

FREEMAN & CORBETT

PHONE (512) 451-6689

8500 BLUFFSTONE COVE, SUITE B-104
AUSTIN, TEXAS 78759

FAX (512) 453-0865

August 3, 2009

Chief Clerk
ATTN: Agenda Docket Clerk
Mail Code 105
Texas Commission on Environmental Quality
PO Box 13087
Austin, TX 78711-3087
Fax: 512-239-3311

2009 AUG - 3 PM 3: 34
CHIEF CLERKS OFFICE
TEXAS COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: Docket No. 2009-0506-WR, City of Lufkin, Texas
Water Rights Application Permit No. ADJ 4411H Concerning to Change of Conditions
Relating to the Priority Date

Dear Madams and Sirs:

This firm represents the City of Lufkin, Texas, Applicant in the referenced proceeding. Enclosed, please find the original and 11 copies of Lufkin's Response to the protests and/or hearing requests filed in the referenced matter by the following entities:

1. Nacogdoches County;
2. Upper Neches River Municipal Water Authority;
3. City of Tyler and Tyler Water Utilities;
4. City of Dallas;
5. City of Nacogdoches; and
6. Angelina and Neches River Authority.

Copies of Lufkin's Response are being sent to all parties of record per the attached certificate of service.

Thank you for your attention to this matter.

Very truly yours,


Ronald J. Freeman

cc. All parties of record per attached certificate of service

TCEQ DOCKET NO. 2009-0506-WR

APPLICATION BY THE CITY
OF LUFKIN, TEXAS FOR WATER
RIGHTS PERMIT NO. ADJ 4411H

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§
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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY

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CHIEF CLERKS OFFICE

RESPONSE AND OBJECTION TO ALL PROTESTS AND REQUESTS FOR HEARING

COMES NOW, the City of Lufkin, Texas (“Applicant” or “Lufkin”) and files this Response to all six of the protests filed in the referenced matter by (i) Nacogdoches County; (ii) the Upper Neches River Municipal Water Authority; (iii) the City of Tyler and Tyler Water Utilities; (iv) the City of Nacogdoches; (v) the Angelina and Neches River Authority; and (vi) the City of Dallas (collectively, “Protestants”), and in support thereof would respectfully show as follows:

I.

Each of the Protestants (other than Dallas, as discussed in Section III below) filed a protest claiming (i) it is the owner of a water right upstream of Applicant’s water right and (ii) that the Application will impair its existing water right. However, the fact that a Protestant owns an existing water right upstream of Applicant’s water right does not warrant giving standing to the Protestant in this Docket. Lufkin’s Application in this Docket, *by its own terms*, cannot impair existing water rights upstream of Applicant’s water right even if it is granted. This is true for the simple reason, as confirmed by TCEQ staff in their February 16, 2008, memo addressing the water rights impacts of the Application (copy attached), that the modification of the two subordination clauses requested by Applicant in this Docket “does not seek to alter Special Conditions 5.C. and 5.D. with respect to [existing water] rights.” Therefore, there cannot be any impairment of existing water rights owned by the Protestants and, accordingly, such claim by the Protestants does not give rise to standing for a contested case hearing.

II.

Each of the Protestants also essentially alleges that it intends to possibly (i) amend its existing water right *in the future* or (ii) seek a new water right *in the future* to meet its future water supply needs. Each Protestant claims that the granting of the Application could impair the Protestant’s ability to address its future municipal and domestic needs in these future applications. However, no Protestant alleges it has any *pending* application to amend its water

rights or to seek new water rights. Speculative claims for future possible permit applications cannot form the basis of a peculiar right giving rise to a party having a justiciable interest in a currently pending application, such as that of Lufkin. It is well established that speculation about future contingencies is insufficient to establish standing as an affected person. *Texas Disposal Systems Landfill, Inc., v. Texas Commission on Environmental Quality, et al*, 259 SW3d 361, 363 (Tex. App.—Austin 2008 no pet.) (holding that “complainant must show that a concrete, particularized, actual or imminent injury faces him due to the decision; a hypothetical or speculative injury is not enough”). The Protestants’ claims about possibly needing to file applications for amended or new permits upstream of Applicant’s water right are simply too speculative to confer any unique status on a Protestant in order to confer party status on the Protestant. Therefore, such claims by the Protestants do not give rise to standing for a contested case hearing.

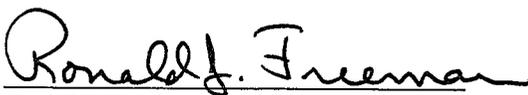
III.

With particular regard to Dallas, in addition to the reasons stated above, Dallas also fails to allege that it even owns a water right upstream of Applicant’s water right in the Angelina-Neches River Basin. Dallas’ claim for party status is thus even more remote than those of the other Protestants. Dallas stands no different than any other entity in Texas and has absolutely no unique status conferring a justiciable interest on it in this Docket.

Wherefore, premises considered, Lufkin respectfully requests that the Commission deny all six requests for hearing and grant the Application as recommended by the Commission’s Executive Director.

Respectfully submitted,

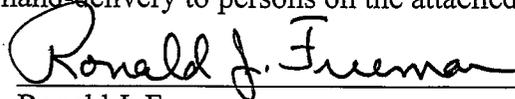
Freeman & Corbett

By: 
Ronald J. Freeman
State Bar No. 07430500
8500 Bluffstone Cove, Suite B-104
Austin, TX 78759
(512) 451-6689
(512) 453-0865 (fax)
rfreeman@freemanandcorbett.com

Attorneys for the City of Lufkin, Texas

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was delivered on August 3, 2009, by fax, first-class mail and/or hand-delivery to persons on the attached service list.



Ronald J. Freeman

CHIEF CLERKS OFFICE

2009 AUG - 3 PM 3: 35

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Amy Dunsmore, Application Manager
Water Rights Team
Water Rights Permitting & Availability Section

Date: February 16, 2008

Through: J Lann Bookout, Team Leader
Surface Water Availability and Interstate Compacts

From: Steven Mahr, Hydrologist
Water Availability Team

Subject: City of Lufkin
ADJ4411
CN 600649115
Neches and Angelina Rivers
Neches River Basin

Water Availability Review

Application Summary

Certificate of Adjudication No. 06-4411 authorizes the City of Lufkin (Lufkin), part owner, to impound water in two reservoirs (owned by the United States of America and operated by the United States Army Corps of Engineers) being Lake Sam Rayburn located on the Angelina River in Jasper, Sabine, San Augustine, Angelina, and Nacogdoches Counties and B.A. Steinhagen Lake located on the Neches River in Tyler and Jasper Counties. The Certificate also authorizes Lufkin to divert and use 28,000 acre-feet of water from Lake Sam Rayburn at various rates for municipal and industrial purposes within Lower Neches Valley Authority's service area in Jefferson, Hardin, Tyler, Liberty, and Chambers Counties. The Certificate contains various priority dates and special conditions.

Special Condition 5.C. states: Excepting municipal purposes, all of owner's right to divert and use public water, under the priority date of November 12, 1963, is subordinate to any present or future domestic and/or municipal water needs or requirements.

Special Condition 5.D. states: Owner's rights, under the priority date of November 12, 1963, authorized by this certificate of adjudication, shall be subordinate 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.

Lufkin seeks an amendment to Certificate of Adjudication No. 06-4411 revising Special Conditions 5.C. and 5.D. to limit subordination of Lufkin's rights to existing rights granted between November 12, 1963 and April, 2008.

No Injury Analysis

Resource Protection staff did not recommend environmental flow requirements for this application. The application does not request a new appropriation of water; therefore, a water availability analysis is not required. However, the application must be reviewed to determine whether there are any impacts on senior water rights. The application requests that the subordination be limited to those water rights granted prior to April 2008. The application was declared administratively complete on August 14, 2008.

Modification of Special Conditions 5.C. and 5.D. to limit subordination of Lufkin's 1963 rights cannot affect existing basin water rights because the application does not seek to alter Special Conditions 5.C. and 5.D. with respect to those rights. Applications that may be filed in the future are not considered when staff performs the hydrology technical review of an application.

Conclusion

The application does not alter whether and to what extent Lufkin can exercise a priority call on water rights senior to the filing date of the application. Therefore, since no water rights can be affected, staff can recommend granting the application so long as the amendment includes a modification of Special Conditions 5.C. and 5.D. limiting subordination of Lufkin's rights to existing rights granted between November 12, 1963 and August 14, 2008, the filing date of this application.


Steven Mahr, Hydrologist

**MAILING LIST
CITY OF LUFKIN
DOCKET NO. 2009-0506-WR; PERMIT NO. ADJ 4411H**

FOR THE APPLICANT:

Paul Parker
City Manager
City of Lufkin
P.O. Box 190
Lufkin, Texas 75902-0190

Ronald Freeman
Freeman & Corbett, LLP
8500 Bluffstone CV
Austin, Texas 78759-7808
Tel: (512) 451-6689
Fax: (512) 453-0865

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

Steve Ramos, Technical Staff
Texas Commission on Environmental Quality
Water Supply Division, MC-160
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-6538
Fax: (512) 239-2214

FOR PUBLIC INTEREST COUNSEL:

Mr. Blas J. Coy, Jr., Attorney
Texas Commission on Environmental Quality
Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-6363
Fax: (512) 239-6377

FOR OFFICE OF PUBLIC ASSISTANCE:

Ms. 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:

Mr. Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

Ms. 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:

Please see attached for the complete mailing list.

REQUESTER(S)

BRAD B CASTLEBERRY
LLOYD GOSSELINK
816 CONGRESS AVE STE 1900
AUSTIN TX 78701-2442

JOE FREELAND
MATHEWS AND FREELAND LLP
PO BOX 1568
AUSTIN TX 78767-1568

JIM MATHEWS
ATTORNEY, MATHEWS & FREELAND LLP
PO BOX 1568
AUSTIN TX 78767-1568

JOHN D STOVER
PO BOX 154540
LUFKIN TX 75915-4540

GWENDOLYN HILL WEBB
ATTORNEY AT LAW, WEBB & WEBB
PO BOX 1329
AUSTIN TX 78767-1329