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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

Ms. LaDonna Castañuela
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC 105
P. O. Box 13087
Austin, Texas 78711-3087

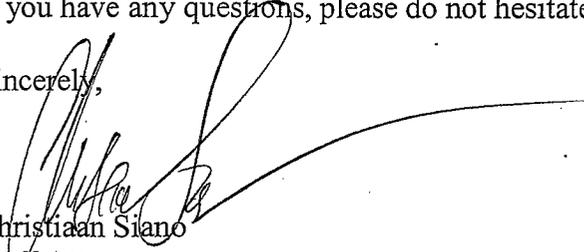
Re: City of Lufkin's Application for Amendment to Certificate of Adjudication No. 06-4411H; TCEQ Docket No. 2009-0506-WR

Dear Ms. Castañuela:

Please find enclosed the original and seven copies of the Executive Director's Response to Hearing Requests.

If you have any questions, please do not hesitate to contact me at (512) 239-6743.

Sincerely,



Christian Siano
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

MAILING LIST
CITY OF LUFKIN
TCEQ Docket No. 2009-0506-WR

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TCEQ DOCKET NO. 2009-0506-WR

CITY OF LUFKIN'S	§	BEFORE THE
APPLICATION FOR	§	TEXAS COMMISSION
AMENDMENT TO	§	ON
CERTIFICATE	§	ENVIRONMENTAL
OF ADJUDICATION	§	QUALITY
NO. 06-4411H	§	

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

I. INTRODUCTION

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to the hearing requests filed on the City of Lufkin's (Lufkin) amendment to Certificate of Adjudication No. 06-4411H. Six requests for a hearing were filed. The Executive Director recommends that four hearing requests be granted and two be denied.

II. BACKGROUND

Certificate of Adjudication No. 06-4411 currently authorizes the City of Lufkin to impound water on Lake Sam Rayburn located on the Angelina River, tributary of the Neches River, Neches River Basin in Jasper, Sabine, San Augustine, Angelina, and Nacogdoches Counties. The Certificate also authorizes the City of Lufkin to divert and use 28,000 acre-feet of water from Lake Sam Rayburn at various rates for municipal and industrial purposes within Jefferson, Hardin, Tyler, Liberty, and Chambers Counties. Special Condition 5.C. subordinates the City of Lufkin's non-municipal water rights to present and future rights in the basin, and Special Condition 5.D. subordinates the City of Lufkin's non-municipal water rights to present and future rights in the basin. The Lower Neches Valley Authority (LNVA) also is an owner of this Certificate, but the LNVA's ownership in the Certificate is separate from Lufkin's.

Lufkin filed this application for an amendment to Certificate of Adjudication No. 06-4411 to modify Special Conditions 5.C. and 5.D to change the subordination of Lufkin's water rights so that the subordination only applies to existing (before April, 2008) water rights. Lufkin also seeks to set a fixed priority date on all of its existing water rights.

ED CCH Request Memo
City of Lufkin
CoA No. 06-4411H

III. PROCEDURAL HISTORY

Lufkin filed this application on July 1, 2008. The application was declared administratively complete August 14, 2008. Notice of the application was mailed to the water right holders of record in the Neches River Basin on October 9, 2009. The notice was published in the *Beaumont Enterprise* October 23, 2008 and the *Lufkin Daily News* on October 26, 2008. The comment period ended on November 25, 2008.

IV. 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).

V. HEARING REQUESTS

All of the six hearing requests were received timely and met the requirements of 30 TEX. ADMIN. CODE § 55.251. The commission received hearing requests from the following:

- Upper Neches River Municipal Water Authority (UNRMWA),
- City of Dallas,
- Angelina & Neches River Authority (ANRA),
- City of Tyler and Tyler Water Utilities (Tyler),
- City of Nacogdoches, and
- Nacogdoches County.

Each hearing requestors’ arguments are as follows:

1. UNRMWA states that it is a conservation and reclamation district with matters of interest pertaining to the application. UNRMWA owns Certificate of Adjudication No. 06-3254 which authorizes it to impound and divert 238,100 acre feet of water in and from Lake Palestine for domestic, municipal, industrial, irrigation, mining, and recreation purposes. UNRMWA claims that its impoundment on Lake Palestine is upstream of the Sam Rayburn impoundment. It expects to apply for additional water use permits in portions of the Neches River Basin at or above Weches Dam for its growing demand. These projects include Fastrill Reservoir, a water management strategy in the State Plan and a reservoir designated as a unique site for reservoir development by the legislature in S.B. 3.

2. The City of Dallas states that it owns several water rights (not described) and has entered in to a contract with UNRMWA for water from Lake Palestine and a Downstream Diversion Dam. Dallas claims that the proposed amendment will significantly reduce the yield of the Fastrill Reservoir, in which it has an interest. Granting this application would decrease the feasibility of the Fastrill Reservoir, which will impact Dallas' future water supply. Furthermore, Dallas contends, allowing this amendment would be detrimental to the public welfare and would be inconsistent with statewide water development plans.

3. ANRA is a conservation and reclamation district with regulatory authority of water in the Neches River. TEX. SPEC. DIST. & LOC. LAWS CODE, Chapter 8501. Sam Rayburn Reservoir is located within ANRA's territory. ANRA holds Permit No. 4228 which authorizes the construction of a reservoir on a tributary of Angelina River, which is upstream of Sam Rayburn. ANRA does not believe that Lufkin has shown that its amendment is consistent with the state and regional plans, or that it will use reasonable diligence to avoid waste and achieve water conservation. On May 4, 2009, TCEQ received a letter from ANRA enclosing a "CONDITIONAL WITHDRAWAL" of its hearing request, requesting that the amendment be granted as proposed by staff in its draft amendment, and hearing requests denied. If the hearing requests are not all denied and the matter proceeds to SOAH, ANRA requests to be named a party.

4. The City of Tyler states that it owns water rights and has contracts that could be adversely affected if the referenced application is granted. These rights and contracts include Certificates of Adjudication Nos. 06-3254 (Lake Palestine), and 06-4853 (Lake Tyler), and 06-3237 (Lake Bellwood). Lake Tyler is upstream of the proposed Ponta Dam on the Angelina River and the proposed Weches Dam on the Neches River, and could be affected if the proposed changes are granted. Tyler is the largest municipality in the Neches River Basin above Sam Rayburn Reservoir and its future water needs could be hampered by this application.

5. Nacogdoches County states that it holds Permit No. 5585, for a reservoir located on the Naconiche Creek in the Neches River Basin. This reservoir appears to be about 50 miles upstream of Sam Rayburn Lake. If granted, this application may impact the county's ability to impound state water and comply with the conditions in its Permit. This reservoir was permitted and the work done on the reservoir with a future water supply source in mind. Lake Naconiche is included in the State Water Plan as a future water supply strategy for the

region. This application would reduce current and future water supplies identified for the county, thereby impairing the ability of the county to meet its projected water demands.

6. The City of Nacogdoches states that it holds Permit No. 2560, which is about 20 miles upstream of Lake Sam Rayburn. The City plans on developing additional supplies of surface water upstream from the proposed Ponta Dam on the Angelina River. If the application is granted, Lufkin will no longer be subordinate to any water right the City may hereafter need in order to meet projected demand for water. The protection afforded the City under Lufkin's existing water right will be removed.

Executive Director's Recommendation: Grant the hearing requests for those requestors that are upstream of the Sam Rayburn Reservoir on the Angelina River. This amendment application is a matter of first impression before the commission. The Executive Director recommends that the hearing requests be granted because the hearing requestors may have a legally protected interest in the amendment application based upon the subordination clause in the City of Lufkin's certificate of adjudication under which a portion of Lufkin's water rights are subordinated not only to existing water rights but also to future water rights. Although one of the basic tenets in water rights is "first in time is first in right," and staff reviews a water rights application to determine if existing water rights can be harmed, the provision in Lufkin's water right subordinating Lufkin to future water rights is in the certificate. It is likely that such a clause was included specifically to protect future water right holders.

Section 11.134(b)(3)(C) of the Water Code states that the Commission cannot grant a water right that it finds is detrimental to the public welfare. Existing water rights are not being impacted by this amendment because Lufkin will continue to be subordinate to existing water rights since it is only requesting to take out the subordination clause with respect to future water rights. However, the requestors may have a right to a hearing on whether the amendment to remove the subordination clause with respect to future water rights could be detrimental to the public welfare because they have future water management strategies, including one reservoir that is in the State Water Plan and has been designated as a unique site for reservoir development by the legislature, possibly relying on Lufkin's subordination to those projects.

UNRMWA and City of Dallas interests are on the Neches River. UNRMWA expresses interest in Lake Palestine rights, existing and future, future water use permits in portions of the Neches River Basin above Lake Sam Rayburn, and an interest in Lake Fastrill, which if built, would be downstream of Lake Palestine. The City of Dallas expresses future interests in Lake Palestine and Lake Fastrill. The Executive Director does not believe that any exiting or future rights on the Neches River can be impacted by this amendment to the City of Lufkin's Certificate of Adjudication. Lufkin has a water right only for water in Lake Sam Rayburn, which is on the Angelina River. It does not appear that removing the subordination to existing water rights in the City of Lufkin's water right could have any impact on future water rights on the Neches River.

The hearing requestors with interests on the Angelina River may have a right to a hearing on whether this amendment could be inconsistent with the state and regional water development plan, as required under TWC §11.134(b)(3)(E).

VI. CONCLUSION

Therefore, the Executive Director recommends *grant* the hearing requests of Angelina & Neches River Authority, City of Tyler (for its interests in Lake Tyler) and Tyler Water Utilities, City of Nacogdoches, and Nacogdoches County, and *deny* the requests of the City of Dallas and Upper Neches River Municipal Water Authority.

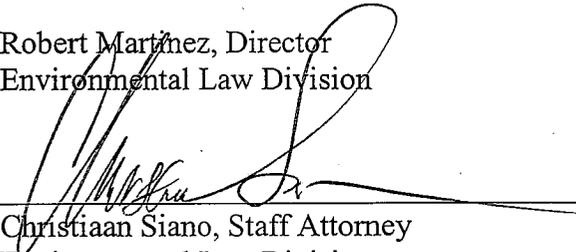
Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Mark R. Vickery, P.G., Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Robert Martinez, Director
Environmental Law Division

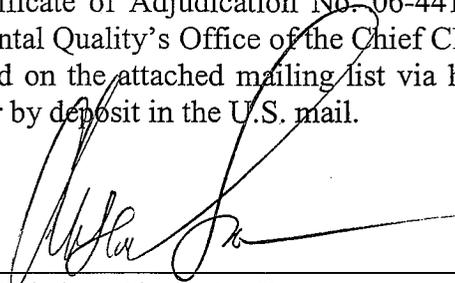


Christiaan Siano, Staff Attorney
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State Bar No. 24051335

REPRESENTING THE EXECUTIVE
DIRECTOR OF THE TEXAS COMMISSION
ON ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that on August 3, 2009, the original and seven copies of the "Executive Director's Response to Hearing Requests" for Certificate of Adjudication No. 06-4411H, were filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, and a complete 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.



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