety as being inconsistent with Chapter 11 of the Water Code.

Respectfully Submitted,

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