

TCEQ DOCKET NO. 2007-0014-WR

2007 AUG 13 PM 4: 27

APPLICATION BY ALVIN, PAMELA,  
AND NATHAN STARR FOR A NEW  
APPROPRIATION OF WATER IN  
KAUFMAN COUNTY, TEXAS;  
APPLICATION NO. 5920.

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BEFORE THE  
CHIEF CLERKS OFFICE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

## EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to hearing request for Alvin, Pamela, and Nathan Starr's (Starr or Applicant) application for a new appropriation of water in Kaufman County, Texas. The Executive Director recommends denial of the application pursuant to TEX. WATER CODE § 11.131, based on its finding that water is not available for the requested appropriation and/or the ability of senior water right holders to make full beneficial use of their appropriations would be impaired. In the event that the Commission does not deny the application at a Commission Meeting, and instead refers the matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing, the Executive Director recommends that the Commission grant the hearing requests of North Texas Municipal Water District (NTMWD) and the City of Dallas ("the City" or "Dallas").

### 1. BACKGROUND

#### The Application

Alvin, Pamela, and Nathan Starr filed a Texas Water Code, Section 11.121, application to divert and use, at a combined maximum rate of 2.01 cfs (900 gpm), an amount not to exceed 320 acre-feet of water per year from the East Fork Trinity River, tributary of the Trinity River, Trinity River Basin. The applicant seeks to appropriate this water to irrigate 200 acres out of a 576.283 acre tract in Kaufman County, Texas.

#### Procedural History

The Applicant had a temporary permit for the requested diversion which was issued on November 1, 2004 and will expire on October 31, 2007 (WR PERM TP-8252). The new application was received on October 7, 2005 and declared administratively complete on February 16, 2006. Pursuant to 30 TEX. ADMIN. CODE §§ 295.151 to 153, notice was published in a newspaper of general circulation within the section of the state where the source of water is located and mailed to water rights holders in the Trinity River Basin on July 3, 2006. The City and NTMWD each filed timely protests/requests for a contested case hearing on the application.

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The Applicant has also filed a hearing request on this application. Once the technical review was completed, the Applicant was informed by certified letter of the Executive Director's conclusion that there was not sufficient unappropriated water available to support a new appropriation. The letter, dated October 17, 2006, directed the Applicant to either request a hearing or withdraw the application by November 27, 2006. The Applicant responded with a demand for a contested hearing on November 13, 2006.

## 2. THE EXECUTIVE DIRECTOR RECOMMENDS DENIAL OF THE APPLICATION

Texas Water Code section 11.134 sets forth the procedure for Commission action on an application for water rights. The Commission "shall grant the application only if . . . unappropriated water is available in the source of supply . . . [and] the proposed appropriation . . . does not impair existing water rights or vested riparian rights." TEX. WATER CODE § 11.134(b)(2)-(3). The Water Code further prescribes that, after a preliminary review of an application, the Commission may deny the application without a hearing if "there is no unappropriated water in the source of supply or . . . the proposed appropriation should not be allowed for other reasons . . ." TEX. WATER CODE § 11.131.

Utilizing the Commission's Water Availability Model (WAM), the Executive Director's staff determined that there is not sufficient unappropriated water available in the source of supply at the Applicant's location to support the requested appropriation, in full or part, on either a term or perpetual basis. Further, to the extent that there are any unperfected water rights in the source, the current conditions simulation of the WAM (which shows actual use) demonstrates that the issuance of a term permit would also prohibit senior appropriative right holders from making full beneficial use of their existing rights. The Commission cannot grant the application if there is no water available or the appropriation would impair existing water rights, therefore, the Executive Director recommends denial of the permit request. TEX. WATER CODE § 11.134(b)(2)-(3).

The Commission may, at its discretion, deny the permit without a referral to SOAH if, after a preliminary examination of the application it appears that there is no unappropriated water in the source of supply. TEX. WATER CODE § 11.131. The backup materials submitted by the Executive Director demonstrate that there is not sufficient unappropriated water in the source of supply. Therefore, the Executive Director recommends that the Commission deny the application at the scheduled September 5, 2007 Commission Meeting. However, in the event that the Commission refers the case to SOAH for a contested case hearing, the Executive Director believes that the Protestants, Dallas and NTMWD, have submitted sufficient information to demonstrate that they may be affected by this permit application.

### 3. RESPONSE TO HEARING REQUESTS

#### 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 (TAC) Chapter 55, Subchapter G (Sections 55.250-55.256).

Title 30, Sections 55.251 (b) and (c) of the TAC require a hearing request to:

- (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).

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).

#### **NTMWD’s Hearing Request**

A timely hearing request was received from NTMWD on July 19, 2006. NTMWD stated that one or more of those rights might be impaired if the application is granted. NTMWD’s hearing request complied with all of the requirements of TEXAS ADMIN. CODE § 55.255. NTMWD holds several existing senior water rights and pending applications in the Trinity River Basin both upstream and downstream of the proposed diversion.

#### **The City’s Hearing Request**

A timely hearing request was received from the City of Dallas on August 3, 2006. The City’s hearing request complied with all of the requirements of TEXAS ADMIN. CODE § 55.255. The City holds senior water rights upstream of the Applicant’s proposed

diversion point, including one right which is approximately 3 miles upstream of the applicant's diversion point in Lake Ray Hubbard (Certificate of Adjudication No. 08-2462). The City also has pending reuse permits it claims may be affected by the application.

### Analysis

Both NTMWD's and the City's (collectively "Protestants") requests for a contested case hearing meet the requirements in 30 TEX. ADMIN. CODE § 55.251. Protestants' hearing requests: (1) were filed in writing with the Office of the Chief Clerk before the end of the public comment/hearing request period; (2) provided the Protestants' names, addresses, and telephone numbers; (3) explained how each Protestant believes the application would affect its justiciable interests; and (4) each included a specific request for a contested case hearing. The Protestants also included statements in their requests explaining their interest and concerns with the application and proposed permit.

A determination of who is an "affected person" must consider the relevant factors listed under 30 TEX. ADMIN. CODE § 55.256.

### Whether the interest claimed is protected by the law under which the application will be considered

Each of the Protestants has at least one valid permit or certificate of adjudication which entitles it to use State water. Both Protestants each additionally have applications for new water rights. The Commission may not grant an application if it would impair existing water rights or vested riparian rights. TEX. WATER CODE § 11.134(b)(3)(B). Applicant's proposed diversions could interfere with NTMWD's contract releases from its upstream reservoirs or reduce streamflows available for NTMWD to meet environmental flow restrictions or interfere with water that is property of downstream senior water right holders. This could force NTMWD to release more water to compensate for the losses. The proposed diversions could also reduce flows to NTMWD's downstream water rights. The City claims that its existing water rights could be impaired without sufficient protections in the Applicant's proposed permit.

### Whether a reasonable relationship exists between the interest claimed and the activity regulated

Protecting the Protestants water rights from impairment is reasonably related to the Commission's consideration of the Applicant's water right application. As stated above, under Section 11.134 of the Texas Water Code, the Commission must consider protection

of these water rights.

**Whether there is a likely impact of the regulated activity on the health, safety, and use of property of the person**

The Protestants' existing water rights are considered property rights. The granting of the application would impair those water rights.

**Whether there is a likely impact of the regulated activity on the use of the impacted natural resource**

Granting this request could impair the Protestants' ability to take water under each of their appropriations.

**4. CONCLUSIONS**

**Conclusion on Hearing Requests**

For the reasons stated above, if the Commission does not deny the application at agenda and the case is referred to SOAH, the Executive Director recommends that NTMWD's and the City's hearing requests be granted.

**Length of Contested Case Hearing**

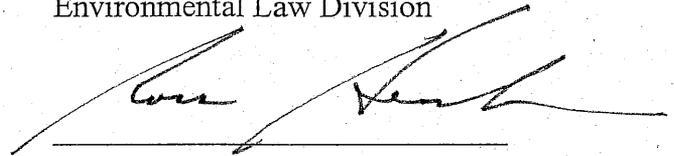
If the Commission decides to grant a hearing request and refer the application to SOAH, the Executive Director recommends that the hearing be no more than six months.

Respectfully submitted,

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

Glenn Shankle, Executive Director

Robert Martinez, Director  
Environmental Law Division

A handwritten signature in black ink, appearing to read "Ross W. Henderson", is written over a horizontal line.

Ross W. Henderson, Staff Attorney  
Environmental Law Division

State Bar. No.24046055

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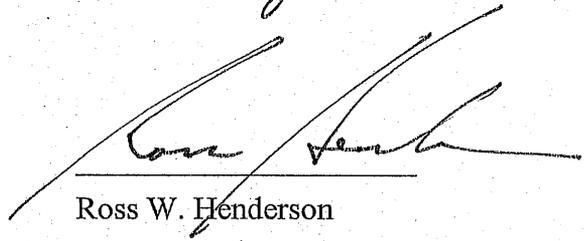
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**CERTIFICATE OF SERVICE**

This is to certify that all parties on the attached Mailing List have been sent a copy of the foregoing document in accordance with Commission rules this 13<sup>th</sup> day of August 2007.



Ross W. Henderson