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Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 10, 2008

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 OCT 10 PM 3:50
CHIEF CLERKS OFFICE

**RE: AMERICAN RICE GROWERS COOPERATIVE ASSOCIATION
TCEQ DOCKET NO. 2006-1723-WR**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Request for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Christina Mann".

Christina Mann, Attorney
Assistant Public Interest Counsel

Handwritten initials "bjc" in cursive script.

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: www.tceq.state.tx.us

**IN THE MATTER OF THE
APPLICATION OF AMERICAN RICE
GROWERS COOPERATIVE
ASSOCIATION AND THE CITY OF
HOUSTON TO AMEND
CERTIFICATE OF ADJUDICATION
NO. 08-4277**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUEST FOR HEARING**

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Response to Request for Hearing in the above-referenced matter, and would respectfully recommend referring this matter to the State Office of Administrative Hearings (SOAH).

I. INTRODUCTION

American Rice Growers Cooperative-Dayton Division and the City of Houston (Applicants) applied to TCEQ¹ on August 29, 1997 for an amendment to certificate of adjudication no. 08-4277. The amendment would authorize the owner to conduct inter-basin transfers of diverted water; add additional uses beyond irrigation (municipal, industrial and mining); add an additional diversion point downstream; increase the diversion rate; and change ownership of the Certificate to the City of Houston after amendment is granted. The owner would also be required to maintain adequate passage for water that the owner is not entitled to divert flowing through the Big Ditch dam and reservoir. The certificate owner must also notify TCEQ of changes to its service area.

¹ Actually, the Applicants applied to TCEQ's predecessor agency, the Texas Natural Resource Conservation Commission (TNRCC).

The Applicants published notice of the water rights application on June 23, 2002 in *The Vindicator* and on June 26, 2002 in the *Houston Chronicle*. On June 27, 2002, attorney John Stover submitted a timely hearing request to the TCEQ on behalf on Mr. Weldon Alders, Medland Investments, L.L.C., and the A. Reese Brown Family Limited Partnership (Alders Group). All other hearing requests were withdrawn. The Alders Group states it is affected by the amendment application because 1) most of the acreage of service area described in the application is owned by the Alders Group, 2) the dam and reservoir authorized by the Certificate is located on land owned by Mr. Alders, and 3) a diversion point authorized by the Certificate is located on land owned by the Alders Group. Pursuant to the analysis provided below, OPIC recommends granting the request and referring this matter to the State Office of Administrative Hearings (SOAH) to determine the nature of the Alders Group's water rights and service area interests and whether or not its rights and interests will be impaired by the proposed amendment of the certificate of adjudication.

II. APPLICABLE LAW

A. Requirements for Affected Person

This application was received on August 29, 1997 and was declared administratively complete on March 1, 2000. As the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Title 30, Chapter 55, Subchapter G, sections 55.250-55.256 of the Texas Administrative Code ("TAC"). Under those provisions, a hearing requestor must make their request in writing 30 days after the publication of the notice of the application and identify the requestor's personal justiciable interest affected by the application, specifically noting the "requestor's location and distance relative to the activity" 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.” 30 TAC § 55.251(b), (c); 30 TAC § 295.171.

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.” 30 TAC § 55.256(a). 30 TAC section 55.256(c) provides relevant factors that will be considered in determining whether a person is affected. These factors include, but are 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) Likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) Likely impact of the regulated activity on 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 TAC § 55.256(c).

The Commission shall grant a request for a contested case hearing if (1) the request is made by an affected person, (2) the request is timely filed with the chief clerk, and (3) the request is made pursuant to a right to hearing authorized by law. 30 TAC § 55.255(b).

B. Requirements for Amendments of Water Rights

Texas Water Code (TWC) Section 11.112 (b) provides that the Commission shall grant an application to amend a certificate of adjudication if the requested change will not cause adverse impacts on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment. TWC Section 11.085 (l) provides

that the Commission may grant an application for an interbasin, in whole or in part, "only to the extent that: (1) the detriments to the basin of origin during the proposed transfer period are less than the benefits to the receiving basin during the proposed transfer period; and (2) the applicant for the interbasin transfer 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 the jurisdiction of the applicant."

III. HEARING REQUEST

The Alders Group states in its hearing request that there has been a conveyance of property from Amoco Production Company and Oryx Energy Company to the Alders Group. As a result, the Alders Group is now the owner of a substantial portion of the Dayton Canal, the owner of the authorized reservoir, and the holder of the right to divert up to 5000 acre-feet of water per year at a rate of 35.56 cubic feet per second for irrigation purposes. The Alders Group opposes the authorization of the inter-basin transfer of water and the expansion of authorized uses for the diverted water beyond irrigation. The Alders Group further explains that it has now succeeded in interest in the service area since the Alders Group owns the property formerly owned by Amoco Production Company and Oryx Energy Company.

It is not clear to OPIC whether or not the Alders Group is claiming a specific senior water right, or challenging ownership of the water right claimed by the Applicant (at the reservoir at Big Ditch). However, it is obvious that the Alders Group is claiming an interest in the service area as successors in interest to the previous landowners entitled to water service in the service area. OPIC finds the Alders Group to be an affected person. The Alders Group² has

² Although the Alders Group is made up of one individual and two entities, OPIC is not treating the request as a group or an association request, as described in 30 TEX. ADMIN. CODE §55.205. The Alders Group is composed of three co-owners of the same real property, with presumably indivisible interests.

demonstrated that a reasonable relationship exists between the interest claimed (preventing a transfer of water out of the basin to protect interest in water rights and maintenance of the service area) and the activity regulated.

IV. CONCLUSION

For the reasons set forth above, OPIC respectfully recommends that the Commission grant the contested case hearing request of the Alders Group and refer this matter to SOAH for a contested case hearing to determine the nature of the Alders Group's water rights and service area interests and whether or not its rights and interests will be impaired by the proposed amendment of the certificate of adjudication.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

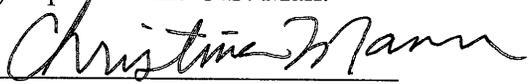
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CHIEF CLERKS OFFICE
OCT 10 PM 3:51

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2008, the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing were filed with the Chief Clerk of the TCEQ and a 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.


Christina Mann

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TCEQ DOCKET NO. 2006-1723-WR

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