

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*



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

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 3, 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. 2009-0185-WR; PERMIT NO. ADJ-1298B**

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 by jlc".

Amy Swanholm, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: [www.tceq.state.tx.us](http://www.tceq.state.tx.us)



**TCEQ DOCKET NO. 2009-0185-WR**

**IN THE MATTER OF THE  
APPLICATION OF THE CITY OF  
SAN ANGELO FOR WATER RIGHTS  
PERMIT NO. ADJ 1298B**

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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 the TCEQ on October 3, 2005 for an amendment to Certificate of Adjudication No. 14-1298 to add a downstream diversion point on the west bank of the South Concho River, a tributary of the Concho River and the Colorado River, in the Colorado River Basin. The application also proposes to add a place of use in Tom Green County. The City owns a portion of Certificate of Adjudication No. 14-1298, which authorizes diversion and use of 252.1 acre-feet of water per year from three points on the South Concho River for agricultural and municipal purposes. There are multiple time priorities and diversion rates for the water. The Certificate contains a special condition requiring the owner to establish a place of use before diverting the water.

The proposed diversion point is the same point authorized by Certificate of Adjudication No. 14-1325. The proposed diversion point is located on the west bank of the South Concho River, 1,700 feet from the northwest corner of the Emil Hermes Survey No. 174, Abstract No. 349 in Tom Green County, at Latitude 31.447°N, Longitude 100.426°W. No increase in diversion rate or amount of water diverted is being requested. The City also proposes adding the City of San Angelo Municipal Water System Service Area as the place of use in Tom Green County. The Executive Director (ED) declared the City's application administratively complete on June 7, 2006. The comment and hearing request period ended on August 21, 2006.

After mailing out notice,<sup>1</sup> TCEQ received seventeen hearing requests from water rights holders in the Colorado River Basin, concerned about the impact the proposed amendment may have upon the hearing requestors' water rights and whether there is enough information in the application to understand the ramifications of the permit change. TCEQ also received comments from the Lower Colorado River Authority (LCRA) stating that it believes the Applicant should be limited to only withdrawing the amount of water that would have been available for withdrawal at the current diversion point. LCRA also urges TCEQ to require water rights holders to develop and implement a detailed diversion accounting plan and include this requirement in any amended water rights.

## II. APPLICABLE LAW

Water rights holders must obtain authority from 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.<sup>2</sup> The 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 upon other water rights holders or the environment, beyond that which would occur if the water right holder seeking an amendment fully exercised the existing right.<sup>3</sup> The amendment also must "meet all other applicable requirements" of Chapter 11 of the Texas Water Code.<sup>4</sup>

### A. Requirements for Contested Case Hearing Requests

This application was declared administratively complete on June 7, 2006. 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

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<sup>1</sup> As of August 3, 2009, OPIC was unable to view the mailing list of individuals and entities that received mailed notice, because the Chief Clerk's file contained a mailing list for a different water right amendment.

<sup>2</sup> TWC § 11.122(a).

<sup>3</sup> TWC § 11.122(b).

<sup>4</sup> *Id.* See also *City of Marshall v. Uncertain*, 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."<sup>5</sup>

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."<sup>6</sup> 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.<sup>7</sup>

In addition, a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.<sup>8</sup>

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<sup>5</sup> 30 TAC § 55.251(b), (c); 30 TAC § 295.171.

<sup>6</sup> 30 TAC § 55.256(a).

<sup>7</sup> 30 TAC § 55.256(c).

<sup>8</sup> 30 TAC § 55.252(a).

The ED, OPIC, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements of 30 TAC § 55.252(a).<sup>9</sup>

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.<sup>10</sup>

### III. HEARING REQUESTS

The TCEQ received fifteen hearing requests from individuals. In addition, TCEQ received one hearing request from the Concho Valley Watershed Association (CVWA) and one request from the South Concho Irrigation Company (SCIC).

OPIC finds that fourteen of the individuals requesting a hearing (Individual Requestors) and SCIC are affected.<sup>11</sup> All but one of the requests received by the TCEQ were submitted in a timely manner. John Ketzler submitted his hearing request after the deadline for requesting a contested case hearing, and therefore is not included in the group of individuals who are affected. Of the individuals who submitted timely requests, eleven submitted identical form letters.<sup>12</sup> In the identical form letters, each individual states that they possess a downstream water right and list the distance their water right is from the diversion point. The hearing requests do not state which diversion point they refer to, but OPIC assumes they are referring to the proposed diversion point in the City's application.

Kenneth Schwartz, in an individually worded hearing request, states that he is concerned the proposed amendment will impact, threaten, or harm his water right. Bobby and Carol Turner and SCIC, in identical hearing requests, state they fear their water rights could be adversely affected and that the application did not contain enough information to fully understand the ramifications of the proposed permit amendment.

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<sup>9</sup> 30 TAC § 55.252(b).

<sup>10</sup> 30 TAC § 55.255(b).

<sup>11</sup> See Appendix A for a list of these individuals.

<sup>12</sup> Bobby and Carol Turner and Kenneth Schwartz submitted different letters.

The Commission may not grant an application to amend an existing permit if it will have an adverse impact upon other water right holders.<sup>13</sup> All of the Individual Requestors and SCIC state that they possess downstream water rights. Therefore, their interest in the potential adverse effects to their existing water rights is protected by the law under which the application will be considered.<sup>14</sup> Furthermore, a reasonable relationship exists between the Individual Requestors' and SCIC's interest in protecting their existing water rights and the activity regulated.<sup>15</sup> Based on this showing, OPIC recommends that the Commission find the Individual Requestors and SCIC have demonstrated they are affected persons entitled to a hearing.

CVWA submitted a hearing request very similar to those submitted by Bobby and Carol Turner and SCIC. Bobby Turner is also listed as CVWA's representative. The request states that CVWA contains members who possess water rights along the South Concho River, down to Lake O.H. Ivie. Although the letter does not specifically state the names of any members or the locations of their water rights, OPIC reasonably infers that Bobby Turner, as CVWA's representative, is also a member. Based on OPIC's determination that Bobby Turner is affected and the information contained in CVWA's own hearing request, OPIC finds that one or more CVWA members would otherwise have standing to request a hearing in their own right. Furthermore, the protection of CVWA members' water rights does not appear to require the participation of the individual water right holders.

From the association's name, OPIC assumes that CVWA's purpose is to protect members' water rights. However, the request does not clearly address this requirement. For this reason, OPIC requests that CVWA provide an explanation of how the interests CVWA seeks to protect in these proceedings and how those interests are germane to CVWA's purpose.<sup>16</sup> CVWA's reply should be filed and serviced on all parties by August 17, 2009.<sup>17</sup>

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<sup>13</sup> TWC § 11.122(b).

<sup>14</sup> 30 TAC § 55.256(c)(1).

<sup>15</sup> 30 TAC § 55.256(c)(3).

<sup>16</sup> 30 TAC § 55.252(b).

<sup>17</sup> 30 TAC § 55.252(b); 30 TAC § 55.254(f).

#### IV. CONCLUSION

For the reasons set forth above, OPIC respectfully recommends that the Commission grant the contested case hearing requests of the Individual Requestors and SCIC and refer this matter to SOAH for a contested case hearing. OPIC will consider any reply filed by CVWA before making its recommendation concerning whether the association's request should be granted.

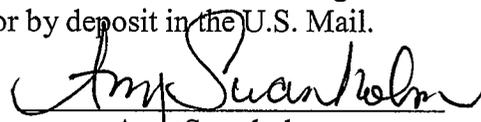
Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
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#### CERTIFICATE OF SERVICE

I hereby certify that on August 3, 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

## Appendix A

Carroll Blacklock  
Sandra Carson  
Van Carson  
Leitha Schwerter  
Todd Schwerter  
Wanda Hudson  
Douglas John  
AJ Jones  
Kevin Noland  
Darrell Rushing  
Kenneth Schwartz  
Bobby Turner  
Carol Turner  
Kenneth Windham



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TCEQ DOCKET NO. 2009-0185-WR; PERMIT NO. ADJ 1298B**

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*See attached list*



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