TCEQ DOCKET NO. 2010-1195-WR

CITY OF SAN ANGELO APPLICATION FOR AMENDMENT TO CERTIFICATE OF ADJUDICATION NO. 14-1337	**§ § § § §**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to the hearing requests on the City of San Angelo (San Angelo) application to amend Certificate of Adjudication No. 14-1337. Two requests for a hearing were filed. The Executive Director recommends that all hearing requests be denied.

I. BACKGROUND

Certificate of Adjudication (COA) No. 14-1337 currently authorizes the City of San Angelo to impound not to exceed 130 acre-feet of water in a reservoir of the Concho River, tributary of the Colorado River, Colorado River Basin in Tom Green County. The Certificate also authorizes the City of San Angelo to divert and use not to exceed 135 acre-feet of water per year from a point on the reservoir at a maximum diversion rate of 3.33 cfs (1,500 gpm) for agricultural purposes to irrigate 67.5 acres of land out of a larger tract in Tom Green County.

San Angelo applied for an amendment to add municipal purposes of use and a place of use within the City's service area in Tom Green County. San Angelo also seeks to add another diversion point approximately 12.1 miles downstream on the Concho River (the same point authorized in COA No. 14-1357, also owned by the City). The water will be transported from a diversion point on the reservoir via pipeline to the City's water treatment plant.

II. PROCEDURAL HISTORY

San Angelo filed this application on August 13, 2007. The application was declared administratively complete August 5, 2009. Notice of the application was mailed to the interjacent water right holders of record on September 4, 2009. No published notice was required, and none was provided, for this application. The comment period ended on October 5, 2009.

III. 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).

A. Response to Hearing Requests

"The executive director, the public interest counsel, and the applicant may submit written responses to the hearing request . . ." 30 TAC §55.254(e)

B. Hearing Requests Requirements

In order for the commission to consider a hearing request, the commission must first determine whether the request meets certain requirements. Specifically, a request for a contested case hearing by an affected person must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time period to request a contested case hearing. 30 TAC §55.251(b).

A hearing request must 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.

(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.

30 TAC § 55.251(c)

C. Requirement that Requestor be an "Affected Person"

In order to grant a contested case hearing, the commission must determine that a requestor is an "affected person."

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).

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 TAC § 55.256(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 section 55.251; (B) is timely filed; and (C) is pursuant to a right to hearing authorized by law. 30 TAC § 55.255(b)(2).

IV. Analysis of the Requests

A. Analysis of the Hearing Request

1. Whether the Requestor Complied With 30 TAC § 55.251(b) & (c)

The commission received hearing requests from the following:

- Van W. Carson, dba Carson Farms
- A. J. Jones, Jr. for self and on behalf of Concho River Basin Water Conservancy

Both of the above hearing requests met the requirements of subsection (b): they requested a contested case hearing in writing, filed with the Office of the Chief Clerk and were received timely. Similarly, both requestors meet the requirements of subsection (c). Both provide appropriate contact information, claim to own a water right that will be affected, and requests a contested case hearing.

The Executive Director concludes that both requestors made valid CCH requests under 30 TAC § 55.251(b) & (c).

2. Whether the Requestor Meets the Requirements of an Affected Person

Van W. Carson. This hearing requestor claims to own a 500 acre-foot water right, with a diversion point within a mile downstream of the current No. 14-1337 diversion point and 12 miles *upstream* of the *proposed* diversion point on the Concho River. This requestor claims that the proposed amendment to add the diversion point and to add municipal use "will severely impair, impact and jeopardize our water rights by altering demands on and the flow of the Concho River."

(This requestor appears to be filing on behalf of Sandra Carson Birnie dba Carson Farms. However, because there is no claim to be acting on behalf of another entity, nor a distinguishable interest, it will be treated as a single hearing request.)

A. J. Jones. This requestor claims to live approximately 2 miles downstream from the proposed diversion point (same as COA 14-1357) and alleges that adding this diversion point could impact and impair his water right (COA 14-1397).

(A. J. Jones also requests a hearing on behalf of Concho River Basin Water Conservancy and has signed his name as "president." However, he has offered no information showing that the Concho River Basin Water Conservancy is affected by the permit or has any justiciable interest. Absent further information, the Concho River Basin Conservancy does not appear to be an affected person.)

V. Executive Director's Recommendation

The Executive Director respectfully recommends that the Commission deny all the hearing requests. The hearing requestors failed to demonstrate that a likely impact on their use of the water in the area impacted by this application would result from granting the amendment. *See* 30 TEX. ADMIN. CODE § 55.256(c)(5). Because the amendment does not seek a new appropriation of water, no water availability analysis is required and none was performed. Staff did, however, perform a no-injury analysis, pursuant to section 297.45. Staff concluded that several water right holders would be negatively impacted, albeit minimally (0.1 percent). The applicant is also impacted by the application (reliability reduced by 35.8 percent). However, any interjacent water right holders are protected by Section 297.45(c), which provides that "If it is determined that a proposed amendment for a change in the diversion point may adversely affect existing water rights, the amendment, if approved, shall be subordinate only to such affected water rights and the amended water right shall otherwise retain its priority date." Thus, given the subordination to interjacent water right holders under section 297.45(c), there will be no practical impact on other basin water rights. Therefore, interjacent water right holder Mr. Carson is protected under our rules. A. J. Jones, being downstream from both the existing and proposed discharge point, is not subject to any change in circumstances, as all activity will happen, as it does now, upstream from his water rights.

Staff's no injury analysis further concluded that adding municipal use and an additional place of use do not affect other water right holders because the amount of water diverted from the stream will not change.

The ED would further note that the Concho River is managed by a water master, who actively manages the water rights on a daily basis and protects senior water rights in times of shortage.

VI. CONCLUSION

Therefore, the Executive Director recommends denying all hearing requests filed for this matter.

Respectfully submitted,

TEXAS COMMISSION ON
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Zak Covar, Executive Director

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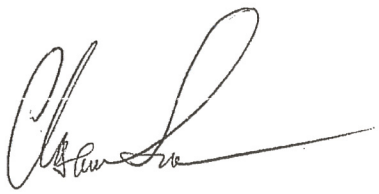
CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2013, the original of "Executive Director's Response To Hearing Request" relating to the City of San Angelo's application water right amendment was filed with the Texas Commission On Environmental Quality's Office of the Chief Clerk and mailed to the individuals on the mailing list.



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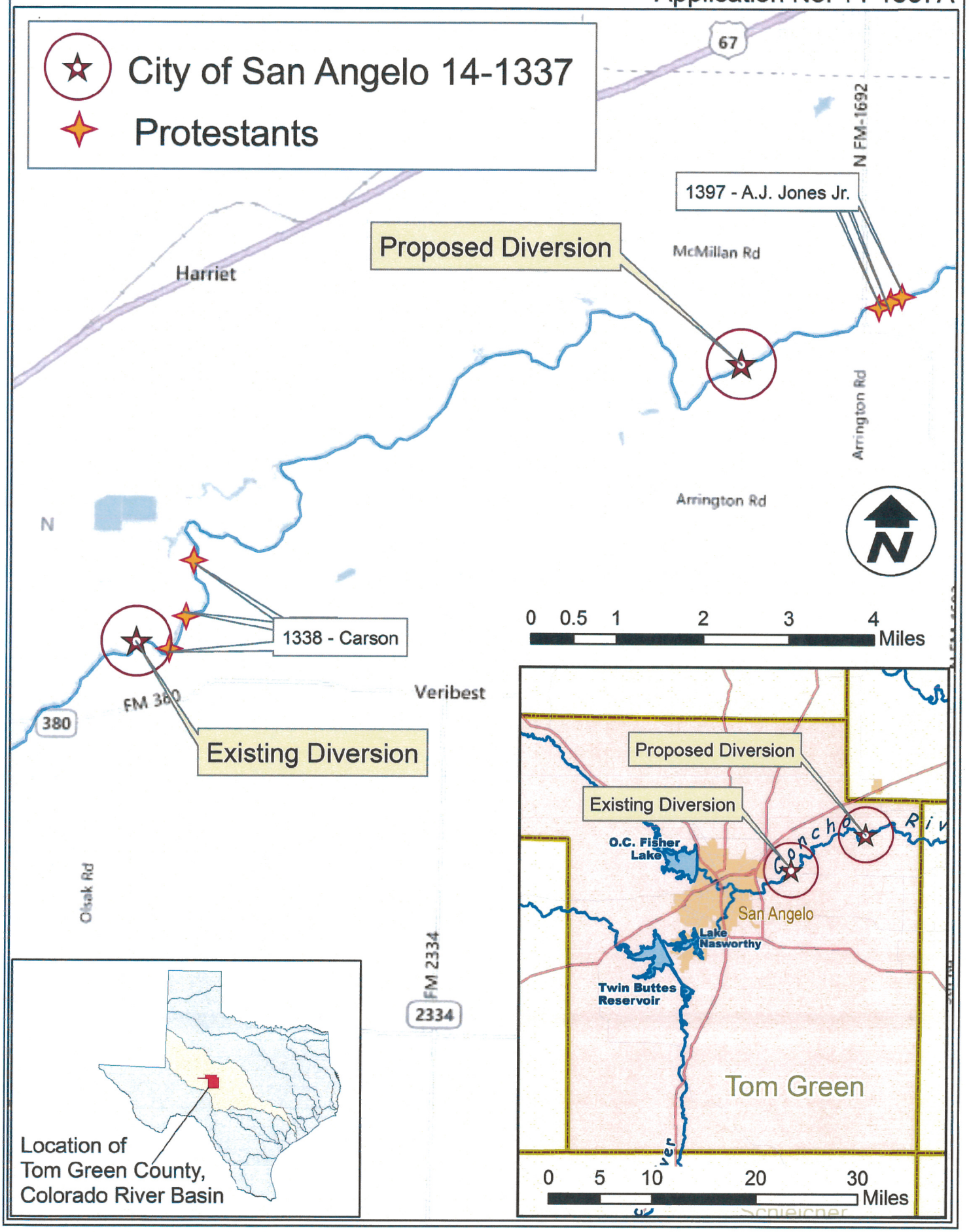
City of San Angelo
Application No. 14-1337A