

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 3, 2009

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

Re: Lower Neches Valley Authority; TCEQ Docket No. 2009-0168-WR

Dear Ms. Castañuela:

Please find enclosed the Executive Director's Response to Hearing Requests regarding Lower Neches Valley Authority's Application for Amendment to Certification of Adjudication No. 06-4411. If you have any questions, please do not hesitate to contact me at (512) 239-0463. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Robin Smith".

Robin Smith
Attorney
Environmental Division

cc: Mailing List

DOCKET NO. 2009-0168-WR

LOWER NECHES VALLEY	§	BEFORE THE
AUTHORITY'S APPLICATION	§	
FOR AMENDMENT TO	§	TEXAS COMMISSION
CERTIFICATION OF	§	
ADJUDICATION NO. 06-4411	§	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 the hearing requests filed on the Lower Neches Valley Authority's (LNVA) amendment to Certificate of Adjudication No. 06-4411. Nine requests for a hearing were filed, one was withdrawn. The Executive Director recommends that all remaining hearing requests be granted.

BACKGROUND

Certificate of Adjudication No. 06-4411 currently authorizes the Lower Neches Valley Authority (LNVA) to impound water in two reservoirs, Lake Sam Rayburn located on the Angelina River in Jasper, Sabine, San Augustine, Angelina, and Nacogdoches Counties and B.A. Steinhagen Lake located on the Neches River in Tyler and Jasper Counties. The Certificate also authorizes LNVA to divert and use 381,876 acre-feet of water from Pine Island Bayou and the Neches River and 792,000 acre-feet of water from Lake Sam Rayburn and B.A. Steinhagen Lake at various rates for agricultural (irrigation), municipal, and industrial purposes within LNVA's service area in Jefferson, Orange, Hardin, Tyler, Liberty, Chambers, and Jasper Counties. Special Conditions 5.C. and 5.D. subordinate LNVA's non-municipal water rights to present or future rights in the basin. The City of Lufkin also is an owner of this Certificate, but the City's ownership in the Certificate is separate from LNVA's.

LNVA filed this application for an amendment to Certificate of Adjudication No. 06-4411 to modify Special Conditions 5.C. and 5.D to change the subordination of LNVA to apply only to existing (before December 19, 2007) water rights. LNVA also requests to set a fixed priority date on all of LNVA's existing water rights.

PROCEDURAL HISTORY

LNVA filed this application on December 20, 2007. The application was declared administratively complete January 3, 2008. Notice of the application was mailed to the water right holders of record in the Neches River Basin on January 18, 2008. The notice was published in the *Beaumont Enterprise* and the *Daily Sentinel*, on January 30, 2008 and January 31, 2008. The comment period ended on 03/03/2008.

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

Title 30, Sections 55.251 (b) and (c) of the Texas Administrative Code specify that a hearing request must:

- (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). For a group or an association, the hearing request may be granted if the group shows that one or more of the members would have standing to be a party in his or her own right, the interests the group seeks to protect are germane to the group's purpose, and the claim asserted would not require the presence of the individual members. 30 TEX. ADMIN. CODE § 55.252(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).

HEARING REQUESTS

All of the nine hearing requests were received timely and met the requirements of 30 Tex. Admin. Code § 55.251. The commission received hearing requests from the following:

The City of Whitehouse, Cherokee County, City of Jacksonville, Upper Neches River Municipal Water Authority (UNRMWA) , City of Dallas, Angelina & Neches River Authority (ANRA), City of Tyler, and Nacogdoches County, City of Nacogdoches. The City of Whitehouse has withdrawn its request.

Hearing Requests:

1. Cherokee County and the City of Jacksonville state that they are participants in the Lake Columbia regional water supply project. Cherokee County has contracts with the ANRA, which holds Permit No. 4228 for Lake Columbia, which is approximately 50 miles upstream of Lake Sam Rayburn on the Angelina River. The City of Jacksonville also has a water right for Lake Jacksonville, which is on a tributary of the Neches River approximately 100 miles upstream of Steinhagen Lake. These entities have expended much money on the Columbia project, and believe that their surface water rights will be impacted if the application is granted. They also argue that LNVA has a surplus of available water and that the recently adopted Region I Water Plan does not indicate that LNVA has a need for more water.

2. UNRMWA states that it is a conservation and reclamation district with matters of interest pertaining to the application. UNRMWA owns Certificate of Adjudication No. 06-3254 which authorizes it to impound and divert 238,100 acre feet of water in and from Lake Palestine for domestic, municipal, industrial, irrigation, mining, and reclamation purposes. This reservoir is approximately 240 river miles upstream of B.A. Steinhagen Lake. UNRWA also expects to apply for additional water use permits in portions of the Neches River Basin at or above Weches Dam for its growing demand. These projects include Fastrill Reservoir, a water management strategy in the State Plan and a reservoir designated as a unique site for reservoir development by the legislature in S.B. 3. The

site for Lake Fastrill is approximately 100 miles upstream of Steinhagen Lake. A preliminary review of the Neches WAM indicates that granting the application would adversely impact the water supply available for Fastrill Reservoir. UNRMWA also claims that LNVA does not address a water supply need in a manner that is consistent with the State or regional plan as required by Texas Water Code § 11.134, and that according to the plan LNVA has 578,020 acre feet per year in excess of its 2060 obligations. The 2007 State Plan indicates that applicant does not have a water supply need within the planning period. The five management strategies for LNVA in the State Plan do not include these amendments, but are clearly in conflict with obtaining future water supply.

3. The City of Dallas states that it owns several water rights (not described) and has entered into a contract with UNRWMA for water from Lake Palestine and is depending on Fastrill River for future water supplies. Granting this application will impact the feasibility and yield of Lake Fastrill, which will impact Dallas' future water supply. Furthermore, Dallas contends that allowing this amendment would be detrimental to the public welfare because it impacts Dallas' ability to get water from Lake Fastrill in the future. Dallas also argues that the application is not consistent with the state and Regional Plans.

4. ANRA is a conservation and reclamation district with regulatory authority of water in the Neches River. Sam Rayburn Reservoir is located within ANRA's territory. ANRA holds Permit No. 4228 for Lake Columbia upstream of Lake Sam Rayburn. ANRA does not believe that LNVA has shown that its amendment is consistent with the state and regional plans, or that it will use reasonable diligence to avoid waste and achieve water conservation.

5. The City of Tyler states that it owns water rights and has contracts that could be adversely affected if the referenced application is granted. These rights and contracts include Certificates of Adjudication Nos. 06-3245 (Lake Palestine), and 006-4853 (Lake Tyler), and 06-3237 (Lake Bellwood). Lake Tyler is upstream of Lake Columbia on the Neches River. Tyler is the largest municipality in the Neches River Basin above Sam Rayburn Reservoir and its future water needs are hampered by this application.

6. Nacogdoches County states that it holds Permit No. 5585, for a reservoir located on the Naconiche Creek in the Neches River Basin. This reservoir appears to be about 50 miles upstream of Sam Rayburn Lake. If granted, this application will impact the county's ability to impound state water and comply with environmental conditions in its Permit. This reservoir was permitted and the work done on the reservoir with a future water supply source in mind. Lake Naconiche is included in the State Water Plan as a future water supply strategy for the region. The county argues that the application is not consistent with the state and regional water plan, but is actually in conflict with it because it would reduce current and future water supplies identified for the county, thereby impairing the ability of the county to meet its projected water demands.

7. The City of Nacogdoches states that it holds Permit No. 2560, which is about 20 miles upstream of Lake Sam Rayburn. The City plans on developing additional supplies of surface water upstream from the proposed Ponta Dam on the Angelina River. If the application is granted, LNVA will no longer be subordinate to any water right the City may hereafter need in order to meet projected demand for water. The protection afforded the City under LNVA's existing water right will be removed.

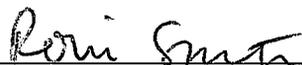
Executive Director's Recommendation. Grant all the remaining requests. This amendment application is a matter of first impression before the commission. The Executive Director recommends that the hearing requests be granted because the hearing requesters may have a legally protected interest in the amendment application based upon the subordination clause in LNVA's certificate of adjudication under which a portion of LNVA's water rights are subordinated not only to existing water rights but also to future water rights. Although one of the basic tenets in water rights is "first in time is first in right," and staff reviews a water rights application to determine if existing water rights can be harmed, the provision in LNVA's water right subordinating LNVA to future water rights is in the certificate. Entities planning for future water rights may have relied on that subordination.

Section 11.134(b)(3)(C) of the Water Code states that the Commission cannot grant a water right that it finds is detrimental to the public welfare. Existing water rights are not being impacted by this amendment because LNVA will continue to be subordinate to existing water rights since it is only requesting to take out the subordination clause with respect to future water rights. However, the requestors may have a right to a hearing on whether the amendment to remove the subordination clause with respect to future water rights could be detrimental to the public welfare because they have future water management strategies, including one reservoir that is in the State Water Plan and has been designated as a unique site for reservoir development by the legislature, possibly relying on LNVA's subordination to those projects.

CONCLUSION

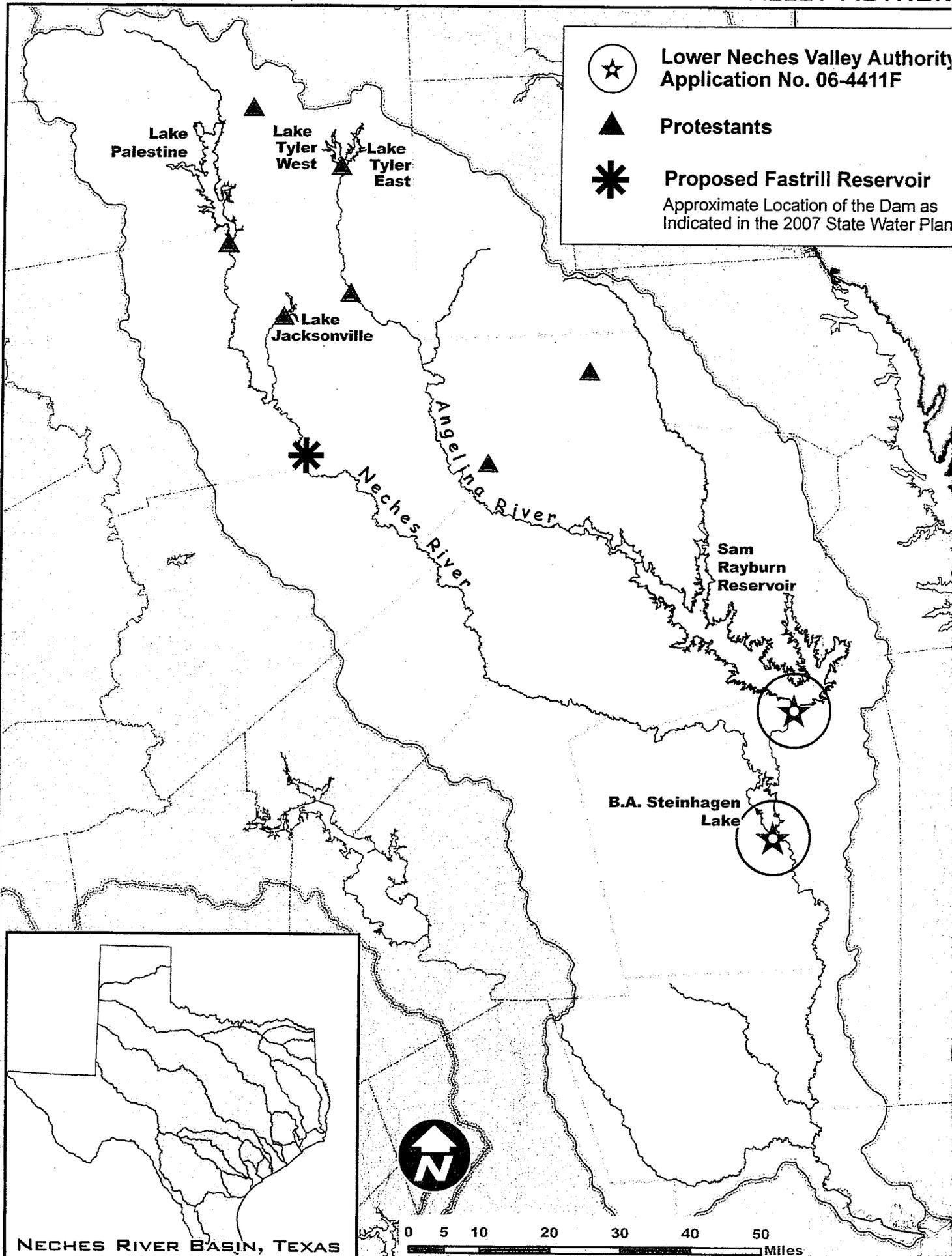
For the reasons stated above, the Executive Director recommends that the hearing requests of Cherokee County, the City of Jacksonville, Upper Neches River Municipal Water Authority, the City of Dallas, Angelina & Neches River Authority, the City of Tyler, Nacogdoches County, and the City of Nacogdoches, be granted.

Respectfully submitted,



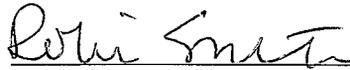
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REPRESENTING THE
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ENVIRONMENTAL QUALITY



CERTIFICATE OF SERVICE

I hereby certify that the Executive Director's Response to Hearing Requests regarding Lower Neches Valley Authority's Application for Amendment to Certificate of Adjudication No. 06-4411, TCEQ Docket No. 2009-0168-WR was filed with the Chief Clerk, faxed to those with fax numbers, and mailed or sent electronically to the persons on the attached mailing list.



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DOCKET NO. 2009-0168-WR; PERMIT NO. ADJ. 4411F

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