

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: City of San Angelo; TCEQ Docket No. 2009-0186-WR

Dear Ms. Castañuela:

Please find enclosed the Executive Director's Response to Hearing Requests regarding the Application of the City of San Angelo for Amendment to Certificate of Adjudication No. 14-1348. 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. 2009-0186-WR

APPLICATION OF THE CITY OF
SAN ANGELO FOR AMENDMENT
TO CERTIFICATE OF
ADJUDICATION NO. 14-1348

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BEFORE THE
TEXAS COMMISSION
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 in this matter. Nineteen hearing requests were received. The Executive Director recommends that the hearing requests be denied.

BACKGROUND

The City of San Angelo (City) owns Certificate of Adjudication No. 14-1348, which authorizes a one-third interest in maintaining a dam and reservoir impounding 55 acre feet of water on the Concho River, tributary of the Colorado River, Colorado River Basin. The City may divert and use 135 acre feet of water from two points on that reservoir for agricultural purposes to irrigate 160 acres of land in Tom Green County. The City has filed an amendment to the Certificate to add municipal use to the authorized agricultural use for the 135 acre feet of water from the reservoir on Concho River and to add a place of use in Tom Green County.

PROCEDURAL HISTORY

This application was received August 5, 2005. The application was declared administratively complete on May 22, 2006. Notice for this amendment application was mailed to the two other water right holders on the reservoir on June 30, 2006. The comment period ended on July 20, 2006. Nineteen hearing requests were received, one late.

The notice decision for this application was made prior to the final decision by the Texas Supreme Court in the *Marshall* case. Also, according to the recent decisions by the Commission on notice for water rights amendments, this item would not have been presented to the Commissioners for a notice decision as it is an additional use and place of use, and involves less than 500 acre feet.

This application, along with four other San Angelo applications, was filed in 2005. (Although the Executive Director requested that all five items be set, one pending amendment for Certificate of Adjudication No. 14-1348B, was not set on the August 25, 2009, agenda.) The watermaster and permitting staff have been meeting regularly over the course of processing these applications with the applicant and protestants in an effort to come to agreement on these permits. This has been at the request of the applicant and the protestants. These meetings have included the development of an accounting plan for the applicant's various permits to provide detailed information on releases and diversions.

The protestants are unhappy with the proposed accounting plan because it does not require the passage of stored water. Many of the hearing requestors have formed a group that has filed petitions asking the Executive Director amend the City's Certificate of Adjudication No. 14-1318 to require the passage of stored water in Twin Buttes Reservoir to downstream water right holders. The Executive Director denied the request and the Commission allowed the groups' motion to overturn to be overruled by operation of law. The group has filed an action in court, which is pending, for the same relief.

Although this application does not involve one of the water rights governed by the accounting plan, the application was held so that all of these water rights could be considered together.

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

Fred Ball owns Certificate of Adjudication No. 14-1253, which is on Spring Creek, 14 miles west of San Angelo. Staff has determined that Spring Creek begins approximately 30 miles downstream of the City's diversion points, below Twin Buttes Reservoir and Lake Nasworthy.

Louis J. Buck owns Certificate of Adjudication No. 14-1363, and domestic and livestock rights, five miles downstream of the City's diversion points.

Van Carson owns of Certificate of Adjudication No. 14-1338, and domestic and livestock rights. Van Carson does indicate where his water rights are, but staff has determined that they are within five miles downstream of these diversion points.

John Cmerek is a domestic and livestock user, approximately 6 miles downstream.

D. Dishroom owns of Certificate No. 14-1364, and domestic and livestock rights, approximately 5 miles downstream of these diversion points.

Thomas Evridge owns Certificate of Adjudication No. 14-1369, and domestic and livestock rights, six miles downstream of these diversion points.

Jennifer Ann and Steven Hoelscher own Certificate of Adjudication No. 1384 and domestic and livestock rights ten miles downstream of these diversion points.

Wanda Hudson owns Certificate of Adjudication No. 14-1342 and is a domestic and livestock user one mile downstream of these diversion points.

Douglas and Betty John own Certificate of Adjudication No. 14-1372, and are domestic and livestock users, six miles downstream of these diversion points.

A. J. Jones owns Certificate of Adjudication No. 14-1397, four to five miles downstream of these diversion points.

John Ketzler owns Certificate of Adjudication No. 14-1436, and domestic and livestock rights five miles downstream of these diversion points.

Darrell Rushing owns Certificate of Adjudication No. 14-1371, and domestic and livestock rights, downstream, but does not indicate where. Staff has determined that this water right is within eight miles downstream of the City's diversion points.

Todd Schwertner owns Certificate of Adjudication No. 14-1370 and domestic and livestock rights five to six miles downstream of the diversion points.

Edward Werner, owns Certificate of Adjudication No. 14-1352, downstream of the diversion points. Mr. Werner does not say where he is. However, staff has determined that this water right is within 8 miles downstream.

Bill Willburg owns Certificate No. 14-1384 and domestic and livestock ten miles downstream of the diversions.

Kenneth Windham owns Certificate of Adjudication No. 14-1368 and domestic and livestock rights downstream of the diversion points.

Milburn Wright owns Certificate of Adjudication No. 14-1360 and domestic rights approximately four miles downstream of the diversion points.

Clyde Watkins, owns Certificate of Adjudication No. 14-1337, 7 miles upstream. This request was received on July 21, 2006, and is therefore late.

Kevin Nolan owns Certificate of Adjudication No. 14-1344, upstream, but does not indicate where. Staff has determined that this water right is approximately 3 or 4 miles upstream.

Recommendation: Deny all of the hearing requests. Normally, no notice is given for change in use and change in place of use, but since diversion was from a reservoir, the two owners of the

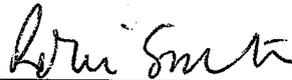
water right to the reservoir were given notice. They did not request a hearing. Staff does not believe that the requestor's water rights can be harmed by this amendment to add a use and place of use. Therefore, they have no legally protected interested that may be affected.

If any hearing requests are granted, the two upstream water right holders should not be granted. And, Clyde Watkins hearing request was late.

CONCLUSION

Therefore, the Executive Director recommends that all of the hearing requests be denied.

Respectfully submitted,



Robin Smith, Attorney
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(512)239-0606 (FAX)

REPRESENTING THE EXECUTIVE
DIRECTOR OF THE TEXAS
COMMISSION ON ENVIRONMENTAL
QUALITY

CERTIFICATE OF SERVICE

I hereby certificate that the Executive Director's Response to hearing requests in the Application of the City of San Angelo for Amendment to Certificate of Adjudication No. 14-1348 matter were filed with the Chief Clerk, faxed to the persons with fax numbers, and mailed to the persons on the attached Mailing List on this 3rd day of August, 2009.



Robin Smith

Attorney

Environmental Law Division

Bar No. 18645600

**MAILING LIST
CITY OF SAN ANGELO
DOCKET NO. 2009-0186-WR; PERMIT NO. ADJ 1348A**

FOR THE APPLICANT:

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FOR THE OFFICE OF PUBLIC
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FOR THE CHIEF CLERK:

Ms. LaDonna Castañuela
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Office of the Chief Clerk, MC-105
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FOR ALTERNATIVE DISPUTE
RESOLUTION:

Mr. Kyle Lucas
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Page 2

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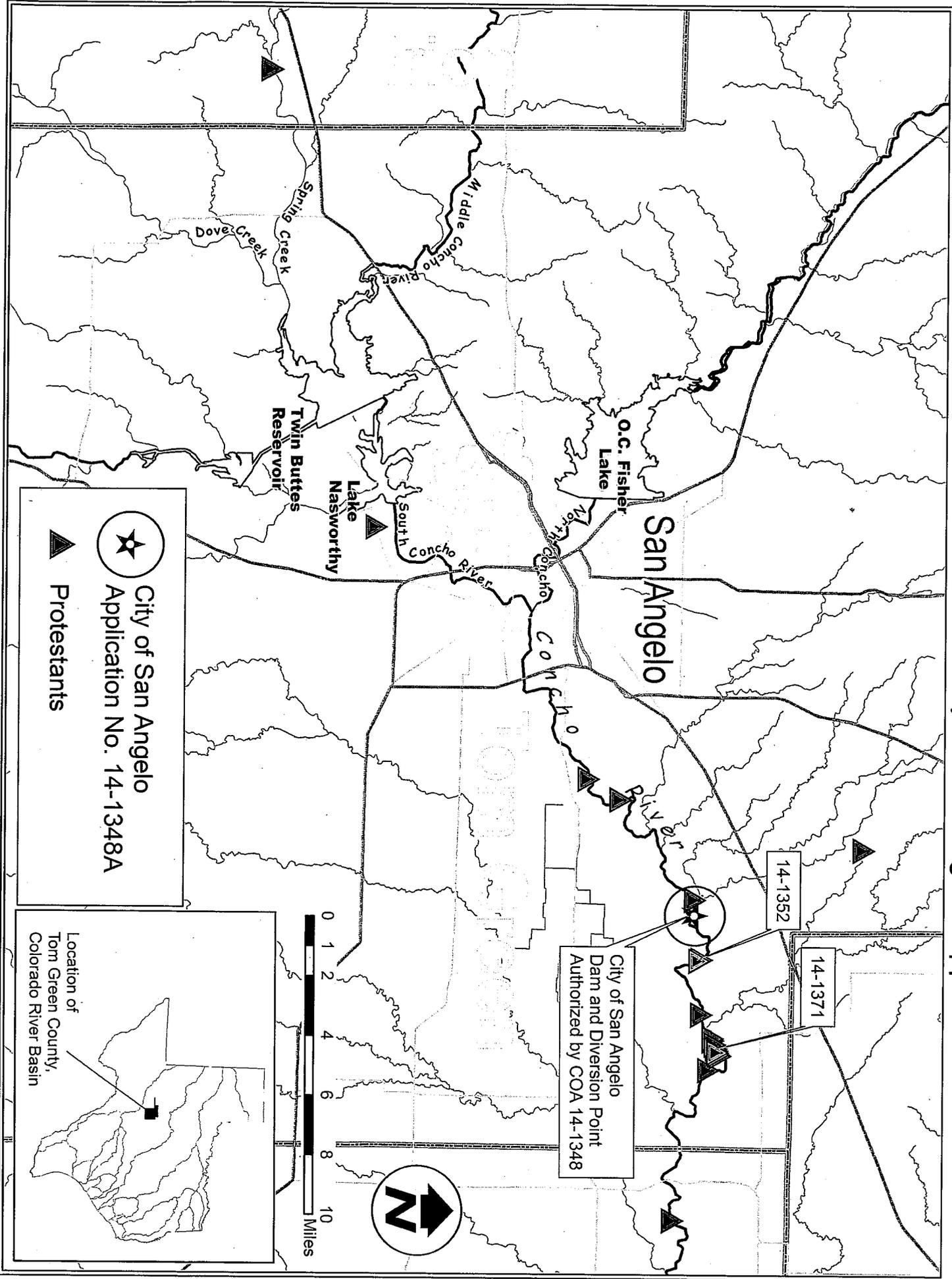
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INTERESTED PERSON(S)

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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

July 22, 2009

TO: Persons on Attached Mailing List

RE: Docket No. 2009-0186-WR - cid-53160
City of San Angelo
Hearing Requests filed on Permit No. ADJ 1348A

The above-referenced application and all timely filed hearing requests filed on the application will be considered by the Commissioners of the Texas Commission on Environmental Quality during the public meeting on **August 26, 2009**. The meeting will begin at 9:30 a.m. in Room 201S of Building E, at the Commission's offices located at 12100 Park 35 Circle in Austin, Texas.

In accordance with Commission rules, copies of the hearing request(s) have been forwarded to the applicant, the Executive Director of the TCEQ, and the Public Interest Counsel of the TCEQ. They may file written responses to these hearing requests on or before 5:00 p.m. on **August 3, 2009**. Persons who filed hearing requests (hearing requesters) may file a written reply to responses on or before 5:00 p.m. on **August 17, 2009**. All responses and replies must be filed with the Chief Clerk of the TCEQ, and sent on the same day to all individuals on the attached mailing list. The address of the Chief Clerk's Office is: Chief Clerk, ATTN: Agenda Docket Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087 (Fax 512/239-3311). The procedures for evaluating hearing requests and for filing responses and replies are located in 30 Texas Administrative Code (TAC) Chapter 55, Subchapter G (Sections 55.250-55.256) and 30 TAC Sections 1.10-1.11.

The Commissioners will not take oral argument or additional public comment on this matter, but may wish to ask questions of the applicant, hearing requesters or staff. The Commissioners will make their decision based on the hearing requests, written responses to the hearing requests, any written replies to those responses, and any response to questions.

Copies of all public comment and hearing requests have also been referred to the Alternative Dispute Resolution Office, where they will be evaluated to determine if informal, voluntary mediation might help resolve any dispute.

Individual members of the public may seek further information concerning the application, public participation, the processing of hearing requests, copies of Commission rules, or the attachment, by calling the TCEQ Office of Public Assistance, toll free, at 1-800-687-4040.

Sincerely,

A handwritten signature in cursive script, appearing to read "LaDonna Castañuela".

LaDonna Castañuela, Chief Clerk

**MAILING LIST
CITY OF SAN ANGELO
DOCKET NO. 2009-0186-WR; PERMIT NO. ADJ 1348A**

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RESOLUTION:

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See attached for a list of requesters and commenters.

REQUESTER(S)

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BECKY BOOKTER
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BETTY & DOUGLAS JOHN
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MILES TX 76861-5217

LEWIS J BUCK
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TODD SCHWERTNER
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THOMAS L EVRIDGE
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REQUIREMENTS FOR WATER RIGHTS HEARING REQUESTS

Commission Rules in 30 TAC Section 55.251 (b) and (c) require a hearing request to:

- (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 "substantially comply" with requirements (2) through (4). 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,
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

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 TAC Section 55.251; (B) is timely filed; and (C) is pursuant to a right to hearing authorized by law.

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. 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; and
- (5) the likely impact of the regulated activity on the use of the impacted natural resource by the person.

30 TAC Section 55.256(c).