

**COMMENTS OF THE NATIONAL WILDLIFE FEDERATION ON
DRAFT DEFINITIVE AGREEMENT BETWEEN SAN ANTONIO WATER
SYSTEM AND LOWER COLORADO RIVER AUTHORITY**

The National Wildlife Federation appreciates the opportunity to provide written comments on the draft "Definitive Agreement Between San Antonio Water System and Lower Colorado River Authority." As previously expressed in various forums, NWF has grave concerns about the potential adverse impacts of the proposed water transfer on the lower portions of the Colorado River and on Matagorda Bay. In our view, the information currently available indicates that the expected adverse impacts are sufficiently damaging to demonstrate that the project should not proceed. However, we understand that LCRA and SAWS wish to develop additional information intended to gain a better understanding of the biological functions of the Matagorda Bay System and of potential adverse impacts. Accordingly, we have expressed a willingness to support the gathering of additional information if it is done through an open, unbiased, and scientifically rigid process. We also have expressed a willingness to participate in a process for further evaluation of the potential for an acceptable project design. As indicated in the comments set out below, we have serious concerns about numerous provisions of the draft Agreement, particularly as they relate to ensuring sound and appropriate study and decision processes. These shortcomings must be addressed in order for us to have confidence that project decisions will be made in a manner consistent with legislatively-mandated protections and with a rigorous science-based approach.

The Contract Fails to Implement H.B. 1629 Conditions or LCRA's Oral Representations.

The Legislature, as a condition of granting LCRA authority to enter into a contract with the City of San Antonio, imposed certain requisite conditions that must be met before the LCRA Board approves such a contract. Those conditions are aimed at ensuring that the people and the natural resources of the Colorado River basin will not be unduly prejudiced by the sale of water outside of the basin. The draft contract basically ignores those conditions by purporting to make the requisite findings without any factual basis. For example, the statute requires the Board to find that the contract "will **ensure** that the beneficial inflows remaining after any water diversions will be adequate to maintain the ecological health and productivity of the Matagorda Bay system." Subsection (m)(3) of Section 28 of Article 8280-107 ("LCRA statute"), as added by H.B. 1629 (77th Leg.)(emphasis added).

The fifth "Whereas" clause of the draft contract states that the LCRA Board has made that exact finding. However, there simply is no contractual provision that backs up the purported finding. Nor is there any factual basis for the statement. Indeed, the draft contract expressly acknowledges that studies are needed in order to better understand the precise inflow needs of the Matagorda Bay system. We understand that to be one of the primary tasks to be considered during the "Study Period." However, no provision in the draft contract provides any assurance that the project will not go forward unless adequate inflows are ensured. Meaningful compliance with the statutory condition requires just that. It requires a clear and definite provision in the contract ensuring that no diversions of water can proceed unless adequate studies have been undertaken to affirmatively demonstrate that the remaining freshwater inflows into the Matagorda Bay system are adequate "to maintain the ecological health and productivity" of the bay system. The single contractual provision addressing environmental studies, Section 1.3.D.,

does not even acknowledge the findings that H.B. 1629 mandates must precede diversions under the contract.

The absence of any such contractual provision guaranteeing that the project will not go forward unless the Matagorda Bay system and the Colorado River are adequately protected also is glaringly inconsistent with LCRA's public representations. LCRA staff, and particularly Joe Beal, have made repeated oral statements to the public (and directly to NWF representatives) that LCRA would ensure the health of the River and the Bay. However, the draft contract, which is the one legally enforceable document LCRA is developing to govern the project, is completely devoid of any such commitment. That is particularly troubling because, pursuant to this contract, decisions about actual diversion amounts and rates will be made years in the future. The LCRA personnel making those decisions, which could affect the people and resources of the Colorado River for 80 years, may not be the same people making decisions today. Accordingly, it is critical that the contract includes clear and definite provisions implementing the protections current personnel have promised.

H.B. 1629 also mandates that the contract also must establish a mechanism for ensuring "a broad public and scientific review process designed to ensure that all information that can practicably developed is considered" in establishing environmental flow conditions. Again, although the draft contract includes a recital of a finding that such a process will be used, there simply is no provision in the contract that provides meaningful assurance on which such a finding could be based. Instead, Section 1.3 merely restates the statutory language, and only in the limited context of designing and undertaking studies. The statutory language requires such a review process for the decisions about the actual provisions guaranteeing such flows, not just for studies. Accordingly, the contract must ensure a process that provides such public and scientific input both for the study phase and for the decision phase. Section 1.3.D., which directly discusses environmental studies, does not even mention the need for any public or scientific review process, much less provide any such mechanism. In addition, this seems to be the only place in the draft contract that "environmental studies" are mentioned. When discussing funding for studies, the studies are merely referred to as "feasibility studies." The precise priority and importance to be assigned to the environmental studies within the overall suite of feasibility studies is unclear.

H.B. 1629 also directs LCRA to include in the contract a provision ensuring that before water is delivered, San Antonio "has prepared a drought contingency plan and has developed and implemented a water conservation plan that will result in the highest practicable levels of water conservation and efficiency achievable within" San Antonio's jurisdiction. Rather than including a provision designed to result in a fact-based finding about that statutory prerequisite, the draft contract simply recites that San Antonio already has done that. That recitation is baseless. San Antonio has made great progress on water conservation, but it has a long way to go before it can claim that the highest practical levels achievable have been realized. Indeed, representatives of the San Antonio Water System routinely acknowledge that much more progress in water conservation can be achieved. The draft contract language suggests an attempt to render that clear statutory protection wholly ineffectual.

SECTION-BY-SECTION COMMENTS

Section 1.3.B. Development of Off-Channel Reservoirs, Run-of-River Flows and Stored Water Releases. The first sentence of this section, which refers to the Development Studies as addressing new water supply for communities upstream of the Highland Lakes, is inconsistent with the remainder of the discussion of the Development Studies. Other sentences in this section indicate that the Development Studies are aimed solely at the goal of developing water for San Antonio. This discrepancy should be addressed.

Section 1.3.D. Environmental Impact. The identification of required permits, licenses, and other governmental approvals is not an "environmental study." Specific undertakings related to permitting should be kept distinct from the assessment of environmental impacts in order to facilitate clear, unbiased decisions. The persons involved in environmental studies and in determining the acceptability of the impacts of the project should not be concurrently attempting to obtain permits for the project. However, this provision, when read in conjunction with Section 1.4.B, suggests just that. Although this appears to be the only provision in the Agreement that directly addresses environmental studies, there is no mention of a commitment to an independent, unbiased decision-making process. That is very disappointing and inconsistent with NWF's understanding of the process in which NWF agreed to participate.

The discussion of environmental studies should be phrased in terms consistent with meeting the statutory prerequisites for the project. For example, Subsection (m)(1) of Section 28 of the LCRA Act requires that the Board find that the project will actually **benefit** recreational and environmental interests, among others, in the lower Colorado River watershed. However, the study language addresses only mitigating adverse impacts. Similarly, Subsection (m)(3) requires a finding that inflows adequate to maintain the ecological health and productivity of the Matagorda Bay system will be ensured. Compliance with that mandate requires studies aimed at determining the requisite amount of inflows. It is not clear that an investigation of the "anticipated environmental impact of implementing" the Agreement is broad enough to satisfy the statutory requirements.

Section 1.5.C. Annual Study Period Advance. This section indicates that, other than a \$500,000 annual obligation which will be applied towards a number of expenses, SAWS has complete discretion in approving additional study costs. Because the \$500,000 could be expended for any number of activities, many of which are not environmental studies, there simply is no commitment of funding to ensure that "all information that can be practicably developed is considered" in establishing environmental flow provisions. As a result, the contract fails to support the requisite finding required by H.B. 1629. The Agreement must guarantee an amount adequate to fund the studies that will provide sufficient information to support the requisite findings or, at minimum, must provide that if the requisite findings are not made, no diversions of water may occur.

Section 1.8.A. Submission and Approval of Agreed Implementation Plan. Rather than conditioning the development of an implementation plan upon findings of compliance with the statutory prerequisites of H.B. 1629, this Section turns the legislation on its head. The draft contract states that the development of an implementation plan by LCRA constitutes a

determination that the statutory requirements have been met. That is a bit like “complying” with a law requiring dogs to be on leashes by declaring that all dog collars will subsequently be referred to as leashes. The contract must provide that LCRA will only approve an implementation plan if it finds that all statutory criteria have been met and must establish a meaningful process and decision criteria, including a mechanism ensuring appropriate public and scientific review, for making those findings.

Section 1.9. Proceed to Implementation Period. This provision states that the Study Period ends only if and when (i) both parties approve an Agreed Implementation Plan, **and** (ii) either (a) the Study Period has ended, or (b) SAWS has directed LCRA to proceed with implementing the project. As written, this provision says the Study Period never ends unless LCRA and SAWS proceed with the Project. Other provisions in the contract say LCRA can't terminate the Agreement until after the end of the Study Period. Read literally, this creates a never-ending loop in which LCRA could never withdraw from the Agreement unless SAWS acquiesces.

This provision may have been intended to address only termination of the Study Period prior to the planned date of February 28, 2009. However, even if so modified, it still means the Study Period can't be cut short by LCRA, even if the studies clearly indicate that LCRA could never make the requisite findings mandated by the Legislature. In order to avoid creating momentum that might drive a bad project forward, it is essential that LCRA have the ability to call the project to a halt as soon as the existence of serious deficiencies are confirmed. The Legislature issued a specific directive to LCRA to ensure that any contract protects and benefits the people and resources of the Colorado River watershed. Accordingly, LCRA must insist on contract provisions that maintain its authority to halt the process whenever appropriate. The absence of such a mechanism is particularly problematic because Section 1.12.B. makes LCRA liable to reimburse SAWS for half of the costs of studies if the project does not go forward. Thus, allowing study costs to increase unnecessarily would create a disincentive for LCRA to decide not to provide the requested water and would impose unnecessary costs on LCRA's ratepayers and customers.

Section 1.11.B. LCRA's Termination Right. This Section indicates that during the Study Period, LCRA can only terminate the studies if SAWS states in writing that the estimated project costs are too high. As noted above, that is inappropriate. LCRA must maintain clear authority to call a halt, and avoid unnecessary costs, whenever it becomes clear that the project will have unacceptable impacts.

Section 1.12.B. Sharing of Feasibility Study Period Costs. If the Agreement is terminated during the Study Period, pursuant to Section 1.8.A., Section 1.10, or Section 1.11.A., B., C., this Section provides that LCRA must pay SAWS 50% of the Aggregate Study Period Advances. As noted above, unless LCRA has the ability to stop the studies, and control costs, this requirement could create a financial disincentive for LCRA to find that full diversions would damage the environment and could impose inappropriate costs on LCRA ratepayers and customers.

Section 2.8. Restrictions on Reservation and Delivery of Water in Extended Term. This provision indicates that the potential for imposition of surcharges for the failure by SAWS to reduce the amount of water used is triggered only if SAWS is using 150,000 acre-feet from the

Colorado at the beginning of phase-out period. That limitation is inconsistent with the requirements of H.B. 1629. Subsection (d) of Section 28 of the LCRA statute mandates that the surcharge for a failure progressively to reduce usage must apply during the last ten years of any extended term regardless of the amount of water being supplied. In other words, if, for example, SAWS is using 100,000 acre-feet of water at the beginning of the phase-out period, H.B. 1629 mandates that surcharges apply during the last ten years of that period unless San Antonio ratchets down its consumption in accordance with an agreed-upon schedule. That could be accomplished for amounts less than 150,000 acre-feet by converting the currently proposed reduction schedule to a percentage reduction and applying that percentage reduction to whatever the applicable amount of water usage is at the beginning of the phase-out period.

Section 2.9.A. Prohibited Expansive Actions. In paragraph (1)(i) of this Section, any action by SAWS (or San Antonio) to compel an increase in the quantity of water reserved and/or purchased beyond that agreed upon must be defined as an expansive action. As currently drafted, this provision has no effect if the agreed upon amount of water used under the Agreement is less than 150,000 acre-feet. Similarly to the point raised above, H.B. 1629 mandates that the surcharge must apply for any attempt to increase the amount of water taken over the amount otherwise agreed to. Section (e)(1) of H.B. 1629 is quite clear in providing that the rate surcharge must be applied whenever SAWS initiates legal proceedings to obtain any increase in the amount of surface water taken. Accordingly, the Agreement must provide that the surcharge applies for attempted legal action to mandate any increase over the agreed-upon amount of water (even if that amount is less than 150,000 acre-feet). In addition, because the statute mandates surcharges for any such actions by "the municipality," the expansive action consequences must be applied to actions by the City of San Antonio, generally, and not just limited to actions by SAWS.

Unlike Paragraph (e)(1), Paragraph (e)(2) of the statute mandates the application of a surcharge in the circumstance where an entity other than San Antonio compels LCRA to supply additional water only if the amount supplied exceeds 150,000 acre-feet or the term exceeds the agreed-upon duration. Accordingly, that limitation in the language of paragraph (2) of this Section of the Agreement is consistent with statutory language. However, H.B. 1629 does not allow the surcharge to be avoided, as paragraph (2) of this Section of the Agreement provides, if SAWS is Aopposing@ the action that results in LCRA being compelled to supply additional water. The statutory language is unconditional and is designed to ensure a disincentive for any person to attempt to compel expansion of the contract. The disincentive for a customer of SAWS to seek to compel the delivery of water by LCRA is the additional surcharge that automatically would be incurred by SAWS and presumably passed along by SAWS to the customer. Allowing SAWS to avoid that additional cost simply by Aopposing@ the action and "relinquishing" its contractual rights, would frustrate clear statutory language and substantially limit the disincentive provided. The Agreement should include a commitment by SAWS that it will oppose any such attempt to compel additional water supplies, but the Agreement may not limit the application of the surcharge in the manner currently provided.

Section 2.12.B. Limitations on Groundwater Use by LCRA for Agricultural Purposes.

The last sentence of this Section is overly broad. Restrictions on the amount of groundwater pumped will necessarily affect the amount of surface water supplied by LCRA, unless LCRA

plans simply to take surface water away from rice farmers, or the Bay, regardless of whether there is groundwater available as a replacement for rice farming. This language inappropriately assigns all risks of reduced groundwater supply to persons within the Colorado River watershed.

Section 2.24. SAWS Obligation to Maintain Conservation Plan in Effect. Subsection (m)(5) of Section 28 of the LCRA statute mandates that LCRA may not contract to sell water unless the LCRA Board finds that the contract **ensures** that SAWS will have drought management and water conservation plans in-place, and implemented, before water is delivered. As drafted, this Section of the Agreement requires SAWS to have the requisite drought management and conservation plans in effect when the Agreement is signed. Apparently, LCRA and SAWS contend that SAWS= current programs Aresult in the highest practicable levels of water conservation and efficiency achievable.@ That simply is not defensible. Representatives of SAWS have often acknowledged that much more effective water conservation can be achieved. The statute recognized that by mandating that the contract must require the requisite drought contingency and water conservation plans to be in place and implemented **before any water is delivered**. NWF certainly has no objection to (and, in fact, supports) SAWS moving to implement measures more quickly than is required by statute. However, we are concerned that the language suggests that SAWS does not plan to improve its current drought management and water conservation programs to comply with the statute. Similarly, the absence of any provisions that would establish a mechanism for the LCRA Board to ascertain that the statutory standard has been met indicates that an important statutory protection for the people and resources of the Colorado River watershed may be ignored.

Section 9.1. Agreement to Establish Contract Committee. The provision creating the contract committee, made up only of representatives of LCRA and SAWS (Section 9.2.A), to make all mutual decisions does not allow for meaningful public and scientific input into decisions about environmental impacts. The contract should ensure a process that involves independent scientific experts involved in a rigorous assessment designed with interim decision points and with clear decision criteria ensuring, among other things, that the Bay is protected.

Section 10.4. No Right to Withhold Delivery of Water. LCRA should have the right to withhold water under certain circumstances. For example, water should be withheld if SAWS fails to demonstrate compliance with the requirements of a revised Section 2.24. Similarly, some mechanism is needed to address situations where mutual assumptions relied upon in developing the project turn out to be wrong or where future developments, such as climate change, reduce the overall available water supply. Basically, this provision assigns all risks of reduced supplies or incorrect assumptions to Matagorda Bay and water users within the Colorado River watershed.

Section 11.3. Severability. Provisions that implement statutory limitations on the delivery of water may not be made severable. H.B. 1629 provides clear direction that water may not be delivered unless numerous conditions are met. If contractual provisions implementing those restrictions are invalidated, the Agreement itself becomes invalid and the contract language should acknowledge that.