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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 31, 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: **CITY OF SAN ANGELO**
TCEQ DOCKET NO. 2009-0101-WR

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanholm".

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2009-0101-WR

**IN THE MATTER OF THE
APPLICATION OF THE CITY OF
SAN ANGELO FOR WATER RIGHTS
PERMIT NO. ADJ 1348B**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTS 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 Requests for Hearing in the above-referenced matter.

I. INTRODUCTION

The City of San Angelo (San Angelo, the City or Applicant) applied to TCEQ on March 3, 2006 to amend Certificate of Adjudication No. 14-1348. Certificate of Adjudication No. 14-1348, as described by the Executive Director's (ED) Notice of Application to Amend a Certificate of Adjudication, grants the City a 1/3 interest in maintaining a dam and reservoir impounding 55 acre-feet of water on the Concho River. The City is also authorized to divert and use 135 acre-feet of water per year from two points on the Concho River, to use for agricultural purposes, at a maximum combined diversion rate of 3.33 cfs (1,500 gpm). The water is currently used to irrigate 106 acres of land in Tom Green County. The time priority for this right is March 31, 1911.

The City seeks to amend its water right by adding a downstream diversion point (currently authorized in the City's Certificate of Adjudication No. 14-1357) located in Tom Green County on the north bank of the Concho River, 450 feet from the southeast corner of the German Emigration Company Original Survey No. 360, Abstract No. 270, approximately 14.8 miles northeast of San Angelo. San Angelo does not seek to increase the combined maximum diversion rate.

San Angelo also recently submitted another application to amend Certificate of Adjudication No. 14-1348 (2009-0186-WR). The application proposes to add municipal purposes as a use for its diverted water and to add the City of San Angelo Municipal Water

System service area, in Tom Green County, as the place of use for the municipal water. The applicant indicates water diverted will be transported by pipeline from the authorized diversion points to the City of San Angelo Water Treatment Plant. The Commission considered this application on August 26, 2009 and granted San Angelo's application.

The Executive Director (ED) declared the City's application administratively complete on November 28, 2007. After mailing out notice within the basin, TCEQ received hearing requests from five individuals concerned about the impact of the proposed amendment on other water rights. The deadline to submit public comments and request a contested case hearing was April 4, 2009. All of the hearing requests were submitted before the deadline to request a contested case hearing. For the following reasons, OPIC recommends granting the hearing requests of Georgia C. Edwards, Wilma Crownover, A.J. Jones and Charles Book.

II. APPLICABLE LAW

Water rights holders must obtain authority from the TCEQ to alter their water right, including changing the place of use, purpose of use, point of diversion, rate of diversion, acreage to be irrigated, or any other change to their current authority under Texas Water Code (TWC) § 11.323.¹ TCEQ shall approve the requested amendment unless the amendment increases the amount of water to be diverted, the rate at which the water will be diverted, or the requested change would have an adverse impact on other water rights holders or the environment, beyond that which would occur if the water right holder seeking an amendment fully exercised its existing right.² The amendment also must "meet all other applicable requirements" of Chapter 11 of the Texas Water Code.³

A. Requirements for Contested Case Hearing Requests

This application was declared administratively complete on November 28, 2007. 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

¹ TWC § 11.122(a).

² TWC § 11.122(b).

³ *Id.* See also *City of Marshall*, 206 S.W. 3d 97, 109-111, (Tex. 2006).

Administrative Code (TAC). Under those provisions, a contested case hearing may be requested by the Commission, the ED, the applicant, and affected persons. 30 TAC § 55.251(a).

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."⁴

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."⁵ 30 TAC § 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.⁶

In addition, governmental entities with authority under state law over issues contemplated by the application may be considered affected persons.⁷

The Commission shall grant a request for a contested case hearing if (1) the request is made by the applicant, or (2) the request is made by an affected person, timely filed with the chief clerk, and made pursuant to a right to hearing authorized by law.⁸

⁴ 30 TAC § 55.251(b), (c); 30 TAC § 295.171.

⁵ 30 TAC § 55.256(a).

⁶ 30 TAC § 55.256(c).

⁷ 30 TAC § 55.256(b).

⁸ 30 TAC § 55.255(b).

III. HEARING REQUESTS

Four individuals requested a contested case hearing on this matter. All of the requests were timely filed before the close of the comment period, on April 4, 2008. Two individuals, Georgia C. Edwards and Wilma Crownover, submitted one letter requesting a contested case hearing. In the letter, they state that their property adjoins the diversion point of Certificate of Adjudication No. 14-1348 and they are concerned that the proposed amendment will impact their irrigation rights. The letter also states that Georgia Edwards is representing Wilma Crownover, who possesses Certificate of Adjudication No. 14-1346. It is not clear whether Georgia Edwards possesses a distinct water right from Wilma's, or whether Wilma Crownover has actually authorized Georgia Edwards to act on her behalf.⁹

A.J. Jones submitted a letter requesting a hearing, stating also that he possesses Certificate of Adjudication No. 14-1397, located approximately two miles downstream. He also states that the proposed amendment would affect his irrigation right.

Charles Book submitted a letter stating he contests the proposed amendment, and that he is the operator of the next downstream diversion point. He is concerned that San Angelo may try to amend Certificate of Adjudication No. 1357, after it amends Certificate of Adjudication No. 14-1348. He also states that the city should explore other options to meet its water needs, such as grey water and desalinization processes, instead of using river water. He believes that in drought conditions, both farmers and the City will not be able to utilize the available water.

The Commission may not grant an application to amend an existing permit if it will have an adverse impact upon other water right holders.¹⁰ Therefore, the interests in protecting their water rights and in preventing the potential adverse effects to their existing water rights, as expressed by Georgia C. Edwards, Wilma Crownover, A.J. Jones and Charles Book,¹¹ are

⁹ OPIC, for the purpose of this brief, assumes that Georgia Edwards is authorized to act on behalf of Wilma Crownover, but asks that Georgia Edwards and/or Wilma Crownover submit more information in reply to this brief.

¹⁰ TWC § 11.122(b).

¹¹ OPIC, for the purpose of this brief, assumes that Charles Book has a water right within the same basin as the Applicant, through his statement that he is the "operator of the next diversion point downstream" but would ask that he submit more information in reply to this brief.

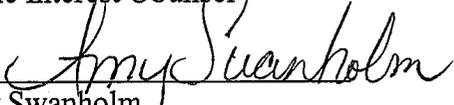
protected by the law under which the application will be considered.¹² Furthermore, a reasonable relationship exists between their interest in protecting their existing water rights and the activity regulated.¹³ Based on this showing, OPIC recommends that the Commission find Georgia C. Edwards, Wilma Crownover, A.J. Jones and Charles Book have demonstrated they are affected persons entitled to a hearing.

IV. CONCLUSION

For the reasons set forth above, OPIC respectfully recommends that the Commission grant the contested case hearing requests of Georgia C. Edwards, Wilma Crownover, A.J. Jones and Charles Book. OPIC also recommends that the Commission refer this matter to the State Office of Administrative Hearings for a contested case hearing.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

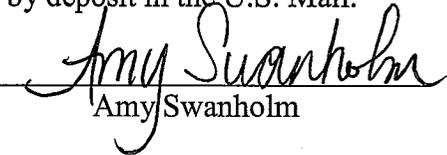
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¹² 30 TAC § 55.256(c)(1).

¹³ 30 TAC § 55.256(c)(3).

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2009, the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests 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.


Amy Swanholm

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