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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 3, 2009

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

Re: **SAN ANGELO WATER SUPPLY CORPORATION**
TCEQ DOCKET NO. 2008-1617-WR; PERMIT NO. ADJ 1318C

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2008-1617-WR

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION BY SAN ANGELO	§	
WATER SUPPLY CORPORATION	§	TEXAS COMMISSION ON
FOR AN AMENDMENT TO	§	
CERTIFICATE OF ADJUDICATION	§	ENVIRONMENTAL QUALITY
NO. 14-1318	§	

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

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 Hearing Requests in the above-referenced matter, and would respectfully recommend referring this matter to the State Office of Administrative Hearings ("SOAH").

I. INTRODUCTION

San Angelo Water Supply Corporation, ("Applicant" or "SAWSC") applied to TCEQ on July 12, 2005, for an amendment to Certificate of Adjudication No. 14-1318 to modify Special Condition 5C of the original Certificate, relating to passage of certain flows, in the Colorado River Basin, Tom Green County.

Currently Certificate of Adjudication No. 14-1318 authorizes Applicant to maintain a dam and reservoir on the Middle Concho River, South Concho River, and Spring Creek, tributaries of the Colorado River, Colorado River Basin, and to impound therein not to exceed 170,000 acre-feet of water. The Applicant is also authorized to divert and use not to exceed 29,000 acre-feet of water per year from the reservoir for municipal purposes and an additional 25,000 acre-feet per year from the reservoir for agricultural purposes to irrigate a maximum of 15,000 acres of land within the boundaries of Tom Green County Water Control and Improvement District (WCID) No. 1. The maximum combined diversion rate at Diversion Point

No. 1 is 270 cfs, 150 cfs of that being for agricultural (irrigation) purposes and 120 cfs being for municipal purposes. The maximum diversion rate for Diversion Point No. 2 is 120 cfs. Several special conditions apply.

Special Condition 5C currently states that "a conduit shall be constructed in the aforesaid dam with the inlet at elevation 1883.5 feet above sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate for the purpose of permitting the free passage of the normal flow through the dam at all times and the passage of those waters to which the Department may determine lower appropriators are entitled." On December 5, 2005, SAWSC proposed that the original language for Special Condition 5 be revised to state "A conduit shall be constructed in the aforesaid dam with the inlet at elevation 1885 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate for the purpose of being able to permit the passage of normal flow, as that term may be scientifically defined, through the dam at such times as needed to meet the calls of senior water right holders downstream."

An amendment to the original application was submitted by SAWSC on December 5, 2005, proposing that the language for Special Condition 5C instead be changed to read as follows: "A conduit shall be constructed in the aforementioned dam with the inlet at elevation 1885.0 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate. Certificate holder shall permit and provide for the free passage of inflows to the Twin Buttes Reservoir through the conduit in amounts to which lower appropriators are entitled as determined by the Watermaster or the commission based on streamflow gages located on upstream watercourses that the Watermaster or commission considers appropriate for making such determinations."

On April 5, 2006, the Executive Director issues a draft permit amending Certificate of Adjudication No. 14-1318 and modifying Special Condition 5C to instead read, "A conduit shall be constructed in the aforementioned dam with the inlet at elevation 1,885.0 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate. Owner shall permit the free passage of inflows through Twin Buttes Reservoir via the conduit as required by Special Condition 2.C. of Certificate of Adjudication No. 14-1318C, and in such amounts as determined by the Watermaster or the Executive Director for downstream water right holders and domestic and livestock users."

The Executive Director ("ED") declared SAWSC's application administratively complete on July 12, 2005. The Applicant published notice of its water rights application in the *San Angelo Standard Times*, on September 2, 2005, and a revised notice in the *San Angelo Standard Times*, on April 28, 2006. The comment and hearing request periods ended on May 30, 2006. The TCEQ received numerous hearing requests¹ prior to the close of the hearing request period from water rights holders on the Concho River and Colorado River Basins concerned about the potential effect of the proposed amendment on the hearing requestors' ability to divert and use their own water rights. Pursuant to the analysis provided below, OPIC recommends denying the request of the Concho River Basin Water Conservancy (CRBWC), granting each pending individual request, and referring this matter to SOAH to determine if SAWSC's application meets the requirements of applicable law.

¹ Requests were received from: Wilburn Bailey; Carroll D. Blacklock; Lewis J. Buck; Lonnie L. Buck; Fred R. Campbell; Van Carson; Concerned Citizen; Gena M. Day; Dwayne Dishroon; Wanda & W.G. Dishroon; Thommy Euridge; Thomas L. Evridge; Samie Ewald; Leonard Grantham; Todd Schwertner; August F. Haechten; Billy Helwig; Jennifer & Steven H. Hoelscher; Wanda Hudson; Douglas John; A.J. Jones; John C. Ketzler; Bernie & Lucy Mika; Kevin L. Nolad; Darrell Rushing; Bill Schneemann; Kenneth Schwartz; Kent Schwartz; Ben O. Sims; Gordon P. & N.L. Snodgrass; David Vinson; M.C. Vinson; Clyde Watkins; Edward E. Werner; Ben A. Willberg; Kenneth R. Windham; and Milburn Wright.

II. APPLICABLE LAW

Persons seeking to appropriate state water or to begin construction of work designed for the storage, taking or diversion of water must first obtain a permit from the Commission to make the appropriation. TEX. WATER CODE ("TWC") § 11.121 (2006). Applications to appropriate unappropriated state water must be made pursuant to the requirements in TWC section 11.124. In accordance with TWC section 11.134, the Commission must consider the following issues in its decision to grant or deny the application: whether unappropriated water is available; whether the proposed appropriation is intended for a beneficial use, does not impair existing water rights or vested riparian rights, is not detrimental to the public welfare, considers assessments performed under sections 11.147(d) and (e) and sections 11.150, 11.151, and 11.152, and addresses water supply needs consistent with the state and applicable regional water plans; and whether the applicant will avoid waste and achieve water conservation. TWC § 11.134(b) (2006). Amendment applications are subject to the same substantive criteria as authorizations for new appropriation of state water.²

A. Requirements for Contested Case Hearing Requests

This application was declared administratively complete after September 1, 1999, and is therefore 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 contested case hearing may be requested by the Commission, the Executive Director, the Applicant, and affected persons. 30 TAC § 55.251(a).

² *City of Marshal v. City of Uncertain*, 206 S.W.3d 97, 108; 2006. "Section 11.122(b)'s predicate clause requires that an amendment application meet "all other applicable requirements of this chapter for the approval of an application."

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 to 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). In addition, governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.256(b).

The Commission has also set forth specific criteria for judging whether a group or organization should be considered an "affected person." 30 TAC § 55.252(a) states that a group or association may request a hearing if:

- 1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- 2) the interests the group or association seeks to protect are germane to the organization's purpose; and

- 3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

Any group or association which meets all of these criteria shall be considered an "affected person."

III. Affected Person Status of the Concho River Basin Water Conservancy (CRBWC) and Individual Requestors

AJ Jones, filing as an individual and on behalf of the CRBWC, attached to his request a list of adjudicated water rights associated with the organization that presumably represents members of the CRBWC who would be affected by the permit amendment and therefore entitled to a contested case hearing in their own right, although this is not directly stated. OPIC finds that the list of adjudicated water rights alone is inadequate to convey affected person status on CRBWC without positive identification of the rights holders as members of the group and the nature of their respective interests. Mr. Jones also does not indicate how the interests CRBWC seeks to protect are germane to the organization's purpose as required by 30 TAC §55.252(a).

Pursuant to 30 TAC §55.252(b), the Public Interest Counsel may request that a group or association provide an explanation of how the group or association meets the requirements of subsection (a). OPIC requests that any reply from CRBWC provide further information showing that at least one member from the organization could individually qualify as an affected person as well as further information regarding the interests CRBWC seeks to protect are germane to the organization's purpose. OPIC will reconsider its position on this hearing request based on any such information provided in a timely filed reply.

Each of the individual requestors state that the amendment application will "impact, threaten, and harm their senior water rights" if granted. The Commission may grant an

application only when the proposed use will not impair existing water rights.³ Therefore, these individuals' interests in the potential adverse effects to their existing water rights are protected by the law under which the application will be considered.⁴ Furthermore, a reasonable relationship exists between the interest claimed and the activity regulated as these individuals state that they have senior water rights that may be impacted by the requested appropriation.⁵ Similarly, the proposed appropriation may affect water availability⁶ and, thereby, the regulated activity may impact the requestors use of their water rights.⁷ Based on this showing, OPIC recommends that the Commission find that all pending requests submitted by individuals have demonstrated they are affected persons and are entitled to a hearing.

IV. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel finds that CRBWC does not presently qualify as an affected person and therefore recommends that its hearing request be denied. However, OPIC is requesting under §55.252(b) that CRBWC provide an explanation of how the group meets the requirements for group standing. If this explanation is provided, OPIC may reconsider its position regarding the affected person status of this group. OPIC further recommends that the Commission grant the contested case hearing requests of the hearing requests filed by individuals discussed above and refer this matter to SOAH for a

³ TWC § 11.134(b)(3)(B).

⁴ 30 TAC § 55.256(c)(1).

⁵ 30 TAC § 55.256(c)(3).

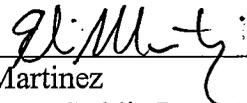
⁶ 30 TAC § 297.42.

⁷ 30 TAC § 55.256(c)(4), (5).

contested case hearing to determine whether SAWSC's application meets the requirements of applicable law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2009, the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Hearing Requests 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.


Eli Martinez

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