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August 17, 2009

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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 AUG 17 PM 4:45
CHIEF CLERKS OFFICE

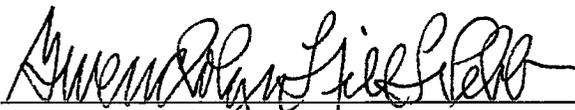
Re: Application to Amend Water Rights Permit No. 06-4411H; City of Dallas' Reply to Responses to Hearing Requests by the City of Lufkin, the Executive Director, and the Office of Public Interest Counsel.

Dear Ms. Castñuela,

Enclosed for filing in the above referenced and docketed matter, please find one (1) original and eleven (11) copies of the City of Dallas' Reply to Responses to Hearing Requests by the City of Lufkin, the Executive Director, and the Office of Public Interest Counsel.

Thank you for your attention to this matter. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,


Gwendolyn Hill Webb
Attorney for the City of Dallas

Enclosure

cc: Attached Mailing List

APPLICATION BY
CITY OF LUFKIN
TO AMEND WATER RIGHTS
PERMIT NO. ADJ 4411H

§ BEFORE THE
§ TEXAS COMMISSION ON
§ ENVIRONMENTAL QUALITY

ON AUG 17 PM 4: 45
CHIEF CLERKS OFFICE

**CITY OF DALLAS' REPLY TO RESPONSES TO HEARING REQUESTS BY THE
CITY OF LUFKIN, THE EXECUTIVE DIRECTOR, AND
THE OFFICE OF PUBLIC INTEREST COUNSEL**

COMES NOW the City of Dallas ("Dallas") and files its Reply to Responses to Hearing Requests of the City of Lufkin ("Applicant"), the Executive Director of the Texas Commission on Environmental Quality ("TCEQ," or "Commission"), and the TCEQ Office of Public Interest Counsel, and in support thereof would respectfully show as follows:

I. Introduction and Background

According to the October 9, 2008 Notice issued by the TCEQ Chief Clerk, Lufkin is authorized to divert and use 28,000 acre-feet of water per year for municipal and industrial purposes from Lake Sam Rayburn under Certificate of Adjudication No. No. 06-4411. Under Application No. 06-4411H, Applicant seeks to Amend Special Conditions 5.C. and 5.D. included in Certificate of Adjudication No. 06-4411, which currently state:

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.**

Applicant requests an amendment so that Special Conditions 5.C. and 5.D. will read as follows:

Special Condition 5.C. 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 of November 13, 1963 and April, 2008.**

Special Condition 5.D. 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 April, 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.

[All emphasis supplied.]

Therefore, it appears the proposed amendment would eliminate the subordination of Applicant's water right to *future* water rights for municipal purposes, and would specifically eliminate the subordination as to water rights associated with the proposed Weches Dam on the Neches River. At the same time, the language in the TCEQ notice is ambiguous with respect to the change requested in Special Condition 5.D: Are there any *existing* rights to storage and use associated with the *proposed* Weches Dam on the Neches River? Does the amendment propose to protect water rights associated with the proposed Weches Dam or not?

The City of Dallas responded to the October 8, 2008 Notice with a written letter of protest requesting a contested case hearing, citing its contractual water right in Lake Palestine based on Certificate of Adjudication No. 06-3254, and stating also:

Fastrill Reservoir is a proposed reservoir in the Neches River Basin with a proposed dam location upstream of the Weches Dam site listed in Special Condition 5.D. Senate Bill 3, passed by the 80th Texas Legislature, designates the Fastrill Reservoir site as one of 19 reservoir sites of unique value for the construction of a reservoir. Dallas has an interest in the development of Fastrill Reservoir as a water supply reservoir to meet projected demands within Dallas' service area. Under the Board approved Water Plan for Texas, 2007, Fastrill Reservoir is part of the plan for water resources to be developed to meet Dallas' water supply needs. Amendment of Certificate of Adjudication No. ("CoA") 06-4411H, as proposed by Applicant, will significantly reduce the yield of Fastrill Reservoir as determined in the Reservoir Site Protection Study performed by HDR Engineering, Inc., Freese & Nichols, Inc., and R.J. Brandes Company on behalf of the Board. This study analyzed the yield available from Fastrill Reservoir based on studies performed on behalf of Upper Neches River Municipal Water Authority (UNRMWA) and Dallas (HDR September 2006).

The Board and Dallas moved to protect their interests in the Fastrill Reservoir site in two separate lawsuits: Civil Action No. 6:07-CV-10, *The Texas Water Development Board vs. The United States Department of the Interior; Dirk Kempthorne, Secretary of the Interior; the United States Fish and Wildlife Service; and H. Dale Hall, Director of the U.S. Fish and Wildlife Service*, and in a separate cause, *City of Dallas, Texas vs. H. Dale Hall, in his official capacity as Director of the United States Fish and Wildlife Service; Dirk Kempthorne, in his official capacity as Secretary of the United States Department of Interior; Benjamin N. Tuggle, in his official capacity as Regional Director of the Southwest Region 2 of the United States Fish and Wildlife Service; and United States*

Department of the Interior. The Texas Water Development Board lawsuit was consolidated with Dallas', and the consolidated case is styled *City of Dallas, Texas v. H. Dale Hall, Director of the United States Fish and Wildlife Service, et al., Cause Nos. 3:07-CV-0060 and 3:07-CV-02113-P.* The consolidated lawsuits are ongoing, and are the subject of a petition for writ of certiorari before the United States Supreme Court.

Applicant's proposed amendment of Special Conditions 5.C. and 5.D. would decrease the feasibility of the proposed Fastrill reservoir as a water supply to meet the needs of Dallas and Region I entities in both the Region C Plan and the 2007 Texas Water Plan approved by the Board. Accordingly, Dallas believes that no amendment should be granted to Applicant as proposed, because the amendment does not meet Texas Water Code §11.134(b) criteria in that removal of the Special Conditions would harm Dallas in its plans for future water supply to meet its customer's needs. Consequently, amendment of the Special Conditions would be detrimental to the public welfare, and would not address a water supply need in a manner that is consistent with the State water plan. The Special Conditions Applicant seeks to amend are the very Special Conditions which made Sam Rayburn Reservoir and B.A. Steinhagen Lake consistent with the public welfare and to statewide water development plans.

And, Dallas also stated:

Finally, to the extent that Lufkin's Application No. 06-4411H adversely impacts the development of Fastrill Reservoir, it does not address a water supply need in a manner that is consistent with the State Water Plan and an approved regional water plan. The Water for Texas, 2007 plan states as to the Region I Plan:

Ongoing Issues

The U.S. Fish and Wildlife Service has designated the North Neches National Wildlife Refuge, which is located in the footprint of Lake Fastrill recommended by Region C for Dallas Water Utilities. **The reservoir is not recommended in the East Texas Regional Water Plan to meet a need but is included as an alternate strategy.** In addition, the region has surplus water available beyond its projected demands. As demand surpasses supply in other areas of the state, there will be increased pressure to transfer surplus water out of the East Texas Region.

[Emphasis supplied. See, page 64, Water for Texas, 2007)

Accordingly, data supporting the 2007 State Water Plan show that Lufkin has existing supplies, without the requested amendment, and the potential water

management strategies evaluated for Lufkin in the 2006 East Texas Regional Water Plan do not include the changes to CoA 06-4411 sought in this application.

In its request for a contested case hearing, Dallas fulfilled all the requirements for being granted a hearing under 30 Tex. Admin. Code, §55.27, including requirements that the request be made by an affected person, and is pursuant to a right to hearing authorized by law. Dallas is a person and water rights holder whose unique water supply interests, as detailed in the 2007 Texas Water Plan, entitle - even require Dallas - to pursue those special interests in court and before the Commission in a contested case hearing. Dallas' request for a contested case hearing specifically identified the basis of its unique interest.

Dallas timely filed its request for a contested case hearing, identifying its present and future water rights, its special interest in Fastrill Reservoir as a future water supply which it struggles to protect, and therefore as an affected person, whose rights under the terms and conditions of Certificate of Adjudication No. 064411 could be affected by the amendments proposed by the City of Lufkin. Presumably, the purpose of the contested case hearing would be to clarify the potential impacts on Dallas' interests, to allow Dallas to participate and present evidence regarding its interests, and to ensure that Dallas' interests were not compromised in the issuance of any amendment, all in accordance with Tex. Water Code, §11.134(b).

II. City of Lufkin's Response to Dallas' Hearing Request

In response to Dallas' hearing request, Applicant states that all protestants, including Dallas, state an interest in future water rights, only. Applicant claims: "Speculative claims for future possible permit applications cannot form the basis of a peculiar right giving rise to a party having justiciable interest in a currently pending application, such as that of the City of Lufkin." As to Dallas, Applicant states: "Dallas' claim for party status is [thus] even more remote than those of the other Protestants." Accordingly, Applicant does not think the Dallas' hearing request should be granted.

Applicant's response to Dallas' hearing request fails to address the impact of its proposed amendment, given the unique nature of the base water right. Where the water right was specifically granted to protect future water rights, including Dallas' interest in Fastrill Reservoir, which both Dallas and the Texas Water Development Board are fighting to protect by all legal means available, it makes no sense to state that the protection of future water rights does not give rise to a justiciable interest at present—in this case, future water rights were granted an interest by the Commission in Certificate of Adjudication No. 06-4411. Water suppliers holding the interest in the feasibility of future water supplies which are protected at present should not be precluded from continuing to protect that interest from impairment.

Moreover, Senate Bill 1, from 1997, specifically directed all water rights holders, water suppliers and, most importantly, those administering regulatory programs for development and finance of water supplies, to participate in an ongoing water planning process (that is, planning for the future). Senate Bill 1 also directs the TCEQ to evaluate water rights on the basis of the water plan. *See*, Tex. Water Code, §11.134(b)(3)(e), which states that the Commission may grant an application only if the amendment, among other concerns: “addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement; and . . .” So, the concept that an amendment application’s impact on future or planned water supplies does not give rise to a justiciable interest is both contrary to the specific grant of that interest in Certificate of Adjudication No. 06-4411, as amended, and outmoded from a legal standpoint, in light of the statutory emphasis on water planning and coordination of that planning with water rights permitting.

Considering the foregoing, Applicant’s proposed denial of Dallas’ hearing request should be overruled and Dallas’ hearing request should be granted, to allow Dallas to continue to protect its contractual water right in Lake Palestine and its present and continuing interests in Fastrill Reservoir.

III. The Executive Director’s Response to Dallas’ Hearing Request

The Executive Director states that Upper Neches River Municipal Water Authority and the City of Dallas have interests on the Neches River only, and that: “the Executive Director does not believe that any existing or future rights on the Neches River can be impacted by this amendment to the City of Lufkin’s Certificate of Adjudication.” Additionally, the Executive Director points out that Fastrill Reservoir is on the Neches River, not the Angelina River. Accordingly, the Executive Director does not think the Dallas’ hearing request should be granted.

The Executive Director’s response overlooks the text of the existing Special Condition 5.D., which specifically subordinate the water rights of the City of Lufkin to the proposed Weches Dam on the Neches River. Moreover, the Executive Director’s Response also overlooks the technical information presented by Dallas regarding the potential impact of Applicant’s proposed amendment on the feasibility of Fastrill Reservoir. Dallas has a duty to protect the property rights granted to it in the existing subordination language as against the potential impact of the proposed amendment on Fastrill Reservoir. The thoughts of the Executive Director regarding the potential impact are properly the subject of evidence in a contested case hearing which Dallas has timely requested. More importantly, the Executive Director’s position in this case is contrary to its position with respect to Application No. 06-4411F, which proposes the same amendment with respect to the water right of Lower Neches Valley Authority. In that case,

the Executive Director recommended granting all remaining requests for contested case hearing, including Dallas' because "the hearing requestors may have a legally protected interest in the amendment application based upon the subordination clause in LNVA's certificate of adjudication...Entities planning for future water rights may have relied on that subordination."

Considering the foregoing, the Executive Director's proposed denial of Dallas' hearing request in this case should be overruled and Dallas' hearing request should be granted to allow Dallas to present evidence and participate in the determination of the impact of the proposed amendment on Dallas' contractual water right in Lake Palestine and its present and continuing interests in Fastrill Reservoir.

IV. The Office of Public Interest Counsel's Response to Dallas' Hearing Request

The Office of Public Interest Counsel ("OPIC"), notes Dallas' water right in Lake Palestine, and interest in the water plan and how Applicant's proposed amendment specifically has the potential to "harm Dallas' plans for future water supply." OPIC's Response states:

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 be granted.

Dallas agrees with the determination by OPIC in every respect, and commends OPIC for its succinct and sententious presentation of its analysis and determination of Dallas' personal justiciable interest.

V. Summary and Conclusions

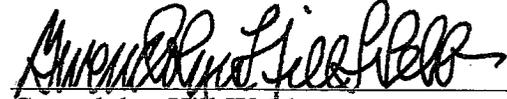
Having timely complied with all formal requirements for a hearing request, Dallas has shown that it is an affected person with a right to a contested case hearing on Application No. 06-4411H. In consideration of all the foregoing, Dallas' request for a contested case hearing meets the requirements of 30 Tex. Admin. Code, §55.255 and should be granted.

Dallas respectfully requests the Texas Commission on Environmental Quality grant the request for a contested case hearing of the City of Dallas.

Respectfully Submitted,

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By:


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CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of August, 2009, served copies of the foregoing City of Dallas' Reply to Responses to Hearing Requests by the City of Lufkin, the Executive Director, and the Office of Public Interest Counsel upon the parties to this proceeding, whose full and complete names and addresses appear below, by certified mail, facsimile, hand delivery, or regular U.S. mail.

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