

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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TCEQ DOCKET NO. 2009-0168-WR

APPLICATION BY  
LOWER NECHES VALLEY  
AUTHORITY  
JEFFERSON COUNTY, TEXAS

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§  
§  
§

BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**APPLICANT'S RESPONSE TO REQUEST FOR CONTESTED CASE HEARING**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW Applicant Lower Neches Valley Authority ("*LNVA*" or "*Applicant*") and, pursuant to 30 Tex. Admin. § 55.209(d), files this response to the requests for contested case hearing concerning LNVA's application to amend Permit No. ADJ 4411F (the "*Application*") submitted to the Texas Commission on Environmental Quality ("*TCEQ*" or "*Commission*") by various entities, including the City of Dallas ("*Dallas*"). The City of Lufkin ("*Lufkin*") has a parallel application (TCEQ Docket No. 2009-0506-WR) with many of the same protestants. LNVA supports Lufkin's position regarding the lack of standing of the protestants in Lufkin's companion case,<sup>1</sup> and specifically addresses in this brief that Dallas's request for a contested case hearing does not demonstrate that Dallas is as "affected person" as required by 30 Tex. Admin. Code § 55.251(a)(4).

**I.  
BACKGROUND**

The Application is an amendment to LNVA's existing water right. It would revise two special conditions in the Certificate of Adjudication effectively to provide a priority date of January 3, 2008 for LNVA's existing water right in relationship to future

<sup>1</sup> Though they have withdrawn their hearing requests, subject to the permit amendment being issued as currently drafted, the City of Jacksonville, Cherokee County and City of Whitehouse were also protestants in the LNVA case and the arguments of Lufkin would address their interests equally well if they were to seek party status.

municipal water rights and to future water rights for the storage and/or use of waters in and above the proposed Ponta Dam and the proposed Weches Dam.

Special Condition 5.C provides:

Excepting for municipal purposes, all of owner's right to divert and use public water, under the priority date of November 12, 1963, is subordinate to any present or future domestic and/or municipal water needs or requirements.

Special Condition 5.D provides:

Owner's rights, under the priority date of November 12, 1963, authorized by this certificate of adjudication, shall be subordinate to any rights hereafter granted by the Commission for storage and/or use of waters in and above the proposed Ponta Dam on the Angelina River and the proposed Weches Dam on the Neches River.

The amendment Application would revise these Special Conditions to limit the subordination to water rights secured as of January 3, 2008 in each case.

The Application was declared to be administratively complete by TCEQ on January 3, 2008 and Notice of Receipt of Application and Intent to Obtain Permit was published in the *Beaumont Enterprise* on January 30, 2008 and the *Daily Sentinel* on January 31, 2008. In response to this public notice, the City of Dallas submitted a letter to TCEQ dated February 15, 2008,<sup>2</sup> requesting a contested case hearing. On December 9, 2008, following completion of the Executive Director's technical review of the Application and preparation of a draft permit, a copy of the draft permit was sent to all parties that had submitted comments after the published notice. In response to this notification, the City of Dallas submitted an additional letter to TCEQ dated January 16, 2009,<sup>3</sup> reiterating its request for a contested case hearing and providing additional

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<sup>2</sup> Letter from Webb & Webb to TCEQ dated February 15, 2008 at p. 3 [hereinafter Dallas 2008 Letter].

<sup>3</sup> Letter from Webb & Webb to TCEQ dated January 16, 2009 [hereinafter Dallas 2009 Letter].

comments regarding the status of the litigation surrounding the proposed Fastrill reservoir (“*Fastrill*”) – its sole asserted basis for standing in the contested case hearing.

After issuance of the draft permit, numerous in-basin entities that had submitted requests for a contested case based on the public notice, submitted conditional withdrawals<sup>4</sup> of those requests, recognizing that the Amendment would not have any adverse affect on their water rights. As such the Angelina and Neches River Authority, Cherokee County, the City of Jacksonville and the City of Whitehouse, all support issuance of the permit as currently drafted.

## **II. ARGUMENT**

**DALLAS HAS FAILED TO DEMONSTRATE A JUSTICIABLE INTEREST THAT IS NOT COMMON TO THE GENERAL PUBLIC AND AS A RESULT, HAS FAILED TO DEMONSTRATE THAT IT IS ENTITLED TO A CONTESTED CASE HEARING.**

To be granted a contested case hearing, a person or entity must be an “affected person,” meaning it has “a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application” that is not “common to members of the general public.”<sup>5</sup>

The Commission is instructed to consider a list of non-exclusive factors in determining whether a person is an affected person, including:

- (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;

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<sup>4</sup> The withdrawals were conditional in that if a contested case hearing is granted, the entities may seek party status. They would support issuance of the permit as currently drafted and merely seek to protect against any changes occurring to the permit through the hearing process that would have unanticipated adverse affects on their interests.

<sup>5</sup> 30 TEX. ADMIN. CODE § 55.256(a).

- (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 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.<sup>6</sup>

**A. Dallas's Interests in Fastrill Cannot be the Basis of a Justiciable Interest.**

In its January 16, 2009 letter Dallas establishes its purported basis for status as an "affected person": "Dallas objected to the issuance of Certificate of Adjudication No. 06-4411F based upon its impact on the proposed Fastrill Reservoir."<sup>7</sup> Fastrill is among many possible water management strategies for Region C, the water planning area that includes the City of Dallas. Dallas's alleged interest in Fastrill is inadequate to distinguish Dallas from the general public for several reasons.

The Fifth Circuit recently upheld the United States Fish and Wildlife Service's ("*FWS*") designation of a National Wildlife Refuge (the "*Refuge*") in the footprint of Fastrill, effectively closing the door on Fastrill's development.<sup>8</sup> Dallas and the Texas Water Development Board ("*TWDB*") filed petitions for certiorari with the Supreme Court on June 10, 2009. However, a grant of certiorari by the Supreme Court is unlikely. More than 96% of the cases for which petitions for certiorari are filed are not granted review.<sup>9</sup> Both the district court<sup>10</sup> and the Fifth Circuit Court of Appeals<sup>11</sup> issued opinions resoundingly rejecting the position supported by Dallas. Significantly, the Fifth Circuit

<sup>6</sup> 30 TEX. ADMIN. CODE § 55.256(c).

<sup>7</sup> Dallas 2009 Letter, p. 2. See also Dallas 2008 Letter, p. 3.

<sup>8</sup> *City of Dallas v. Dep't of the Interior*, 562 F.3d 712, 715 (5th Cir. 2009), copy provided at Exhibit 1.

<sup>9</sup> See *Supreme Court - Statistics*, 121 HARV. LAW REV. 436, 444 (2007) and *Supreme Court - Statistics*, 120 HARV. LAW REV. 372, 380 (2006) (indicating that even looking solely at paid cases, review is granted for less than 4% of petitions).

<sup>10</sup> *City of Dallas v. Dep't of the Interior*, No. 3:07-CV-0060-P, slip op. (N.D. Tex. June 30, 2008), copy provided at Exhibit 2.

<sup>11</sup> *City of Dallas*, 562 F.3d 712.

Court of Appeals declined to stay the mandate following its judgment (i.e. declined to delay the effectiveness of its opinion during an appeal), despite a motion to do so from Dallas and TPWD.<sup>12</sup> Both the district and circuit court decisions were based on established circuit precedent,<sup>13</sup> and despite strained assertions by Dallas and TWDB to the contrary, did not create a split of opinion about the law among federal circuits and did not present any compelling question under the National Environmental Policy Act, the statute under which the challenge was raised.<sup>14</sup> Thus, Fastrill has been foreclosed by the federal litigation. It is no longer a viable project. As such, illusive hopes that it might someday be built cannot form the basis for a legitimate hearing request – a fact that is only compounded by the absence of an existing water right, or even an application for a water right, for Fastrill.

Even if Fastrill were not precluded by the FWS designation of the Refuge, the regulatory factors for standing would still dictate that Dallas is not an “affected person.”<sup>15</sup>

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<sup>12</sup> *City of Dallas v. Dep't of the Interior*, Mandate, No. 08-10890 (5th Cir. filed May 12, 2009). The standards for staying a mandate are that there be a reasonable probability that four members of the Supreme Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed. See *Baldwin v. Maggio*, 715 F.2d 152, 153 (5th Cir. 1983). The Court of Appeals issued the mandate even before the briefing in opposition to the motion to stay the mandate was submitted.

<sup>13</sup> See *Sabine River Auth. v. Dep't of the Interior*, 951 F.2d 669 (5th Cir. 1992)(holding that because setting an acquisition boundary for a refuge does not affect a change in the use of character of land or in the physical environment it is not a “major federal action” and no Environmental Impact Statement is necessary).

<sup>14</sup> For a description of why there is no circuit split or compelling question of federal law, see *City of Dallas v. Dep't of the Interior*, Federal Appellees' Opposition to Motion for Stay of Mandate Pending Petition for Writ of Certiorari, No. 08-10890 (5th Cir. filed May 14, 2009), copy provided at Exhibit 3. The Fifth Circuit took no action with respect to this filing because the denial of the motion to stay the mandate had already been issued, recognizing the flawed nature of Dallas and TWDB's position even without the benefit of briefing. However, this brief very clearly lays out the reasoning for the court's prompt denial of the motion to stay the mandate.

<sup>15</sup> 30 TEX. ADMIN. CODE § 55.256(c).

There is no existing water right for Fastrill. There is no application pending either.<sup>16</sup> As such, there is no right or interest to be protected and no basis for standing. According to the Fifth Circuit Court of Appeals, “[b]esides including it in periodically updated planning documents, the City [of Dallas] and [Texas Water Development Board] have never taken any concrete steps toward constructing the reservoir, such as seeking permits, acquiring property, or commencing any of the hydrological, fiscal, or environmental studies necessary to a major public works project.”<sup>17</sup>

The effect of an amendment on *existing water right holders* is mandated by Water Code § 11.122(b) and, where applicable, § 11.134(b)(3)(B), in keeping with the “first in time, first in right” nature of Texas water law.<sup>18</sup> A water right is defined as a right “to impound, divert, or use state water” – until it is actually acquired under state law there is no right.<sup>19</sup> The chance that possibly—maybe—someday Dallas *might* seek a water right (or, more likely, a contract for water from another entity that seeks a water right) and an interbasin transfer for water from Fastrill simply is not an interest that is or should be protected under the Texas Water Code.

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<sup>16</sup> Dallas asserts in the Dallas 2009 Letter at p. 6 that it “has been precluded by the litigation from moving forward with an application for a Fastrill Reservoir water right since early 2007 when the parties to the litigation” entered into a standstill agreement. However, it is not at all clear that the standstill agreement would have precluded an application for a water right. Dallas’s obligation is “to take no further action, including commencing condemnation proceedings or purchasing any interest in any land within the boundaries of the Refuge, that would have the legal effect of blocking, impeding or frustrating the establishment or further establishment of the Refuge.” Applying for a water right merely begins what has now become a near decade-long process and would not have a “legal effect” blocking, impeding or frustrating the establishment of the Refuge. Further, Dallas executed the standstill agreement *voluntarily* in the first instance. The parties’ standstill was submitted to the court as an Agreed Order only in July of 2008 when the temporary injunction against the FWS’s acceptance of property was granted by the district court. There is no indication that Dallas, knowing that a water right permit for Fastrill would take a number of years to secure, asked USFW to make an exception to the standstill so it could at least file an application to secure a filing date or that Dallas is prepared to make such a filing with any dispatch in the future.

<sup>17</sup> *City of Dallas v. Dep’t of the Interior*, 562 F.3d 712, 719 (5th Cir. 2009), copy provided at Exhibit 1.

<sup>18</sup> See Tex. Water Code § 11.027.

<sup>19</sup> Tex. Water Code § 11.002.

Dallas has asserted that consistency with the State Water Plan is an interest reflected in the Water Code.<sup>20</sup> Dallas confuses arguments about the merits of the Application with standing. Dallas wants TCEQ to ignore reality and pretend that Fastrill is not entirely precluded by the federal litigation or at least facing an extraordinary level of uncertainty. And then Dallas wants the Commission to conclude that because Fastrill is mentioned in the State Water Plan<sup>21</sup> that Dallas somehow has the right to participate in this proceeding.

Further, relevant distance restrictions are imposed by the interbasin transfer rule, which precludes out-of-basin transfer of water absent special findings.<sup>22</sup> Any future use of water from Fastrill by Dallas would be contingent on overcoming this restriction based on conditions at the time. Therefore, this factor also indicates that Dallas is not an affected person in the context of this proceeding.

In addition, there is no reasonable relationship between the limitation of the subordination provisions proposed in the Application and Dallas's potential future shortfall in water supplies; there is no likely impact on the health, safety and use of any property belonging to Dallas; and there is no likely impact on the use of water by Dallas.<sup>23</sup> The Fifth Circuit noted that "the effects of establishing the [wildlife] refuge, and thus precluding the reservoir, are highly speculative and cannot be shown to be the proximate cause of future water shortages in Dallas."<sup>24</sup> The reality is that granting the

<sup>20</sup> See Tex. Water Code § 11.134(b)(3)(E).

<sup>21</sup> See Tex. Water Code § 16.051 ("The state water plan, as formally adopted by the board, shall be *a guide* to state water policy." (emphasis added)).

<sup>22</sup> See Tex. Water Code § 11.085. An application for an interbasin transfer may be granted "only to the extent that 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."

<sup>23</sup> See 30 TEX. ADMIN. CODE § 55.256(c)(3), (4) and (5).

<sup>24</sup> *City of Dallas*, 562 F.3d 719 (emphasis added).

Application would have a de minimis impact on Fastrill and not impede its feasibility, but without even getting into the facts of the situation, it is clear that Dallas's water supply needs are not reasonably related to, or likely to be impacted by, granting of the Application: The State Water Plan indicates that if Region C implemented all of its recommended water management strategies, including Fastrill, the total supply would be approximately 22% greater than the projected demand for the region in 2060.<sup>25</sup> Dallas's needs may, in the end, be fully satisfied by water conservation, development of Marvin Nichols Reservoir, water from Oklahoma, water from the Panhandle or any other number of strategies that Dallas *is actively pursuing* and that have not been foreclosed by judicial action. Thus there is no reasonable connection between the granting of this Application and any water shortfall in Region C; and Dallas's bald face assertion to the contrary should not give it standing.

Dallas's asserted basis for its position that it is an "affected person" within the meaning of 30 Tex. Admin. Code § 55.251(a) is its so-called interest in Fastrill. As such its request for a contested case hearing should not be allowed. Absent its theoretical interest in Fastrill, Dallas is no different than El Paso, Amarillo or any other city, big or small, in Texas. It is an out-of-basin city, located a great distance away from LNVA's water sources, that may have future water demands that it will be looking to meet with a variety of strategies—only some of which are currently described in any meaningful way. A generic interest in the subordination provisions addressed in the Application is not a sufficient basis to be considered an "affected person."

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<sup>25</sup> State Water Plan 2007, p. 26.

**B. Dallas Does Not Hold a Water Right in the Neches Basin and, Therefore, Does Not Have Standing.**

Dallas indicates in its February 15, 2008 request for a contested case that it has a contract with Upper Neches River Municipal Water Authority (“UNRMWA”) for certain water from Lake Palestine.<sup>26</sup> Review of the regulatory factors for standing to request a contested case hearing clearly indicates that a contract interest is not adequate to distinguish a contract holder from the general public as an “affected person.”<sup>27</sup>

First, the interest claimed is not one protected by the law under which the Application will be considered. As noted above, the effect of an amendment on *existing water right holders* is mandated by Water Code § 11.122(b) and, where applicable, § 11.134(b)(3)(B).<sup>28</sup> A water right is defined as a right “to impound, divert, or use state water.”<sup>29</sup> A contract right to water from UNRMWA is not an existing water right and is not protected by the Texas Water Code.

Second, there is no likely impact of the regulated activity on the health, safety, and use of property of the person; and there is no likely impact of the regulated activity on the use of the impacted natural resource by the person. These impacts are unlikely because the terms of the contracts may provide any number of contingencies or rights that make an impact on a contract beneficiary’s water supply unlikely or even impossible. The water right holder is in the best position to determine what, if any, concerns it has

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<sup>26</sup> Dallas 2008 Letter, p. 2.

<sup>27</sup> Cherokee County and Whitehouse have conditionally withdrawn from the contested case hearing. However, it should be noted that they also only hold contract rights to water in the basin rather than holding the water rights themselves.

<sup>28</sup> See Tex. Water Code § 11.027. Further, as addressed by Lufkin, this Application does not affect existing water rights, such as UNRMWA’s water right, but merely fixes a priority for LNVA’s existing water right that would make it senior to water rights sought in the future.

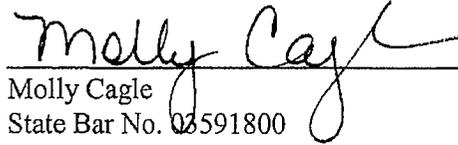
<sup>29</sup> Tex. Water Code § 11.002.

regarding the Application, and Lufkin has addressed such protestants. Therefore Dallas has no interest that confers standing.

### **III.** **CONCLUSION**

Sensibly, there is simply no basis to consider a distant, out-of-basin city an "affected person" for an Application to fix a priority date for an existing water right in the Neches Basin. Dallas's request for a contested case hearing falls well short of demonstrating that Dallas has a justiciable interest that distinguishes it from the general public as required by 30 Tex. Admin. Code § 55.251(a) and § 55.256(a). Not only is its request for a hearing premised on a project that has been foreclosed by the federal courts and on UNRMWA's rights rather than its own, but also there simply is no reasonable relationship between Dallas's potential future needs, which may be satisfied in any number of ways, and the fixing of LNVA's priority date. Accordingly, LNVA respectfully requests that the Commission deny Dallas's request to participate in the contested case hearing. In addition, LNVA supports Lufkin's position regarding the standing of the other protestants and respectfully requests that the Commission not grant a contested case hearing in this matter.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Applicant's Response to Request for Contested Case Hearing has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. Mail, and/or Certified Mail, Return Receipt Requested, on all parties whose names appear on the attached mailing list on this the 3rd day of August, 2009.

  
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