

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. 2009-0186-WR; PERMIT NO. ADJ 1348A

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" followed by a small flourish.

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

TCEQ DOCKET NO. 2009-0186-WR

**IN THE MATTER OF THE
APPLICATION OF THE CITY OF
SAN ANGELO FOR WATER RIGHTS
PERMIT NO. ADJ 1348A**

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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 TCEQ on March 3, 2006 to amend Certificate of Adjudication No. 14-1348. Certificate of Adjudication No. 14-1348 grants the City a 1/3 interest in maintaining a dam and reservoir impounding 55 acre-feet of water on the Concho River, a tributary of the Colorado River, located in the Colorado River Basin. The City is also authorized to divert and use 135 acre-feet of water per year from two points on the Concho River, to use for agricultural purposes, at a maximum combined diversion rate of 3.33 cfs (1,500 gpm). The water will irrigate 106 acres of land in Tom Green County. The time priority for this right is March 31, 1911. The City seeks to amend its water right by adding municipal purposes as a use for the water and to add the City of San Angelo Municipal Water System service area, in Tom Green County, as the place of use for the municipal water. The applicant indicates water diverted will be transported by pipeline from the authorized diversion points to the City of San Angelo Water Treatment Plant.

The Executive Director (ED) declared the City's application administratively complete on May 22, 2006. After mailing out notice within the basin, TCEQ received hearing requests from twenty seven water rights holders in the Colorado River Basin concerned about the impact of the proposed amendment on their water rights. The deadline to submit public comments and

request a contested case hearing was July 20, 2006. All but one hearing request were submitted before the deadline to request a contested case hearing.¹

II. APPLICABLE LAW

Water rights holders must obtain authority from the 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) § 11.323.² 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 on other water rights holders or the environment, beyond that which would occur if the water right holder seeking an amendment fully exercised its existing right.³ The amendment also must “meet all other applicable requirements” of Chapter 11 of the Texas Water Code.⁴

A. Requirements for Contested Case Hearing Requests

This application was declared administratively complete on May 22, 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 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”

¹ Clyde C. Watkins submitted a hearing request dated July 21, 2006, one day past the deadline for requesting a contested case hearing. This hearing request will not be considered further, as it is not timely.

² TWC § 11.122(a).

³ TWC § 11.122(b).

⁴ *Id.* See also *City of Marshall*, 206 S.W. 3d 97, 109-111, (Tex. 2006).

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."⁵

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."⁶ 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.⁷

In addition, governmental entities with authority under state law over issues contemplated by the application may be considered affected persons.⁸

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.⁹

III. HEARING REQUESTS

Twenty six individuals filed timely hearing requests using two form letters and stating that they possess water rights that will be impacted, threatened, and harmed by the proposed amendment. Twenty one individuals state they possess a water right located downstream from

⁵ 30 TAC § 55.251(b), (c); 30 TAC § 295.171.

⁶ 30 TAC § 55.256(a).

⁷ 30 TAC § 55.256(c).

⁸ 30 TAC § 55.256(b).

⁹ 30 TAC § 55.255(b).

the Applicant's current point of diversion (Downstream Requestors).¹⁰ Two individuals, Lewis Buck and Kevin Noland, state they possess a water right located upstream from the Applicant's current point of diversion. Two individuals, Fred Ball and Betty Bookter, states that he possesses a water right located on Spring Creek, 14 miles west of San Angelo. Wanda Hudson, who submitted two form letters, states that she possesses a water right one mile upstream and in a different request states she is one mile downstream of the point of diversion.

The Downstream Requestors, Lewis Buck, Kevin Noland, Fred Bell, Betty Bookter, and Wanda Hudson have shown that they are affected because they possess a water right within the same basin as the City. All of their requests were submitted to TCEQ in a timely manner. They state that they are concerned the proposed amendment will impact, threaten, or harm their domestic and livestock water rights.

The Commission may not grant an application to amend an existing permit if it will have an adverse impact upon other water right holders.¹¹ 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.¹² Furthermore, a reasonable relationship exists between their interest in protecting their existing water rights and the activity regulated.¹³ Based on this showing, OPIC recommends that the Commission find the Downstream Requestors, Lewis Buck, Kevin Noland, Fred Bell, Betty Bookter and Wanda Hudson have demonstrated they are affected persons entitled to a hearing.

IV. CONCLUSION

For the reasons set forth above, OPIC respectfully recommends that the Commission grant the contested case hearing requests of the Downstream Requestors, Lewis Buck, Kevin Noland, Fred Bell, Betty Bookter and Wanda Hudson. OPIC also recommends that the

¹⁰ See Appendix A for a list of hearing requestors who state they are holders of downstream water rights.

¹¹ TWC § 11.122(b).

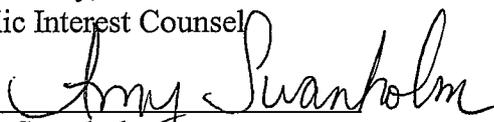
¹² 30 TAC § 55.256(c)(1).

¹³ 30 TAC § 55.256(c)(3).

Commission refer this matter to the State Office of Administrative Hearings for a contested case hearing.

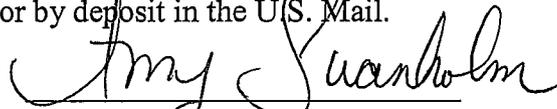
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
Amy Swanholm
Assistant Public Interest Counsel
State Bar No. 24056400
P.O. Box 13087 MC 103
Austin, Texas 78711
(512) 239-6363 PHONE
(512) 239-6377 FAX

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

Downstream Water Rights Holders

Van W. Carson
John C. Merek
Dwayne Dishroon
Wanda Dishroon
W.G. Dishroon
Thomas L. Everidge
Leitha Schwertner
Todd Schwertner
Jennifer Hoelscher
Steven Hoelscher
Betty John
Douglas John
AJ Jones
John Ketzler
Kevin Noland
Darrell Rushing
Todd Schwertner
Edward Werner
Ben Willberg
Kenneth Windham
Milburn Wright

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

FOR THE APPLICANT:

Will Wilde
City of San Angelo
P.O. Box 1751
San Angelo, Texas 76902-1751
Tel: (915) 657-4209
Fax: (915) 655-6397

FOR THE EXECUTIVE DIRECTOR:

Todd Galiga, Senior Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

Ron Ellis, Technical Staff
Texas Commission on Environmental Quality
Water Supply Division, MC-160
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-1282
Fax: (512) 239-2214

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-4007

**FOR ALTERNATIVE DISPUTE
RESOLUTION:**

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0687
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

REQUESTERS:

See attached list

FRED BALL
2819 CHATTERTON DR
SAN ANGELO TX 76904-6155

STEVEN HOELSCHER
2261 COUNTRY CLUB RD
SAN ANGELO TX 76904-9351

BEN A WILLBERG
9990 FM 380
PAINT ROCK TX 76866-3602

BECKY BOOKTER
2819 CHATTERTON DR
SAN ANGELO TX 76904-6155

WANDA HUDSON
8193 THOMPSON RD
MILES TX 76861

KENNETH R WINDHAM
16125 MY RD
MILES TX 76861-5200

LEWIS J BUCK
15793 MY RD
MILES TX 76861-5210

BETTY & DOUGLAS JOHN
16293 MY RD
MILES TX 76861-5217

MILBURN WRIGHT
PO BOX 7074
MILES TX 76861

VAN W CARSON
CPA
17 S CHADBOURNE ST STE 509
SAN ANGELO TX 76903-5862

A J JONES
UCRA
15957 MY RD
MILES TX 76861-5228

JOHN CMEREK
6834 N FM 1692
MILES TX 76861-5225

JOHN C KETZLER
7253 JACKSON LN
MILES TX 76861-5222

MR DWAYNE DISHROON
PO BOX 374
MILES TX 76861-0374

KEVIN L NOLAND
11097 S DOUGLAS LOOP
MILES TX 76861-4717

WANDA & WG DISHROON
PO BOX 374
MILES TX 76861-0374

DARRELL RUSHING
16269 MY RD
MILES TX 76861-5217

THOMAS L EVRIDGE
16185 MY RD
MILES TX 76861-5200

TODD SCHWERTNER
16205 MY RD
MILES TX 76861-5217

LETHA GREEN & TODD SCHWERTNER
PO BOX 70
MILES TX 76861-0070

CLYDE WATKINS
101 PENROSE ST
SAN ANGELO TX 76903-8635

JENNIFER ANN HOELSCHER
2261 COUNTRY CLUB RD
SAN ANGELO TX 76904-9351

EDWARD E WERNER
PO BOX 58
MILES TX 76861-0058

