TCEQ DOCKET NO. 2009-0168-WR

APPLICATION BY	§	**BEFORE THE**
LOWER NECHES VALLEY	§	**TEXAS COMMISSION ON**
AUTHORITY	§	**ENVIRONMENTAL QUALITY**
JEFFERSON COUNTY, TEXAS	§	

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

TCEQ DOCKET NO. 2009-0506-WR

APPLICATION BY THE CITY	§	**BEFORE THE**
OF LUFKIN FOR AMENDMENT TO	§	**TEXAS COMMISSION**
CERTIFICATE OF ADJUDICATION	§	**ENVIRONMENTAL QUALITY**
NO. 06-441H	§	

CITY OF NACOGDOCHES' REPLY TO
LOWER NECHES VALLEY AUTHORITY AND CITY OF LUFKIN

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The City of Nacogdoches, Texas ("Nacogdoches") files this reply to the responses of the Lower Neches Valley Authority ("LNVA") and the City of Lufkin ("Lufkin") regarding Nacogdoches' request for hearing on LNVA's and Lufkin's applications to amend their water rights. LNVA and Lufkin both request modification of special provisions of their respective permits that subordinate their use of water authorized by those permits to "present or *future* domestic and/or municipal water needs or requirements" and 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." Amendment of the subordination clause as requested would effectively give LNVA and Lufkin new water rights and would effectively eliminate the protections provided by prior commission decisions to Nacogdoches and other upstream municipal water providers.

The Executive Director and Office of the Public Interest Counsel recommend granting Nacogdoches' hearing request. LNVA's response fails to specifically address Nacogdoches' hearing request, focusing primarily on its opposition to the City of Dallas' hearing request. Instead, LNVA merely supports Lufkin's position regarding standing of Nacogdoches and other protestants. Lufkin argues that no justiciable interest in its permit application can be shown by a party who currently possesses an upstream water right or who plans to seek a new water right in the future. In essence, Lufkin asserts that the only persons who would have standing to contest its application would be those persons who currently have a pending application for a water right that competes with Lufkin's application. Lufkin is wrong.

<u>Nacogdoches' Water Rights Provide a Justiciable Interest</u>

Nacogdoches currently holds permit 2560 authorizing the City to construct Lake Nacogdoches and impound waters therein. The permit also authorizes the City to divert and use up to 22,000 ac-ft of water per annum from Lake Nacogdoches for municipal purposes. The

City's interest in preserving and protecting its water right provides a justiciable interest to support the City's request for contested case hearings on the permit amendment applications filed by Lufkin and LNVA. Both Lufkin and LNVA were required to provide mailed notice to water rights holders, including the City of Nacogdoches. Even if Lufkin's application is not intended to impair existing water rights, the City has a right to participate in a hearing on Lufkin's application in order to ensure that its water rights are properly interpreted and considered and that no harm to such rights occurs. The potential for such harm in interpreting and applying water rights with complex subordination provisions such as those found in LNVA's and Lufkin's permits is demonstrated by the following language from the 2006 Region I Plan which interprets LNVA's water rights without applying the appropriate subordination clauses:

> "The City currently has water rights to divert 22,000 ac-ft/yr of water from Lake Nacogdoches. The modified Neches WAM Run 3 shows the current firm yield of this lake to be 9,865 ac-ft/yr and reducing to 7,430 ac-ft/yr by 2060.
>
> The WRAP computer model recognized Lake Nacogdoches' priority date, 1970, as junior to Sam Rayburn's, 1963. As a result, the model simulates releases of water from Lake Nacogdoches during the drought of record in an attempt to keep Rayburn full when calculating the yield of there reservoirs. Calculating the yield of Lake Nacogdoches in this fashion drastically decreases the calculated yield of Lake Nacogdoches, but does not significantly increase the yield of Rayburn."[1]

The City's request for hearing is based in part on its desire to protect its existing water rights and ensure that they are properly interpreted and applied in light of the subordination language contained in LNVA's and Lufkin's permits and permit amendment applications.

<u>Nacogdoches' Interest in Developing Additional Water Supplies to Meet the Growing Demand of Its Customers Creates a Justiciable Interest</u>

Nacogdoches is a growing city with growing water demands. According to the 2006 Region I Water Plan (Attachment 1), population is anticipated to increase from 33,044 in 2010 to 54,235 in 2060 – an increase of 65%. During that period water demand is anticipated to increase by approximately the same percentage, rising from 7,625 ac-ft in 2010 to 12,540 ac-ft in 2060. That same plan shows Nacogdoches having a shortage of water supply as soon as 2030.

LNVA's and Lufkin's amendment applications seek to modify special provisions that subordinate their respective water rights to ***future*** water right applications that fall into two categories: (1) "present or future domestic and/or municipal water needs or requirements" and (2) "***any*** rights hereafter granted by the commission for storage and/or use of water in or above the proposed Ponta Dam on the Angelina River and the proposed Weches Dam on the Neches River."

[1] This misinterpretation of the subordination provision is corrected in the draft 2011 Region I Water Plan.

As a growing city with growing water needs located upstream of LNVA's and Lufkin's water rights, Nacogdoches fits squarely within the class of persons protected by the subordination clauses that LNVA and Lufkin seek to amend. The subordination clauses create the right among members of that class that is currently protected by the existing permit language. LNVA's and Lufkin's applications seek to directly modify and impair that right.

Lufkin argues that claims by Nacogdoches and others concerning future permit applications are speculative, citing *Texas Disposal System Landfill, Inc. v. Texas Commission on Environmental Quality, et al*, 259 S.W.3d 361, 363 (Tex. App.—Austin 2008, no pet.). That case involved a landfill operator complaining about a permit amendment granted to another landfill operator on grounds that the commission's decision could potentially jeopardize the trust relationship between the Plaintiff landfill operator and its neighbors. *Texas Disposal System Landfill, Inc.* provides no guidance for this case. It did not involve the potential alteration of a permit provision recognizing a right to be protected for future water rights application in a specific basin. In reaching its decision that Texas Disposal's alleged injury was speculative, the court noted that Texas Disposal did not contend that it was an economic competitor in the same regulated sector as the landfill operator whose permit it challenged.

Nacogdoches has an interest in a permit application that seeks to extinguish a right or protection given to future permit applicants within the same basin.

The commission should grant Nacogdoches' request for contested case hearing.

Respectfully submitted,

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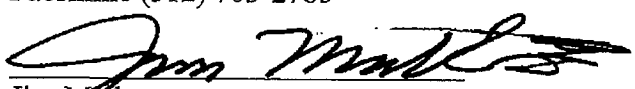
By: 
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CERTIFICATE OF SERVICE

I hereby certify that on this the 17th day of August 2009, a true and correct copy of the foregoing document was served on the following by mail:

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ATTACHMENT 1

Nacogdoches County

2006 Water Plan
East Texas Region

Water User Group	2010	2020	2030	2040	2050	2060
Appleby WSC						
Population (number of persons)	4,341	5,481	6,560	7,749	9,985	12,345
Water Demand (ac-ft/yr)	763	945	1,117	1,311	1,678	2,074
Current Supply (ac-ft/yr)						
Carrizo-Wilcox	770	810	841	871	920	964
Lake Nacogdoches	240	346	414	477	575	652
Supply - Demand	247	211	138	37	-183	-458
County-Other						
Population (number of persons)	21,463	23,669	25,755	28,054	32,380	36,944
Water Demand (ac-ft/yr)	2,452	2,625	2,770	2,954	3,373	3,849
Current Supply (ac-ft/yr)						
Carrizo-Wilcox	3,495	3,495	3,495	3,495	3,495	3,495
Other-Undifferentiated	9	9	9	9	9	9
Queen City	25	25	25	25	25	25
Sparta	29	29	29	29	29	29
Supply - Demand	1,106	933	788	604	185	-291
Cushing						
Population (number of persons)	683	730	774	823	915	1,012
Water Demand (ac-ft/yr)	129	135	140	147	162	179
Current Supply (ac-ft/yr)						
Carrizo-Wilcox	237	237	237	237	237	237
Supply - Demand	108	102	97	90	75	58
Garrison						
Population (number of persons)	844	844	844	844	844	844
Water Demand (ac-ft/yr)	149	147	144	141	139	139
Current Supply (ac-ft/yr)						
Carrizo-Wilcox	460	460	460	460	460	460
Supply - Demand	311	313	316	319	321	321
Lilly Grove SUD						
Population (number of persons)	3,229	4,172	5,064	6,047	7,896	9,847
Water Demand (ac-ft/yr)	423	533	641	752	982	1,224
Current Supply (ac-ft/yr)						
Groundwater	547	547	547	547	547	547
Supply - Demand	124	14	-94	-205	-435	-677
Nacogdoches						
Population (number of persons)	33,044	36,501	39,946	43,074	49,198	54,345
Water Demand (ac-ft/yr)	7,625	8,423	9,218	9,939	11,352	12,540
Current Supply (ac-ft/yr)						
Lake Nacogdoches	6,937	6,541	6,194	5,837	5,543	5,197
Carrizo-Wilcox	2,274	2,240	2,220	2,196	2,193	2,168
Supply - Demand	1,586	358	-804	-1,906	-3,616	-5,175
Swift WSC						
Population (number of persons)	3,753	4,517	5,240	6,037	7,535	9,116
Water Demand (ac-ft/yr)	483	567	640	730	903	1,093
Current Supply (ac-ft/yr)						
Groundwater	405	405	405	405	405	405
Supply - Demand	-78	-162	-235	-325	-498	-688

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