

TCEQ DOCKET NO. 2009-0168-WR

APPLICATION B	§	BEFORE THE
LOWER NECHES VALLEY	§	TEXAS COMMISSION ON
AUTHORITY	§	ENVIRONMENTAL QUALITY
JEFFERSON COUNTY, TEXAS	§	

TCEQ DOCKET NO. 2009-0506-WR

APPLICATION BY THE CITY	§	BEFORE THE
OF LUFKIN FOR AMENDMENT TO	§	TEXAS COMMISSION
CERTIFICATE OF ADJUDICATION	§	ENVIRONMENTAL QUALITY
NO. 06-441H	§	

CHIEF CLERKS OFFICE

2009 AUG 17 PM 4: 27

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CITY OF TYLER'S REPLIES TO LNVA AND CITY OF LUFKIN

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the City of Tyler, Texas ("Tyler") and files these replies to the responses of the Lower Neches Valley Authority ("LNVA") and the City of Lufkin ("Lufkin") regarding Tyler's protest to the LNVA's and Lufkin's applications to amend their water rights.

The crux of Tyler's position is that it is a member of a class of water users (municipal users in the Upper Neches Basin) whose rights will be specifically affected by the changes sought by LNVA and Lufkin. Tyler's rights are associated both with its existing water rights and contracts in the Neches Basin, as well as its status as a municipal water supplier that will need to obtain additional water from the Neches Basin in the future. Tyler faces concrete, particularized, actual or imminent injuries if these amendments are granted. As such, Tyler has standing to participate in these matters.

Background

In 1963, the Texas Water Commission issued a water right to LNVA for 820,000 acre-feet of water (including 50,000 acre-feet of municipal rights). As a condition of issuing a water right for such an enormous amount of water, the Texas Water Commission added the following provision to the water right:

7. Any and all rights granted or perfected under the terms of this permit for use of public water, other than for municipal purposes, shall be considered as and/or declared to be subordinate to any present or future domestic and municipal water needs or requirements. . . . This permit shall be subordinate to any rights hereafter granted by the Commission for storage and/or use of water in and above the proposed Ponta Dam on the Angelina River and the proposed Weches Dam on the Neches River.

This provision effectively accomplished two things: (1) it made all of LNVA's industrial and agricultural rights junior to all existing and future domestic and municipal uses anywhere in the Neches Basin, and (2) it made all of LNVA's rights junior to all existing and future uses in the Upper Neches Basin (that part of the Neches Basin above the proposed Ponta Dam and above the proposed Weches Dam). Tyler has not yet discovered the rationale for this provision, but Tyler suspects that the Texas Water Commission was reluctant to grant such an enormous amount of water to a single entity, particularly given that the entity could not show a beneficial use for all of the water then or in the future. The Commission may not have wanted to give LNVA the power to speculatively hold the water for unknown future uses in the Lower Neches Basin to the detriment of potential uses in the Upper Neches Basin. Essentially, if LNVA wanted to firm up the appropriation date for its rights, the Commission appears to have wanted to LNVA reapply for the right.

Standing as an Existing Water Rights Holder

Tyler's existing water rights and contracts provide it with standing to participate in this matter. Lufkin's and LNVA's applications, for purposes of standing, should be viewed as applications for new appropriations of water. Special Conditions 5.C. and 5.D. in the two water rights effectively require LNVA and Lufkin as a condition of removing the subordination provision, to fully justify their appropriations, including demonstrations that water is available for appropriation and that beneficial uses exist for the appropriated water.

Lufkin argues that existing water rights holders do not have standing to challenge the issuance of new water rights because senior rights are protected by their priority dates. Under Lufkin's view of standing, only entities with competing water rights applications would ever have standing to protest the issuance of a new water right. The Commission has never restricted standing to participate in water rights hearings to such a degree.¹

Moreover, Commission rules require that notice be given to existing water rights holders in the basin,² and the Commission routinely grants hearings based on the protests of existing water rights holders. The reason why the Commission requires notice to existing water rights holders is because these entities rights may be affected by the issuance of a new water right. Even upstream senior water rights can be affected by the issuance of junior downstream rights. For instance, in the issuance of the junior downstream right, the Commission may make findings regarding the nature and scope of an upstream senior's rights, and the upstream senior's rights could be adversely affected by the Commission's decision.

Tyler holds water rights in the Neches Basin that are senior to LNVA's and Lufkin's rights. The changes sought by LNVA and Lufkin could impair Tyler's rights. Tyler has standing to object to the proposed amendments to LNVA's and Lufkin's water rights because it is an existing water right holder in the basin

¹ It is interesting to note that under Lufkin's argument, the Commission could have avoided review in *City of Marshall v. City of Uncertain*, 206 S.W.3d 97 (Tex. 2006) because the Uncertain parties would not have standing to challenge Marshall's amendment application.

² 30 TAC § 295.153(b).

Standing as a Potential Future User of Water in the Basin

Lufkin's and LNVA's applications seek to change a fundamental assumption regarding the availability of water in the Upper Neches Basin that has existed for more than 45 years. The Special Conditions sought to be removed by Lufkin and LNVA effectively have protected water in the Upper Neches Basin from appropriation by users in the Lower Neches Basin, and protected future municipal uses throughout the basin from LNVA's speculative industrial uses. This assumption has influenced the manner in which the planning for future water supplies is conducted in the Upper Neches Basin. For instance, this assumption was included in the Water Availability Modeling performed for the Regional Plan.³ Additionally, based on the protection provided by these Special Conditions, water entities in the Upper Neches Basin have postponed the premature development of large-scale water projects, which otherwise would be needed to keep LNVA from tying up the remaining water in the Upper Neches Basin for speculative lower basin uses.

Tyler currently is the largest municipality in the Upper Neches Basin and is predicted to become the largest municipality in the entire Neches Basin by 2060.⁴ While Tyler is currently predicted by the Regional Planning Group to have sufficient water through the planning period, Tyler believes that it may need additional supplies of water before then end of next planning period. The current Regional Plan underestimates Tyler's existing population and its projected population in 2060, and may overestimate Tyler's existing supplies. Tyler believes that the next regional plan will show that Tyler needs to develop additional supplies before the end of the planning period. If LNVA's and Lufkin's water rights are amended as proposed, Tyler may not be able to find additional water within the Neches Basin to meet its projected demands.

The issue of how the remaining unappropriated water in the Upper Neches Basin should be allocated between Upper Basin and Lower Basin uses could have been raised and addressed in the regional planning process. Neither LNVA nor Lufkin raised this issue in the regional planning process. If LNVA and Lufkin are going to try to change fundamental parts of the basin planning process in these proceedings, Tyler and other entities participating in the regional planning process should be allowed to participate.

Lufkin argues that Tyler's claim that it might need additional water is a "speculative claim." To the contrary, Tyler asserts that its claim is real and that it is LNVA's and Lufkin's claims that are speculative. The 2006 Water Plan for Region I shows Tyler with a "surplus" of only 3,028 acre-feet in 2060, out of a total demand of 32,253 acre-feet.⁵ Tyler believes that up-to-date facts will show that this surplus is actually a deficit. The regional plan, however, shows Lufkin with a projected demand of only 13,599 acre-feet in 2060.⁶ The water right that Lufkin seeks to amend provides Lufkin with 28,000 acre-feet of water. When added to the almost 7,000 acre-feet of currently developed groundwater, Lufkin will have a 2060 surplus of 21,343 acre-

³ 2006 Water Plan, East Texas Region at 3-5.

⁴ 2006 Water Plan, East Texas Region at 1-9.

⁵ 2006 Water Plan, East Texas Region at Chapter 4, Appendix A.

⁶ *Id.*

feet – almost twice its projected demand. Similarly, Tyler does not believe that LNVA can demonstrate that it needs the entire amount of its existing appropriation, even in 2060.

Tyler's anticipated need for additional water in the Upper Neches Basin is not speculative. Unlike the protestants in *Texas Disposal Systems Landfill, Inc. v. Texas Commission on Environmental Quality*, 259 S.W.3d 361 (Tex. App. – Austin 2008, no pet.), this is not a question of whether pigs could fly if they had wings. Tyler is not the "general public." Tyler and Lufkin and LNVA all draw water from the same, finite source. If Lufkin and LNVA are allowed to draw more water from the source (which is the effect of the proposed amendment), Tyler may not be able to get the water it needs in the future. Tyler has standing to challenge the amendment of these applications and to test whether LNVA and Lufkin are factually and legally entitled to draw more water.

Reply to the Executive Director's Response

Tyler fully agrees with the Executive Director's response in the LNVA matter. Tyler, however, disagrees with the Executive Directors response in the Lufkin matter that interests on the Neches River do not have standing in this matter because Lufkin's water right is only for the Sam Rayburn Reservoir, which is on the Angelina River. Tyler asserts that the Executive Director is taking too narrow of a view of Lufkin's water right. Lufkin's water right is derived entirely from LNVA's right, which encompasses both the Angelina and Neches Rivers. The two water rights cannot be treated separately. To treat the two water rights separately creates the opportunity for LNVA to play a shell game with the quantities appropriated in the two rivers.

WHEREFORE, PREMISES CONSIDERED, Tyler requests that its hearing requests in LNVA's and Lufkin's applications to amend their water rights be granted and that a hearing be held to allow LNVA and Lufkin to demonstrate that their applications comply with all applicable laws and rules.

Respectfully submitted,

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