



1984 *25 Years* 2009

Mr. Castleberry's Direct Line: (512) 322-5856
Email: bcastleberry@lglawfirm.com

August 17, 2009

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Bldg. F, 3rd Floor
Austin, Texas 78711-3087

VIA HAND DELIVERY

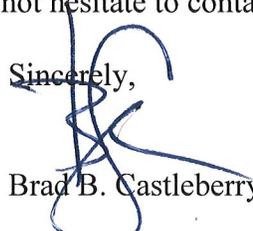
Re: Lower Neches Valley Authority's Application for Amendment to Certificate of Adjudication No. 06-4411

Dear Ms. Castañuela:

Enclosed for filing please find the original and eight copies of Requestor's Reply to Response to Hearing Request in the above-referenced matter. Please file stamp one copy and return it to me via my messenger.

If you have any questions, please do not hesitate to contact me at (512) 322-5856.

Sincerely,


Brad B. Castleberry

BBC/ldp
2733\00\tr090817srt3
ENCLOSURES

cc: The Honorable Joe English
Mr. George Campbell

TCEQ DOCKET NO. 2009-0168-WR

LOWER NECHES VALLEY	§	BEFORE THE
AUTHORITY'S APPLICATION	§	
FOR AMENDMENT TO	§	TEXAS COMMISSION ON
CERTIFICATE OF	§	
ADJUDICATION NO. 06-4411	§	ENVIRONMENTAL QUALITY

REQUESTOR'S REPLY TO RESPONSE TO HEARING REQUEST

TO THE HONORABLE COMMISSIONERS:

COMES NOW, Nacogdoches County (the "County" or "Requestor"), and files this Reply to Response to Hearing Request in the above-referenced matter, in reply to the responses filed by the Executive Director (the "ED") of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission") and the Lower Neches Valley Authority ("LNVA" or the "Applicant"). Pursuant to Section 55.255(b) of Title 30 of the Texas Administrative Code ("TAC"), the County's request for hearing should be granted by the Commission because (1) the County is an "affected person"; (2) the request complies with the provisions of Section 55.251; (3) the request was timely filed with the chief clerk; and (4) the County's request is made pursuant to a right to hearing authorized by law.

The ED properly determined that the County's hearing request should be granted because the County has a personal justiciable interest that will be impacted by the Applicant's application in a way not common to the general public. Applicant's contention that a contested case hearing should not be granted to the County because the impact by the Application is too speculative is unfounded. If the Application is granted, the County's ability to provide water to its residents will be impaired, establishing an actual and specific injury that forms the basis of its status as an

affected person. As such, the County's hearing request should be referred to the State Office of Administrative Hearings ("SOAH").

I. INTRODUCTION

LNVA applied to TCEQ on December 20, 2007 for an amendment to Certificate of Adjudication No. 06-4411 (the "Certificate") to modify Special Conditions 5.C. and 5.D. to change the subordination of the Certificate to apply only to existing water rights—before December 19, 2007 (the "Application"). In the Application, LNVA also requested to set a fixed priority date on all of LNVA's existing water rights.

On February 26, 2008, the County filed a timely request for hearing regarding the Permit. The ED provided its Response to Hearing Request on August 3, 2009 and recommended the County's hearing request be granted. The Office of Public Interest Counsel ("OPIC") filed its Response to Request for Hearing on August 3, 2009 and recommended therein that the hearing request be granted.

In accordance with Section 55.254(f) of 30 TAC, the County as requestor files this Reply to Response to Hearing Request and requests that the Commission grant the hearing request for the reasons set forth below.

II. REPLY TO EXECUTIVE DIRECTOR'S RESPONSE

A. General Hearing Request Requirements

In compliance with Section 55.251, the County filed a timely hearing request in writing that (1) provided the relevant contact information required; (2) identified that person's personal justiciable interest affected by the application; and (3) clearly requested a contested case hearing.

B. Requirement of Affected Person Status and Personal Justiciable Interest

Pursuant to Section 55.256(c), a number of factors are evaluated to determine whether a requestor qualifies as an “affected person.” In the County's hearing request, the County identified “a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” The County set forth this personal justiciable interest by providing:

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 adversely affected by the activity in a manner not common to members of the general public. 30 TAC § 55.251(c)(2).

The County has a legal right under Water Use Permit No. 5585 (the “Permit”), which authorizes the impoundment of water in MPS Site 23A, Attoyac Bayou Watershed Project, located on the Naconiche Creek in the Neches River Basin. If granted, the Applicant's application may impact the County's ability to impound state water and comply with the conditions of the Permit.

Since the release of the Attoyac Bayou Project Work Plan in 1964, the Commissioners Court of the County has recognized that the reservoir would have the potential for supplying a dependable source of water to water systems in the region. The planning, financial commitments, long-term environmental, archeological and other studies, and construction of the reservoir were completed with a future water supply source in mind. Lake Naconiche is also included in the State Water Plan as a potential future source of water for the County's residents. The Application will also impact the County’s ability to address the future municipal and domestic needs of its residents. Because of the adverse impact to existing and future water rights, both constituting legal rights and economic interests of the County, the County has a

personal justiciable interest that will be adversely affected in a way not common to the general public.

C. Personal Justiciable Interest is not Speculative

The Applicant alleges that the County does not qualify as an affected person because the injury asserted is too speculative, stating that “[i]t is well established that speculation about future contingencies is insufficient to establish standing as an affected person.” *See* Applicant’s Response to Request for Contested Case Hearing, page 10 (incorporating by reference the City of Lufkin’s arguments). This allegation is based solely on a 2008 case from the Amarillo Court of Appeals, *Texas Disposal Systems Landfill, Inc. v. Texas Commission on Environmental Quality*—begging the question as to how well established this argument actually is. 259 S.W.3d 361 (Tex. App.—Amarillo 2008, no pet.). A closer examination reveals that this case is not directly on point, addressing whether the Plaintiff had standing to file for judicial review of the Commission’s decision to modify a landfill permit that is located over 200 miles away from the Plaintiff’s landfill—not whether the Plaintiff should be granted a contested case hearing as an “affected person” under Chapter 55 of the 30 TAC. *Id.* at 363. It was quite clear in *Texas Disposal* that the need for multiple contingencies to occur before any injury to the Plaintiff was too hypothetical to establish a justiciable interest.

Texas Disposal believes that it can contest the regulatory decision because the manner in which the permit was modified “potentially” jeopardizes the trust relationship that exists between it and its neighbors in Austin, and that, in turn, “potentially” interferes with the normal operations of its landfill. *Id.*

The court determined that this potentiality was a purely speculative and hypothetical injury—that the method of modifying a landfill permit by a landfill 200 miles away from the Plaintiff *might* later be used by a competitor landfill that *might* interfere with the Plaintiff’s operations was not concrete enough to establish a justiciable interest for standing. *Id.*

Given the events that needed to occur for the Plaintiff in *Texas Disposal* to be injured, this case is distinguishable and not on point as to the determination of the County's status as an affected person. "[A]n 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). The "justiciable interest" of an affected person may not be based upon a hypothetical injury. See *Daimler Chrysler Corp. v. Inman*, 252 S.W.3d 299, 304-05 (Tex. 2008) (citing to *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993)).

The County has articulated its status as an affected person based upon a personal justiciable interest related to its legal rights, duties, privileges, powers, and economic interest in existing water rights and any amendments thereto and to future water rights that will be adversely affected by the Application. The fact that these amendments to existing water rights and future rights will be in the future do not make them purely speculative and hypothetical. The growing population served by the County will require additional water supplies—that is a fact—and the way to provide for such water is through water rights applications to amend existing water rights or for additional water rights. The Application seeks to remove a subordination clause that will no longer guarantee the County's right—a *present and existing legal right*—to priority over the Applicant's Certificate. Consequently, any subsequent amendment by the Applicant to the Certificate for additional water supplies—which the Applicant obviously intends to seek, otherwise why remove the subordination special condition—will reduce total water supplies available for appropriation in the Neches River Basin. This is not hypothetical, potential, or speculative injury. By granting this Application, when, not if, the Applicant requests to amend the Certificate for additional water, the County *will suffer* a specific and actual

injury by the reduction of water supply available to satisfy the needs of the population served by the County.

D. Application violates Section 11.134 of the Texas Water Code

Applications for a water rights amendment must comply with Chapter 11 of the Texas Water Code and accompanying TCEQ rules. Under Section 11.134(b)(3)(E),

[t]he commission shall grant the application *only if*...the proposed appropriation...addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement. TEX. WATER CODE § 11.134(b)(3)(E) (emphasis added).

The Application submitted by LNVA fails to comply with Section 11.134(b)(3)(E). Data supporting the 2007 State Water Plan show that Applicant has existing supplies, without the requested amendment, that are 578,020 acre-feet per year in excess of its year 2060 obligations based on water demand projections approved by the Texas Water Development Board. According to the 2007 State Water Plan, Applicant does not have a water supply need within the planning period. The five potential water management strategies evaluated for Applicant in the Region I Regional Water Plan *do not* include the amendments requested in the Application. In fact, the amendments sought by the Application are clearly in conflict with the approved Region I Regional Water Plan inasmuch as they would reduce current and future water supplies identified for the County. The additional impairment the Application will have on the County's ability to meet its projected water demands further demonstrates its personal justiciable interest as an affected person and how it will be affected in a manner not common to the general public.

Because the County's hearing request complies with the provisions of Section 55.255(b)(2) of 30 TAC, the Commission should concur with the determinations of both the ED and OPIC and grant the County's request for hearing.

III. REQUEST FOR CONSOLIDATION

The County hereby requests the Commission, in referring this matter to SOAH, to also consolidate this matter with TCEQ Docket No. 2009-0506-WR to promote efficiency and serve the interests of judicial economy. TCEQ Docket No. 2009-0506-WR is an application by the City of Lufkin to amend Permit No. 4411, the same permit LNVA seeks to amend in the Application with both applications requesting the exact changes and having the exact same hearing requestors. This was part of the basis for the Commission's granting a continuance on April 13, 2009 of the Commission's consideration of the Application. Furthermore, given the similarity between the applications, a decision on one application could unfairly prejudice the decision on the other application. Consequently, the County respectfully requests that the Commission consolidate these two matters for the above-stated reasons.

IV. CONCLUSION

For the reasons set forth above, Nacogdoches County respectfully requests that the Commission grant the County's contested case hearing request and refer this matter to SOAH for a contested case hearing.

Respectfully submitted,

LLOYD GOSSELINK

ROCHELLE & TOWNSEND, P.C.

816 Congress Ave., Suite 1900

Austin, Texas 78701

(512) 322-5856

(512) 472-0532 (Fax)

By: _____

BRAD B. CASTLEBERRY

State Bar No. 24036339

ATTORNEYS FOR

NACOGDOCHES COUNTY

CERTIFICATE OF SERVICE

I hereby certify that on this the 17th day of August, 2009, a true and correct copy of the foregoing was sent via first-class mail, electronic mail, facsimile, or hand-delivery to the following persons:

FOR THE APPLICANT:

Ms. Molly Cagle
Vinson & Elkins, LLP
2801 Via Fortuna, Suite 100
Austin, Texas 78746-7567

Mr. Robert Stroder, PE
Lower Neches Valley Authority
P.O. Box 5117
Beaumont, Texas 77726-5117

FOR THE EXECUTIVE DIRECTOR:

Ms. Robin Smith (MC 173)
Environmental Law Division
TCEQ
P.O. Box 13087
Austin, Texas 78711-3087

Ms. Iliana Delgado (MC 160)
Water Supply Division, TCEQ
P.O. Box 13087
Austin, Texas 78711-3087

Mr. Esteban Ramos (MC 160)
Water Supply Division, TCEQ
P.O. Box 13087
Austin, Texas 78711-3087

FOR PUBLIC INTEREST COUNSEL:

Mr. Blas J. Coy, Jr. (MC 103)
Public Interest Counsel, TCEQ
P.O. Box 13087
Austin, Texas 78711-3087

FOR THE CHIEF CLERK:

Ms. LaDonna Castañuela (MC 105)
Office of the Chief Clerk, TCEQ
P.O. Box 13087
Austin, Texas 78711-3087

FOR OFFICE OF PUBLIC ASSISTANCE

Ms. Bridget Bohac (MC 108)
Office of Public Assistance, TCEQ
P.O. Box 13087
Austin, Texas 78711-3087

**FOR ALTERNATIVE DISPUTE
RESOLUTION:**

Mr. Kyle Lucas (MC 222)
TCEQ
P.O. Box 13087
Austin, Texas 78711-3087

REQUESTOR:

Mr. Marvin J. Angle
P.O. Box 1870
Jacksonville, Texas 75766-1870

Mr. George Campbell
Nacogdoches County
101 W. Main Street, Suite 107
Nacogdoches, Texas 75961-4807

Mr. Chris Davis, Judge
Cherokee County
135 S. Main Street
Rusk, Texas 75785-1351

Mr. Ronny Fite
P.O. Box 776
Whitehouse, Texas 75791-0776

Mr. Joe Freeland
Matthews & Freeland, LLP
P.O. Box 1568
Austin, Texas 78768-1568

Mr. Jim Jeffers
P.O. Box 635030
Nacogdoches, Texas 75963-5030

Mr. Jim Matthews
Matthews & Freeland, LLP
P.O. Box 1568
Austin, Texas 78768-1568

Mr. Gregory M. Morgan, P.E.
City of Tyler
P.O. Box 2039
Tyler, Texas 75710

Mr. Monty P. Shank
General Manager
Upper Neches River MWD
P.O. Box 1965
Palestine, Texas 75802

Mr. John D. Stover
P.O. Box 1728
Lufkin, Texas 75902-1728

Ms. Gwendolyn Hill Webb
Webb & Webb
P.O. Box 1329
Austin, Texas 78767-1329

Jody Puckett, P.E.
Dallas City Hall, Room 4AN
1500 Marilla Street
Dallas, Texas 75201

INTERESTED PERSONS:

Mr. Ronald J. Freeman
Freeman & Corbett, LLP
8500 Bluffstone Cove, Suite B104
Austin, Texas 78759-7811



BRAD B. CASTLEBERRY