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April 30, 2014

Office of General Counsel  
ATTN: Connie Sanders  
Texas Water Development Board  
1700 North Congress Avenue  
Austin, TX 78701

VIA MAIL & EMAIL

Dear Ms. Sanders:

Please accept this letter as the comments of the Lone Star Chapter of the Sierra Club on the TWDB Executive Administrator's draft preliminary recommendation regarding the resolution of the interregional conflict between the 2011 Region C and D Water Plans as posted on the agency website on March 4, 2014. The Sierra Club respectfully but strongly opposes the Executive Administrator's draft preliminary recommendation for the reasons enumerated below. We urge the Executive Administrator to revise his recommendation to reflect our suggestions. In the event that does not occur, the Sierra Club urges the directors of the Texas Water Development Board to reject the draft preliminary recommendation and adopt the alternative interim resolution to the Region C/Region D conflict that we propose.

**Sierra Club opposes the Executive Administrator's draft preliminary recommendation for at least the following five reasons:**

- (1) The recommendation in part directly contradicts the decisions of the state courts in this matter and, if adopted, will only lead to additional, protracted legal disputes that will complicate efforts to meet long-term water demand projections for Region C.
- (2) The proposed Marvin Nichols reservoir will severely and negatively impact the natural and agricultural resources of Region D, which is in contradiction to important goals of the current state and regional water planning process.
- (3) The proposed Marvin Nichols reservoir may not rank high on several criteria in the new regional prioritization process, especially as certain factors in flux are likely to impact its ranking in a negative way.
- (4) The water demand projections for Region C have decreased considerably since the 2011 regional plan, and recent actions and new opportunities to enhance water conservation call into question any justification for the proposed Marvin Nichols reservoir, at least within the 50-year planning horizon.
- (5) There is no urgency that requires the imposition of the proposed Marvin Nichols reservoir in the 2011 Region C plan. An interim 2011 plan without Marvin Nichols can be approved to allow other strategies to move forward while a new regional plan is being developed and efforts are continued to find a mutually acceptable resolution between Regions C & D.

The following pages provide elaboration on each of these five points.

**The TWDB Executive Administrator's draft preliminary recommendation in part directly contradicts the decisions of the state courts in this matter and, if adopted, will only lead to additional, protracted legal disputes that will complicate efforts to meet long-term water demand projections for Region C.**

Although the draft preliminary recommendation released in early March purports to be a “resolution” of the conflict between the 2011 Region C and Region D water plans, in fact the TWDB Executive Administrator in the analysis section of his draft memo revives the issue of what constitutes a conflict between regional water plans. In doing so he stakes out a position that was clearly rejected by the state district court and the state appellate panel that heard the litigation (the *Ward Timber* case) challenging the TWDB's approval of the 2011 Region C water plan despite the objections of Region D to the proposed Marvin Nichols reservoir in the Region C plan.

The Executive Administrator continues TWDB's contention that an “interregional conflict” exists only “when more than one regional water plan relies upon the same water source, so that there is not sufficient water available to fully implement both plans, creating an over-allocation of that source.” That is the definition of “interregional conflict” that TWDB put into its regional water planning rules in 2012, although it was used unofficially by the agency since 2001. If this indeed was the singular, accepted definition of interregional conflict (which is not defined in the Water Code), then Region D's objections to the proposed Marvin Nichols reservoir in the Region C plan would not necessarily be a conflict.

***But the state courts have clearly and emphatically rejected TWDB's narrow definition of what constitutes an interregional conflict – which means that the Executive Administrator is holding to a position that ignores the decisions of the courts. In the May 23, 2013 opinion of the Eleventh Circuit Court of Appeals in the *Ward Timber* case the court – in commenting on the TWDB's narrow interpretation of interregional conflict being – said firmly: “We find that the Board's interpretation is clearly inconsistent with legislative intent.”***

The Eleventh Circuit Court of Appeals – siding with the plaintiffs from Region D challenging TWDB's approval of the 2011 Region C plan – agreed that “interregional conflict” encompasses “the type of major conflict here between Region C's proposed major reservoir in Region D and its impact on the resources in Region D.” The Court further said that “it is evident that the legislature wants the state water plan to be comprehensive: (1) to assure that future water needs will be met while protecting regional interests and significant natural and agricultural resources in the state and (2) to not have conflicts or internal inconsistencies.” The Court pointed out in its opinion that “Region D identified several impacts [of the proposed reservoir] and concluded that the impacts of the Marvin Nichols Reservoir outweighed a selection of that strategy.”

Although the appellate court affirmed the district court's decision to remand resolution of the interregional conflict to TWDB, the Executive Administrator – while characterizing his draft preliminary recommendation as a “resolution” of the conflict is actually asserting once again – erroneously – that a conflict does not exist and is ignoring Region D's well-reasoned concerns about the impact of building Marvin Nichols Reservoir on the region's agricultural and natural resources. What this means in effect is that this issue is far from resolved and is simply going back to the courts – where it is unlikely that the state courts are going to come to different conclusions than they did

only months ago. Thus, rather than putting resources and time into working for solutions to the impasse, more money and time will be spent in the court room.

**The proposed Marvin Nichols reservoir will severely and negatively impact the natural and agricultural resources of Region D, which is in contradiction to important goals of the current state and regional water planning process.**

The Texas Legislature in Section 16.053 (h)(7) of the Water Code stated in part that TWDB may approve a regional water plan only after it has determined that “the plan is consistent with long-term protection of the state’s water resources, agricultural resources, and natural resources...” The Eleventh Circuit Court of Appeals in its decision in the *Ward Timber* case noted that requirement and further discussed the possible environmental and economic impacts of reservoir development such as Region C’s proposed Marvin Nichols reservoir on those resources.

It is not necessary here to restate all of those impacts, which are extensively discussed in the 2011 Region D water plan. But the Eleventh Circuit in its opinion in the *Ward Timber* case noted some of those impacts, and the enumeration of a few of them is sufficient to illustrate the point: the proposed Marvin Nichols would flood 66,000 to 70,000 acres in portions of several counties. Those flooded lands would include 33,000 to 53,000 acres of forest lands, some of which are Priority 1 bottomland hardwoods and wetlands. As a result of mitigation requirements, an additional 163,620 to 648,578 acres would have to be acquired.

An estimated 165,000 to 200,000 acres of agricultural land would be lost to production as a result of the reservoir’s flooding and mitigation. In a state that loses more agricultural land each year than any others due to a variety of factors, including land development, the impact of this massive reservoir in East Texas is definitely not consistent with any goal for the long-term protection of agricultural and natural resources. Moreover, it would be one more example of the relentless assault on naturally flowing streams in Texas, despite a state process to preserve environmental flows.

All this for the construction of the type of outmoded water supply project that is increasingly subject to question due to costs, evaporation of water, eventual sedimentation, impact on private property rights, and concern that the water is not truly needed for essential purposes. The 2011 Region C water plan is essentially asking Region D to be a sacrifice zone for the benefit of water demands in the Dallas-Fort Worth area. Region C has options to address its true water needs without making such a tragic and negative impact on the agricultural and natural resources of Northeast Texas.

**The proposed Marvin Nichols reservoir may not rank high on several criteria in the new regional prioritization process, especially as certain factors in flux are likely to impact its ranking in a negative way.**

The Executive Administrator in his draft memo on “resolving” the conflict between Region C and Region D asserts the following:

“Continuing Marvin Nichols [in the Region C plan]...acknowledges the recent legislative mandate in House Bill 4 and Senate Joint Resolution 1 to develop and fund the strategies in the [water] plan as opposed to excising strategies at a critical time for water supply development in Texas.”

To the contrary – as those of us who actively monitored the passage of HB 4 in the state legislative process are keenly aware – even some legislators who played a leadership role in passing the legislation referred to the state water plan as including a wish list of projects, some of which would never be built, in part because regional and state water planners had not been required to prioritize the projects in those plans. That indeed was one of the compelling reasons for the inclusion of provisions in HB 4 for prioritization of water projects at the regional planning level and another prioritization process at the state level for projects for which state financial assistance was sought.

Focusing here for purposes of simplicity on just the regional prioritization process – to be done by regional water planning groups for the projects proposed in their respective plans – the proposed Marvin Nichols reservoir may not rank high on several criteria in comparison to other projects in the Region C Water Plan, if the prioritization process is conducted objectively. The five basic criteria to be used by regional water planning groups to rank their projects are as follows:

- Decade of need for the project
- Project feasibility
- Project viability
- Project sustainability
- Cost-effectiveness of the project

Although its initial ranking among projects in the 2011 Region C plan may place the proposed Marvin Nichols Reservoir in the mid-range of projects, several factors are probably going to negatively impact its ranking if it is included as a water management strategy in the 2016 plan. That plan is scheduled to be ready for submittal in its initial draft form roughly one year from now, with a new prioritization of projects included in that plan. Here are some of the ongoing issues or changing factors that will affect any ranking of Marvin Nichols as water management strategy for Region C:

Decade of need (“need” is defined in the Texas regional water planning process is the difference between projected water demands and existing water supplies and contracts) – In the 2011 Region C plan the delivery system from Marvin Nichols Reservoir is expected to be developed in phases. Phase 1 (the reservoir and initial pipelines and pump stations) would be in place by 2030. Phase 2 (parallel pipelines and additional pump stations to deliver more water) would be online by 2050. *However*, even proponents of the proposed reservoir are saying that lowered water demand projections (see the next section of these comments) are at least delaying the “need” for the project. Wayne Owen, planning director for the Tarrant Regional Water District, was recently quoted by the Fort Worth Business Press as saying the timetable for completing the Marvin Nichols Reservoir “was definitely being pushed back” and could be stretched from 2030 to 2040.

Project feasibility – One of the factors in weighing the feasibility of a project in the new process of prioritization is whether the sponsor has the necessary legal rights and water rights to be able to use the water from a project. Even if continued in the Region C water plan any effort to actually build the Marvin Nichols Reservoir is going to involve a lengthy, protracted, and expensive permitting process that has no guarantee of success. The fight against the proposed reservoir by people in Region D is only likely to intensify if TWDB attempts to mandate the project in the Region C plan despite the anticipated negative impacts of the reservoir on resources in Region D.

Cost-effectiveness – Trying to understand the anticipated costs of the proposed Marvin Nichols Reservoir from the data provided in the 2011 Region C water plan is a somewhat complicated task. But the bottom line is that the total cost of the reservoir, the pipelines to distribute the water from

it, the pump stations, and the interest on funds borrowed to finance the project was estimated to total about \$3.4 billion (not including annual operating costs projected to be about \$331 million).

In actuality the costs projected in the 2011 plan may have increased. For example, the breakdown in the 2011 plan indicated that 77,427 acres of land would be acquired for the dam and reservoir at a cost of \$1250 per acre (for a total of almost \$97 million). However, a quick look at listings for rural land for sale in Red River County as of this month indicates that the developers of the project might be hard-pressed to find land to buy at that price now – a more common figure seems to be about \$2000 an acre. Moreover, it's not clear how much of the costs of “permitting and mitigation” (total \$214 million) reflect acquisition of mitigation lands, but it certainly seems that this estimate must be based on the lower projection of 163,000+ acres needed for mitigation rather than the 648,000+ acres. The cost of acquiring 163,000+ acres at \$1250 an acre is about \$204 million. If the mitigation requirement is 648,000+ acres that would require \$810 million at \$1250 an acre – a substantial increase in project cost – and only with the possibly outmoded \$1250 per acre land price.

These factors raise serious questions about the ranking that the Marvin Nichols Reservoir would have in the regional prioritization process in the 2016 Region C water plan, even if it is in the mid-range of projects in the 2011 plan when ranked according to some factors that are changing.

**The water demand projections for Region C have decreased considerably since the 2011 regional plan, and recent actions and new opportunities to enhance water conservation call into question any justification for the proposed Marvin Nichols reservoir, at least within the 50-year planning horizon.**

The bottom line is that water conservation is beginning to have an impact in Region C, even though there is still much to do to enhance water efficiency and reduce non-essential water use in the region as whole. Some progress in reducing per capita water use has already been made in some areas, and the potential for more success is on the horizon.

North Texas Municipal Water District (NTMWD) has had an aggressive water conservation education program since 2006. The District is now working with its 13 member cities and other customer cities to seek adoption of “model” water conservation plans, which if properly implemented will achieve more reductions in per capita water use. The City of Dallas in 2012 adopted ongoing restrictions on outdoor lawn watering (no more than twice a week), and the City of Fort Worth – at the urging of Tarrant Regional Water District and others – just adopted that ongoing restriction in April (this restriction is also part of the NTMWD model conservation plan).

The impact of the conservation that has already occurred is being seen in the new round of regional water planning. According to Tom Gooch, a consultant to the Region C Water Planning Group, the 2011 Region C plan projected that in 2020 the gallons per capita per day (GPCD) of municipal water use by North Texans would be 207. However, again according to Tom Gooch, the projections for the new round of water planning are that the GPCD figure for municipal water use in the region in 2020 will only be 177. *Indeed the water demand projections for this fourth round of regional water planning show that – as a result of the lower projected per capita water use and some lower population growth projections – the demand for water in Region C in 2070 is projected to be lower than the demand for water that had been projected for 2060 in the 2011 Region C Plan – by about 300,000 acre-feet of water per year!*

Please note that these lowered projected water demands do NOT yet reflect the impacts that are likely to be seen by the new outdoor lawn watering restrictions becoming more prevalent in the region, which may further reduce the water demands in Region C during the planning horizon. Moreover, a number of state legislative developments in 2013 provide possibilities for enhancing conservation efforts further, including reducing water loss in municipal water distribution systems, which is quite high in some jurisdictions in Region C. The new legislative actions include:

- The new State Water Implementation Fund for Texas (SWIFT) for providing state financial assistance (loans, not grants) for projects in the state water plan, of which not less than 20% of the funds are to be used for conservation or reuse projects.
- A revamped Property Assessed Clean Energy (PACE) program in Texas to allow owners of commercial or industrial properties to obtain low-cost, long-term loans for water conservation, energy-efficiency improvements, and renewable retrofits.
- New annual water loss audit requirements for retail water utilities with more than 3300 connections and new requirements that state financial assistance applicants with water loss above a threshold to be set by TWDB have to use part of that financial assistance or other funding programs to curb that water loss.

These – and other new statutes – may also spur more reductions in per capita water use in Region C and other regions, which will decrease the “need” for a costly, grandiose, and environmentally questionable water infrastructure projects such as the Marvin Nichols Reservoir.

**There is no urgency that requires the imposition of the proposed Marvin Nichols reservoir in the 2011 Region C plan. An interim 2011 plan without Marvin Nichols can be approved to allow other strategies to move forward while a new regional plan is being developed and efforts are continued to find a mutually acceptable resolution between Regions C & D.**

The reductions in per capita water use and water demand projections that have occurred and the potential for more progress allow TWDB and Region C to take an interim step without including a dubious reservoir project in an already outdated 2011 Region C Plan. The new projected water demands for Region C for each of the remaining decades in the 2011 plan (2020, 2030, 2040, 2050, and 2060) are 300 to 400,000 acre-feet of water per year less than the projections in the 2011 plan. TWDB as an interim measure should remove the Marvin Nichols Reservoir from the 2011 Region C Plan and require that additional municipal water conservation be included to meet any resulting “shortfall” in water supplies. In effect some of that is already happening, as is demonstrated by the lowered water demand projections for the new round of planning, and more conservation is possible given recent state and local actions.

TWDB can undertake a pro-active effort to assist Region C in maximizing water conservation in the 2016 regional water plan and identifying any other water management strategies that might be needed to provide additional water supplies at appropriate points in the 50-year planning horizon. Such an effort would be a much more efficient and productive use of taxpayers’ money than a return to the courthouse to rehash arguments where the courts have already clearly spoken their opinions.

Respectfully submitted,

Ken Kramer, Water Resources Chair