

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
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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 LUFKIN**
TCEQ DOCKET NO. 2009-0506-WR; PERMIT NO. ADJ 4411H

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Requests in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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DOCKET NO. 2009-0506-WR

APPLICATION BY CITY OF LUFKIN § **BEFORE THE**
TO AMEND WATER RIGHTS § **TEXAS COMMISSION ON**
PERMIT NO. ADJ 4411H § **ENVIRONMENTAL QUALITY**

**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUESTS**

To the Members of the Texas Commission on Environmental Quality:

The Office of the Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ or the "Commission") files this response to hearing requests in the above-referenced matter.

I. Introduction

The City of Lufkin ("Lufkin") has applied to the TCEQ to amend its portion of Certificate of Adjudication No. 06-4411. The TCEQ declared Lufkin's application administratively complete on August 14, 2008.

Lufkin's portion of Certificate of Adjudication No. 06-4411 authorizes the impoundment of water in 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 further authorizes Lufkin to divert and use 28,000 acre-feet of water per year from Lake Sam Rayburn at various rates for municipal and industrial purposes within Tyler, Hardin, Liberty, Chambers, and Jefferson Counties. The priority date for Lufkin's portion is November 12, 1963. Lufkin seeks to amend Special Conditions 5.C. and 5.D. to limit subordination of Lufkin's water right to existing water rights in the Neches River Basin.

The TCEQ received timely hearing requests from: Nacogdoches County (“County”), the Upper Neches River Municipal Water Authority (UNRMWA), the City of Tyler (“Tyler”), the City of Nacogdoches (“Nacogdoches”), and the City of Dallas (“Dallas”). The TCEQ also received a hearing request withdrawal from the Angelina and Neches River Authority (ANRA). For the reasons stated herein, OPIC recommends that all of the hearing requests be granted.

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) § 11.323.¹ The TCEQ must 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.² The amendment also must “meet all other applicable requirements” of Chapter 11 of the Texas Water Code.³

The TCEQ procedural rules require that a hearing request substantially comply with the following:

- (1) give the name, address, and daytime telephone number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

¹ TWC § 11.122(a).

² TWC § 11.122(b).

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

- (2) 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;
- (3) request a contested case hearing; and
- (4) provide any other information specified in the public notice of application.⁴

A request for a contested case hearing shall be granted if the request is made by an affected person and complies with the requirements of § 55.251; is timely filed with the TCEQ Chief Clerk; and is pursuant to a right to hearing authorized by law.⁵

An "affected person" is defined as one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.⁶ An interest common to members of the general public does not qualify as a personal justiciable interest.⁷

Governmental entities, including local governments and public agencies, with authority under state law over issues contemplated by the application may be considered affected persons.⁸

To determine whether a hearing requestor qualifies as an affected person, all relevant factors must be considered, including, but not limited to, the following:

- (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;

⁴ 30 TEX. ADMIN. CODE § 55.251(c).

⁵ 30 TAC § 55.255(b).

⁶ 30 TAC § 55.256(a).

⁷ *Id.*

⁸ 30 TAC § 55.256(b).

- (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.⁹

III. Analysis

The special conditions at issue in this amendment application are set out below.

Currently, 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.

Current 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.

If approved, amended Special Condition 5.C. would state:

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 existing municipal water rights granted by the Commission with a priority date between November 13, 1963 and January 3, 2008.

Amended Special Condition 5.D. would state:

Owner's rights, under the priority date of November 12, 1963, authorized by this certificate of adjudication, shall be subordinate to all existing rights granted by the Commission with a priority date between November 13, 1963 and January 3, 2008 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.

⁹ 30 TAC § 55.256(c).

Nacogdoches County

Nacogdoches County holds Water Use Permit No. 5585 for water in the Neches River Basin and states that its rights and interests in the Neches River Basin may be impaired by the proposed amendments. Specifically, the County states that the proposed amendments may impact its ability to impound state water and comply with its water use permit. Also, the County states that the proposed amendments could impair its use of water associated with the County's permit and impair the County's ability to address future municipal and domestic needs of residents.

As a water rights holder in the Neches River Basin with interests that are protected by the current special conditions, the County possesses a personal justiciable interest related to a legal right, which is potentially affected by this application. OPIC finds that Nacogdoches County meets the legal definition of an affected person, and the County's hearing request should therefore be granted.

UNRMWA

UNRMWA is authorized to divert and use state water pursuant to Certificate of Adjudication No. 06-3254 and states that its rights and interests in the Neches River Basin may be impaired by the proposed amendments. UNRMWA further states that Lufkin's proposed amendments are in conflict with the approved regional water plan and may impact current supplies authorized to UNRMWA.

As a water rights holder in the Neches River Basin with interests that are protected by the current special conditions, UNRMWA possesses a personal justiciable interest related to a legal right, which is potentially affected by this application. OPIC finds that UNRMWA meets the legal definition of an affected person, and its hearing request should therefore be granted.

City of Tyler

According to Tyler's hearing request, Tyler owns water rights and is party to water contracts that could be adversely affected if this application is granted. Tyler states that these rights and contracts include Certificate of Adjudication Nos. 06-3254 (Lake Palestine), 06-4853 (Lake Tyler), and 06-3237 (Lake Bellwood). Tyler further states its rights and contracts are upstream of the proposed Ponta Dam on the Angelina River and the proposed Weches Dam on the Neches River, and could be adversely affected if the special conditions are amended as proposed. Finally, Tyler states that the proposed amendments could impair development of surface water in the Upper Neches River Basin, and changes to the allocation of water between the Upper and Lower Neches should be addressed in the regional planning process prior to being reflected in a water right amendment.

As a water rights holder in the Neches River Basin with interests that are protected by the current special conditions, Tyler possesses a personal justiciable interest related to a legal right, which is potentially affected by this application. OPIC finds that Tyler meets the legal definition of an affected person, and its hearing request should therefore be granted.

City of Nacogdoches

As stated in Nacogdoches' hearing request, Nacogdoches presently has authorization to divert and use water from Lake Nacogdoches under Water Right No. 2560 and plans to develop additional surface water supplies upstream from the proposed Ponta Dam on the Angelina River. Nacogdoches believes that the proposed amendments would adversely affect Nacogdoches by limiting its ability to develop new water supplies upstream of the proposed Ponta Dam to meet the needs of its water customers.

As a water rights holder in the Neches River Basin with interests that are protected by the current special conditions, Nacogdoches possesses a personal justiciable interest related to a legal right, which is potentially affected by this application. OPIC finds that Nacogdoches meets the legal definition of an affected person, and its hearing request should therefore be granted.

City of Dallas

Dallas is a surface water rights holder and states that it has entered into a long term contract with UNRMWA for water from Lake Palestine and the downstream diversion dam authorized under Certificate of Adjudication 06-3254. Dallas contends that Lufkin's application does not meet Texas Water Code § 11.134(b) because it would harm Dallas' plans for future water supply. Dallas further contends that the proposed amendments would be detrimental to public welfare and do not address a water supply need in a manner consistent with the state water plan and the approved regional water plan.

As a holder of water rights in the Neches River Basin with interests that are protected by the current special conditions, Dallas possesses a personal justiciable interest related to a legal right, which is potentially affected by this application. OPIC finds that Dallas meets the legal definition of an affected person, and its hearing request should therefore be granted.

IV. Conclusion

Under 30 TAC § 55.255, a hearing request made by an affected person must be granted if: (1) the request complies with the form requirements for hearing requests; (2) the request is timely filed; and (3) the request is pursuant to a right to hearing authorized by law. All hearing requests in this matter comply with the form requirements of § 55.251. As stated previously, all of the hearing requests were also timely filed with the Chief Clerk. Finally, the hearing requests are made pursuant to the right to hearing provided by Texas Water Code Chapter 11.

Having found that all hearing requestors in this matter are affected persons whose hearing requests comply with the requirements of § 55.255, OPIC respectfully recommends the Commission grant the hearing requests made by Nacogdoches County, UNRMWA, Tyler, Nacogdoches, and Dallas.

Respectfully submitted,

Blas J. Coy, Jr.
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By 

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2009, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.


Garrett Arthur

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