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August 17, 2009

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Bldg. F, 3rd Floor
Austin, Texas 78711-3087

VIA HAND DELIVERY

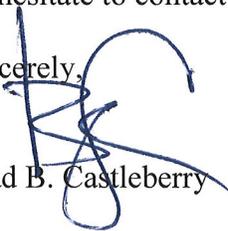
Re: City of Lufkin's Application for Amendment to Certificate of Adjudication
No. 06-4411H

Dear Ms. Castañuela:

Enclosed for filing please find the original and eight copies of Requestor's Reply to Response to Hearing Request in the above-referenced matter. Please file stamp one copy and return it to me via my messenger.

If you have any questions, please do not hesitate to contact me at (512) 322-5856.

Sincerely,


Brad B. Castleberry

BBC/ldp
2733\00\Lufkin\ltr090817srt
ENCLOSURES

cc: The Honorable Joe English
Mr. George Campbell

TCEQ DOCKET NO. 2009-0506-WR

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

REQUESTOR'S REPLY TO RESPONSE TO HEARING REQUEST

TO THE HONORABLE COMMISSIONERS:

COMES NOW, Nacogdoches County (the "County" or "Requestor"), and files this Reply to Response to Hearing Request in the above-referenced matter, in reply to the responses filed by the Executive Director (the "ED") of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission") and the City of Lufkin (the "City" or "Applicant"). Pursuant to Section 55.255(b) of Title 30 of the Texas Administrative Code ("TAC"), the County's request for hearing should be granted by the Commission because (1) the County is an "affected person"; (2) the request complies with the provisions of Section 55.251; (3) the request was timely filed with the chief clerk; and (4) the County's request is made pursuant to a right to hearing authorized by law.

The ED properly determined that the County's hearing request should be granted because the County has a personal justiciable interest that will be impacted by the Applicant's application in a way not common to the general public. Applicant's contention that a contested case hearing should not be granted to the County because the impact by the Application is too speculative is unfounded. If the Application is granted, the County's ability to provide water to its residents will be impaired, establishing an actual and specific injury that forms the basis of its status as an

affected person. As such, the County's hearing request should be referred to the State Office of Administrative Hearings ("SOAH").

I. INTRODUCTION

The City applied to TCEQ on July 1, 2008 for an amendment to Certificate of Adjudication No. 06-4411 (the "Certificate") to modify Special Conditions 5.C. and 5.D. to change the subordination of the Certificate to apply only to existing water rights—before April, 2008 (the "Application"). In the Application, the City also requested to set a fixed priority date on all of the City's existing water rights.

On October 31, 2008, the County filed a timely request for hearing regarding the Permit. The ED provided its Response to Hearing Request on August 3, 2009 and recommended the County's hearing request be granted. The Office of Public Interest Counsel ("OPIC") filed its Response to Request for Hearing on August 3, 2009 and recommended therein that the hearing request be granted.

In accordance with Section 55.254(f) of 30 TAC, the County as requestor files this Reply to Response to Hearing Request and requests that the Commission grant the hearing request for the reasons set forth below.

II. REPLY TO EXECUTIVE DIRECTOR'S RESPONSE

A. General Hearing Request Requirements

In compliance with Section 55.251, the County filed a timely hearing request in writing that (1) provided the relevant contact information required; (2) identified that person's personal justiciable interest affected by the application; and (3) clearly requested a contested case hearing.

B. Requirement of Affected Person Status and Personal Justiciable Interest

Pursuant to Section 55.256(c), a number of factors are evaluated to determine whether a requestor qualifies as an “affected person.” In the County's hearing request, the County identified “a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” The County set forth this personal justiciable interest by providing:

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 adversely affected by the activity in a manner not common to members of the general public. 30 TAC § 55.251(c)(2).

The County has a legal right under Water Use Permit No. 5585 (the “Permit”), which authorizes the impoundment of water in MPS Site 23A, Attoyac Bayou Watershed Project, located on the Naconiche Creek in the Neches River Basin. If granted, the Applicant's application may impact the County's ability to impound state water and comply with the conditions of the Permit.

Since the release of the Attoyac Bayou Project Work Plan in 1964, the Commissioners Court of the County has recognized that the reservoir would have the potential for supplying a dependable source of water to water systems in the region. The planning, financial commitments, long-term environmental, archeological and other studies, and construction of the reservoir were completed with a future water supply source in mind. Lake Naconiche is also included in the State Water Plan as a potential future source of water for the County's residents. The Application will also impact the County's ability to address the future municipal and domestic needs of its residents. Because of the adverse impact to existing and future water rights, both constituting legal rights and economic interests of the County, the County has a

personal justiciable interest that will be adversely affected in a way not common to the general public.

C. Personal Justiciable Interest is not Speculative

The Applicant alleges that the County does not qualify as an affected person because the injury asserted is too speculative, stating that “[i]t is well established that speculation about future contingencies is insufficient to establish standing as an affected person.” *See Applicant’s Response and Objection to all Protests and Requests for Hearing*, page 2. This allegation is based solely on a 2008 case from the Amarillo Court of Appeals, *Texas Disposal Systems Landfill, Inc. v. Texas Commission on Environmental Quality*—begging the question as to how well established this argument actually is. 259 S.W.3d 361 (Tex. App.—Amarillo 2008, no pet.). A closer examination reveals that this case is not directly on point, addressing whether the Plaintiff had standing to file for judicial review of the Commission’s decision to modify a landfill permit that is located over 200 miles away from the Plaintiff’s landfill—not whether the Plaintiff should be granted a contested case hearing as an “affected person” under Chapter 55 of the 30 TAC. *Id.* at 363. It was quite clear in *Texas Disposal* that the need for multiple contingencies to occur before any injury to the Plaintiff was too hypothetical to establish a justiciable interest.

Texas Disposal believes that it can contest the regulatory decision because the manner in which the permit was modified “potentially” jeopardizes the trust relationship that exists between it and its neighbors in Austin, and that, in turn, “potentially” interferes with the normal operations of its landfill. *Id.*

The court determined that this potentiality was a purely speculative and hypothetical injury—that the method of modifying a landfill permit by a landfill 200 miles away from the Plaintiff *might* later be used by a competitor landfill that *might* interfere with the Plaintiff’s operations was not concrete enough to establish a justiciable interest for standing. *Id.*

Given the events that needed to occur for the Plaintiff in *Texas Disposal* to be injured, this case is distinguishable and not on point as to the determination of the County's status as an affected person. "[A]n 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." 30 TAC § 55.256(a). The "justiciable interest" of an affected person may not be based upon a hypothetical injury. See *Daimler Chrysler Corp. v. Inman*, 252 S.W.3d 299, 304-05 (Tex. 2008) (citing to *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993)).

The County has articulated its status as an affected person based upon a personal justiciable interest related to its legal rights, duties, privileges, powers, and economic interest in existing water rights and any amendments thereto and to future water rights that will be adversely affected by the Application. The fact that these amendments to existing water rights and future rights will be in the future do not make them purely speculative and hypothetical. The growing population served by the County will require additional water supplies—that is a fact—and the way to provide for such water is through water rights applications to amend existing water rights or for additional water rights. The Application seeks to remove a subordination clause that will no longer guarantee the County's right—a *present and existing legal right*—to priority over the Applicant's Certificate. Consequently, any subsequent amendment by the Applicant to the Certificate for additional water supplies—which the Applicant obviously intends to seek, otherwise why remove the subordination special condition—will reduce total water supplies available for appropriation in the Neches River Basin. This is not hypothetical, potential, or speculative injury. By granting this Application, when, not if, the Applicant requests to amend the Certificate for additional water, the County *will suffer* a specific and actual

injury by the reduction of water supply available to satisfy the needs of the population served by the County.

Because the County's hearing request complies with the provisions of Section 55.255(b)(2) of 30 TAC, the Commission should concur with the determinations of both the ED and OPIC and grant the County's request for hearing.

III. REQUEST FOR CONSOLIDATION

The County hereby requests the Commission, in referring this matter to SOAH, to also consolidate this matter with TCEQ Docket No. 2009-0168-WR to promote efficiency and serve the interests of judicial economy. TCEQ Docket No. 2009-0168-WR is an application by the Lower Neches Valley Authority to amend Permit No. 4411, the same permit the City seeks to amend in the Application with both applications requesting the exact changes and having the exact same hearing requestors. This was part of the basis for the Commission's granting a continuance on April 13, 2009 of the Commission's consideration of the Application. Furthermore, given the similarity between the applications, a decision on one application could unfairly prejudice the decision on the other application. Consequently, the County respectfully requests that the Commission consolidate these two matters for the above-stated reasons.

IV. CONCLUSION

For the reasons set forth above, Nacogdoches County respectfully requests that the Commission grant the County's contested case hearing request and refer this matter to SOAH for a contested case hearing.

Respectfully submitted,

**LLOYD GOSSELINK
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By: _____

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**ATTORNEYS FOR
NACOGDOCHES COUNTY**

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CERTIFICATE OF SERVICE

I hereby certify that on this the 17th day of August, 2009, a true and correct copy of the foregoing was sent via first-class mail, electronic mail, facsimile, or hand-delivery to the following persons:

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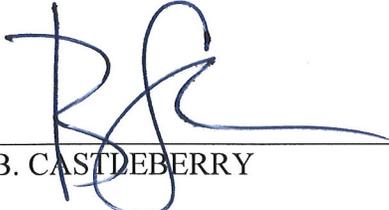
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