

TCEQ DOCKET NO. 2006-1723-WR

2008 OCT 13 PM 4:26

APPLICATION OF AMERICAN §
RICE GROWER'S COOPERATIVE §
ASSOCIATION FOR §
AMENDMENT §
TO CERTIFICATE OF §
ADJUDICATION NO.4277 §

BEFORE THE
TEXAS COMMISSION
ON

CHIEF CLERKS OFFICE

ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUEST

The Executive Director of the Texas Commission on Environmental Quality (TCEQ) files this Response to the hearing requests filed on American Rice Grower's Cooperative Association's (American Rice) application to amend Certificate of Adjudication No. 4277. Four hearing requests were filed; all but one were withdrawn. The Executive Director recommends that the remaining hearing request be denied.

BACKGROUND

American Rice is the owner of Certificate of Adjudication No. 08-4277. That certificate authorizes the maintenance of a dam and reservoir of 65 acre feet on Big Ditch, tributary of the Trinity River Basin and diversion and use of not to exceed 5,000 acre feet of water per annum from the perimeter of the reservoir at 35.56 cubic feet per second (cfs) for agricultural purposes to irrigate 9,238.04 acres of land. The certificate also authorizes the diversion and use of not to exceed a total of 33,000 acre feet of water per annum from a point on the Big Ditch at a diversion rate of 140 cfs for agricultural purposes of the same land, a diversion point on the East Prong Old River to divert at 22.22 cfs, and a point on Big Ditch at 17.78 cfs, all in the Trinity River Basin and Liberty County, for agricultural purposes of the same land. The priority date for the 65 acre foot impoundment and 5,000 acre foot diversion from the perimeter of the reservoir is August 25, 1969, and the priority dates for the 33,000 acre foot diversions are July 2, 1913.

American Rice and the City of Houston request to amend the certificate as follows:

to authorize an interbasin transfer from the Trinity Basin to the San Jacinto River Basin, Trinity-San Jacinto Coastal Basin, the Neches River Basin, the Neches-Trinity Coastal Basin, and the San Jacinto-Brazos Coastal Basin, for use in Liberty, Chambers, Harris, Galveston, Brazoria, Fort Bend, San Jacinto, Walker, Grimes, Waller, Montgomery, and Jefferson Counties,

to add municipal, industrial, and mining use to the current agricultural use,

to add an additional diversion point downstream of the current diversion point on the Trinity River in Liberty County,

to increase the diversion rate at the additional diversion point,

to confirm that the amended Certificate retains for all purposes the July 2, 1913 priority date for the 33,000 acre foot diversion, and the August 25, 1969 priority date for the diversion point from the reservoir for the 5,000 acre feet, and

to change the ownership of the certificate to the City of Houston.

PROCEDURAL HISTORY

This application was received on August 29, 1997. The application was declared administratively complete and filed with the Office of the Chief Clerk on March 1, 2000. The Chief Clerk sent notice on May 29, 2002 to all the water right holders in the Trinity River Basin, the San Jacinto River Basin, the Trinity-San Jacinto Coastal Basin, and San Jacinto -Brazos Coastal Basin, and notice was published in *The Vindicator*, in Liberty County on June 23, 2002, and in Harris County in the *Houston Chronicle*, covering several counties, on June 26, 2002. The comment period ended on July 26, 2002.

Four hearing requests were received, and three hearing requestors withdrew the request. The application was technically complete in July, 2003.

Reason for Length of Time to Process Application: After this application was filed, the Executive Director had to determine whether the application would be governed by the Interbasin Transfer (IBT) provisions in Senate Bill 1, effective September 1, 1997, or governed by the prior IBT statute which was in effect on August 29, 1997. There was correspondence on this issue from the legislator who authored Senate Bill 1.

After the S.B. 1 determination, from March 20, 1998 to October of 2003, staff reviewed the application, but the applicants also requested staff to hold off on processing and staff gave the applicants time to negotiate with potential protestants and later, the hearing requestors. Staff also had several meetings with the applicants. Applicants and staff discussed how the notice should read. After notice was given, Applicants objected to the environmental conditions in the draft permit which was mailed July 14, 2003. From this time until 2006, several meetings were held among staff, applicants, and the Executive Director to discuss the environmental conditions in the permit. Staff changed the draft permit in March of 2006 in part to address some of these concerns. Throughout this time the applicant requested additional time to settle the case with the hearing requestors. Three of the four timely hearing requests were withdrawn after settlement with the applicants.

LEGAL AUTHORITY

The application is subject to the procedures for evaluating hearing requests on applications declared administratively complete on or after September 1, 1999 in 30 Texas Administrative Code, Chapter 55, Subchapter G (Sections 55.250-55.256).

Title 30, Sections 55.251 (b) and (c) of the Texas Administrative Code specify that a hearing request must:

- (1) be in writing and be filed with the Office of the Chief Clerk during the public comment period;
- (2) give the name, address, and daytime telephone number of the person who files the request;
- (3) identify the person's personal justiciable interest affected by the application including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public; and
- (4) request a contested case hearing.

A hearing request must comply with requirement (1) above and must "substantially comply" with requirements (2) through (4). 30 Tex. Admin. Code § 55.251(c).

A request for a contested case hearing must be granted if the request is made by an affected person and the request:

- (A) complies with the requirements of 30 Tex. Admin. Code § 55.251;
- (B) is timely filed; and
- (C) is pursuant to a right to hearing authorized by law.

30 Tex. Admin. Code § 55.255(b)(2).

An "affected person" is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to the general public does not constitute a justiciable interest. 30 Tex. Admin. Code § 55.256(a).

For a group or an association, the hearing request may be granted if the group shows that one or more of the members would have standing to be a party in his or her own right, the interests the group seeks to protect are germane to the group's purpose, and the claim asserted would not require the presence of the individual members. 30 Tex. Admin. Code § 55.252(a).

To determine whether a person is an affected person, all relevant factors must be considered, including but not limited to:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) the likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) the likely impact of the regulated activity on the use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 Tex. Admin. Code § 55.256(c).

Under 30 Tex. Admin. Code § 55.256(b), governmental entities with authority under state law over issues contemplated by the application may be affected persons.

HEARING REQUESTS

Four hearing requests, from Tarrant Regional Water District, Frost Properties, Ltd., Gulf Coast Water Authority (and its predecessor Chocolate Bayou Water Company), and the Alders Group, were filed on this application. All but the Alders Group withdrew their hearing requests.

Alders Group:

The Alders Group's request for hearing is timely and complies with all other procedural requirements for requests for hearing.

The Alders Group is made up of Weldon Alders, Medland Investments, L.L.C. along with the A. Reese Brown Family Limited Partnership. The Alders Group states that it owns 13,500 acres of land, 9,238.04 acres of which is the service area in the application. The Alders Group also states that it owns the land where the dam and reservoir are located, and the land where two diversion points are located. The Alders Group bought this land from Amoco Production Company, Sun Operating Limited Partnership, and American Rice.

The Alders Group also points out that the Water Right Purchase Agreement between American Rice Growers and the City of Houston lists Amoco Production Company and Oryx Energy Company as landowners entitled to water service in American Rice's service area. The Alders Group states that because it succeeded to the interests of Amoco and Onyx, it "has become the owner of the authorized reservoir and the holder of the right to divert 5,000 acre feet of water per annum from its perimeter at the maximum rate of 35.56 cubic feet per second to irrigate his property." The Group is opposed to any "change of use to any county other than Liberty County and any basin other than the Trinity River Basin" and the use of water for other than irrigation.

The Executive Director has no records that indicate that the Alders Group owns a water right for the 5,000 acre feet from the reservoir. No water right for the Alders Group is on file, and staff has not received any documents which granted or transferred a water right to the Alders Group. The Alders Group may be talking about its right to be served by American Rice. The Executive Director does not believe that having a contract to use this water makes Alders Group an affected person for this application. American Rice will have to serve the Alders Group's land under any contracts regardless of whether this application is granted, and the Alders Group's property rights would not be adversely affected.

Alders Group does not specifically argue that Amoco Production Company, Sun Operating Limited Partnership, and American Rice owned an irrigation right that passed with the land to the Alders Group. If it is arguing this, the Executive Director has no records indicating that Amoco and Sun owned an irrigation right. Staff has not been provided staff with the deed from Amoco, Sun, and American Rice to the Alders Group. And, American Rice's irrigation right would not have passed with the land. *See*, 30 TAC § 297.81(b) (an irrigation right held by a water supply company does not pass with the land).

Additionally, in the contract of sale from American Rice to the City, submitted with this application, the parties state that Dayton Canal System sold its water rights to American Rice. Dayton Canal therefore sold its water rights by contract to American Rice and possibly others. Consequently, the water rights would not pass as being appurtenant.

Therefore, the Alders Group has not shown that it has an interest that is protected by the law under which the application will be considered, there are distance restrictions or other limitations imposed by law on an affected interest, a reasonable relationship exists between the interest claimed and the activity regulated, there is a likely impact of the regulated activity on the health, safety, and use of property of the person, or that there is likely impact of the regulated activity on the use of the impacted natural resource by the person.

CONCLUSION

Under Tex. Water Code § 11.134(3)(B), the TCEQ may grant a water right only if it does not impair existing water rights, and several other factors. The Alders Group does not have a water right that could be affected by this application. The fact that the Alders Group owns the land that is being served by American Rice does not make it an affected person under any of the criteria for obtaining a water right.

The Executive Director recommends that the Alders Group's hearing request be denied.

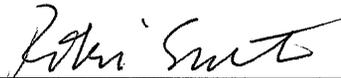
Respectfully submitted,

Texas Commission on Environmental Quality

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REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
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CERTIFICATE OF SERVICE

I certify that on October 13, 2008, the "Executive Director's Response to Hearing Request" was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, and the State Office of Administrative Hearings, and a complete copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.



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Permit No. ADJ 4277A

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CERTIFICATE OF SERVICE

I certify that on October 13, 2008, the "Executive Director's Response to Hearing Request" was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, and the State Office of Administrative Hearings, and a complete copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.

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