

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

October 22, 2010

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

**Re: SOAH Docket No. 582-10-0293; TCEQ Docket No.2008-1616-WR; In Re:
Application No. 14-1318B by City of San Angelo for Amendment to
Certificate of Adjudication No. 14-1318**

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than November 12, 2010. Any replies to exceptions or briefs must be filed in the same manner no later than November 22, 2010.

This matter has been designated **TCEQ Docket No. 2008-1616-WR; SOAH Docket No. 582-10-0293**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,


Sharon Cloninger
Administrative Law Judge

SC/th
Enclosures
cc: Mailing List

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STYLE/CASE: SAN ANGELO WATER SUPPLY CORP.
SOAH DOCKET NUMBER: 582-10-0293
REFERRING AGENCY CASE: 2008-1616-WR

STATE OFFICE OF ADMINISTRATIVE
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CONCHO RIVER BASIN WATER CONSERVANCY
ASSOCIATION

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-10-0293
TCEQ DOCKET NO. 2008-1616-WR

APPLICATION NO. 14-1318B BY CITY § BEFORE THE STATE OFFICE
OF SAN ANGELO FOR AMENDMENT §
TO § OF
CERTIFICATE OF ADJUDICATION §
NO. 14-1318 § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The City of San Angelo (City or Applicant) has submitted an application (Application) to the Texas Commission on Environmental Quality (TCEQ or Commission) for an amendment to Certificate of Adjudication No. 14-1318 (COA 14-1318). The City seeks to correct the listed elevation of the inlet to the conduit through Twin Buttes Reservoir (Reservoir) on the Middle Concho River in Tom Green County from 1,883.5 feet above mean sea level (msl) to the actual as-built elevation of 1,885 feet above msl.¹

The Executive Director (ED) of the Commission and the Office of Public Interest Counsel (OPIC) support the Application. The Concho River Basin Water Conservancy Association (CRBWCA or Protestants) opposes the Application, asserting the requested change will adversely impact other water right holders.

Protestants further claim the City is entitled to impound only flood and storm water in the Reservoir under COA 14-1318, because certain provisions of the City's Permit No. 1949 (Permit), which preceded COA 14-1318, were incorrectly excluded by the Commission's predecessor in its Final Determination for the Concho River.² As set out in Order No. 3, the ALJ found the Permit has been superseded and is no longer in effect, and the flood and storm water provisions were not incorrectly excluded from the Final Determination. Accordingly, the City's

¹ The sill of the outlet works is located at elevation 1,885.0 feet above msl, which represents the elevation of 100 years of sediment accumulation against the Dam. SA 1318B Ex. 2-D at 75 of 223.

² Protestants' Closing Argument at 1-3 and 10-15.

Motion to Strike Protestants' Pleadings related to the Permit, as contained in Protestants' Closing Argument, is granted.

The Administrative Law Judge (ALJ) concludes the Application meets all applicable standards and rules and the 14-1318B draft amendment (Draft Amendment) should be approved.

II. PROCEDURAL HISTORY AND JURISDICTION

Applicant filed the Application with TCEQ on November 29, 2004.³ The Application was declared administratively complete on April 19, 2005.⁴ TCEQ staff subsequently issued a Draft Amendment to reflect the as-built sill elevation of the conduit through the Twin Buttes Reservoir Dam (Dam).⁵ After public notice of the Application was issued on June 21, 2005, TCEQ received several requests for a contested case hearing.⁶ Following an assessment of affected persons, the Commission referred the Application to the State Office of Administrative Hearings (SOAH) for a contested case, where a preliminary hearing was held on October 27, 2009.⁷

The ED submitted jurisdictional exhibits⁸ at the October 27, 2009 preliminary hearing, establishing SOAH's jurisdiction over the contested case,⁹ and the ALJ admitted the following parties:

³ SA 1318B Ex. 1 at 6:16-19; ED 1318B Ex. 1 at 2:21-22.

⁴ SA 1318B Ex. 1 at 8:8-15; ED 1318B Ex. 1 at 2:15-20.

⁵ SA 1318B Ex. 1 at 12:6-7; SA 1318B Ex. 1-E.

⁶ ED 1318B Ex. 5; ED Ex. A.

⁷ ED Ex. A.

⁸ ED Exhibits. A, B, and C.

⁹ Order No. 1.

Party	Representative
City	Martin Rochelle and Jason Hill, Attorneys
CRBWCA and South Concho Irrigation Company ¹⁰	Glenn Jarvis, Attorney
ED	James Aldredge and Robin Smith, Staff Attorneys
OPIC	Amy Swanholm and Eli Martinez, Attorneys

The hearing on the merits convened June 28, 2010, at SOAH, William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas, before ALJ Sharon Cloninger. Mr. Rochelle and Mr. Hill appeared on behalf of the City; Mr. Jarvis represented CRBWCA; the ED appeared through Mr. Aldredge and Ms. Smith; and OPIC was represented by Ms. Swanholm and Mr. Martinez. After briefs were filed, the record closed on August 30, 2010.

III. APPLICABLE LAW

Water rights permit applications are generally governed by TEXAS WATER CODE (TWC) ch. 11; 30 TEX. ADMIN. CODE (TAC) chs. 295 and 297; and TCEQ's procedural rules.

An amendment to an existing water right that does not increase the amount of water authorized for diversion or the authorized rate of diversion will be approved by the Commission as long as the requested change would not cause adverse impacts to other water right holders or the environment of a greater magnitude than under the existing permit or certificate of adjudication. TWC § 11.122(b) and 30 TAC § 297.45(b).

¹⁰ On January 22, 2010, the ALJ accepted South Concho Irrigation Company's request to withdraw as a party. See Order No. 2.

The burden of proving that the proposed amendment would not adversely impact other water right holders or the environment rests with the applicant. 30 TAC § 297.45(d).

The ALJ finds that the Draft Amendment, if approved, would not cause adverse impact to other water right holders or the environment. TWC § 11.122(b) and 30 TAC § 297.45(b). However, because Protestants argue that water right holders will be adversely impacted by adoption of the Draft Amendment, the ALJ will conduct an analysis under TWC § 11.134(b) and (c).

Under TWC § 11.134(b), the Commission may grant the Application after the hearing only if:

- (1) the application conforms to the requirements prescribed by this chapter and is accompanied by the prescribed fee;
- (2) unappropriated water is available in the source of supply;
- (3) the proposed appropriation:
 - (A) is intended for a beneficial use;
 - (B) does not impair existing water rights or vested riparian rights;
 - (C) is not detrimental to the public welfare;
 - (D) considers any applicable environmental flow standards established under Section 11.1471 and, if applicable, the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152; and
 - (E) 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
- (4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by Section 11.002(8)(B).

As set out in TWC § 11.134(c), the Commission may not issue a water right for municipal purposes in a region that does not have an approved regional water plan unless the Commission determines that conditions warrant waiver of this requirement.

IV. BACKGROUND AND OVERVIEW

A. COA 14-1318

San Angelo Water Supply Corporation (SAWSC)¹¹ owns COA 14-1318, as amended, which allows it to impound 170,000 acre feet of water and divert and use up to 25,000 acre feet of water per year from the Reservoir for agricultural purposes to irrigate 15,000 acres of land within the boundaries of Tom Green County Water Control and Improvement District No. 1, and to divert and use up to 29,000 acre feet of water per year from the Reservoir for municipal purposes.

Special Condition 5C of COA 14-1318 reads:

a conduit shall be constructed in the aforementioned dam with the inlet at elevation 1883.5 feet above mean sea level, having an opening not less than five feet in diameter and equipped with a regulating gate for the purpose of permitting the free passage of the normal flow through the dam at all times and the passage of those waters to which the Commission may determine lower appropriators are entitled.¹²

B. History

On February 3, 1960, the Board of Water Engineers of the State of Texas (TBWE) issued in the name of the Applicant a permit that allowed for the United States Bureau of Reclamation (BuRec) to construct a dam approximately nine miles southwest of the City to impound waters of the State on the Middle Concho River, Spring Creek, and the South Concho River.¹³ Construction of the dam began in May 1960 and was completed by February 1963.¹⁴ The dam

¹¹ The City filed the Application on behalf of SAWSC.

¹² ED 1318B Ex. 1, 2:28 to 3:12.

¹³ SA 1318B Ex. 2-B.

¹⁴ SA 1318B Ex. 2 at 13:4-5.

became known as the Twin Buttes Dam (the Dam),¹⁵ and the resulting reservoir created by the impoundment became known as the Twin Buttes Reservoir (the Reservoir).¹⁶

TBWE's original authorization for the Dam included a provision specifying that the structure was to be constructed with a conduit running through the Dam.¹⁷ This conduit was to be built at least five feet in diameter and to be equipped with a gate mechanism that provided for the controlled passage of flows through the Reservoir.¹⁸ Under TBWE's original authorization, the bottom of the inlet for this conduit structure was to be constructed at an elevation of 1,883.5 feet above msl.¹⁹ However, this same authorization provided that:

All construction work shall be done in accordance with plans approved by [the TBWE] and any changes or alterations made in said plans shall be filed with the [TBWE] and its approval obtained before construction. The permit herein granted may be amended in accordance with such changes or alterations.²⁰

Just one month after issuing its original authorization,²¹ the TBWE took up and considered approval of the proposed final construction plans for the Dam.²² Within those final plans was a proposal to change the authorized elevation of the bottom of the inlet to the conduit structure from the originally authorized elevation of 1,883.5 feet above msl to a revised elevation of 1,885.0 feet above msl.²³ After considering the issue, the TBWE approved the final construction plans for the Dam and affirmatively amended its original authorization to require

¹⁵ SA 1318B Ex. 2 at 11:3-5.

¹⁶ SA 1318B Ex. 2 at 11:2-3.

¹⁷ SA 1318B Ex. 2 at 12:13-15; Transcript of Hearing on the Merits of SOAH Docket No. 582-10-0293, TCEQ Docket No. 2008-1616-WR, *Application No. 14-1318B by City of San Angelo for Amendment to Certificate of Adjudication No. 14-1318*, before SOAH, June 28, 2010 (Tr.) at 131:14-17.

¹⁸ SA 1318B Ex. 2-B at 2.

¹⁹ SA 1318B Ex. 2-B at 2.

²⁰ SA 1318B Ex. 2-B at 3.

²¹ SA 1318B Ex. 2-B.

²² SA 1318B Ex. 2-C at 11, 13.

²³ SA 1318B Ex. 2-C at 11-13.

the bottom of the inlet to the conduit through the Dam to be built at elevation 1,885.0 feet above msl.²⁴

Following completion of the Dam in February 1963, BuRec published *Twin Buttes Dam: Technical Record of Design and Construction*, wherein it describes in great detail all aspects of the Dam project purpose, citing preliminary studies, design, and construction.²⁵ Importantly, BuRec devotes substantial detail to what it refers to as the Dam's "Outlet Works"—the portion of the Dam that contains the conduit that allows water to pass from the Reservoir through the Dam to the watercourse downstream.²⁶ Therefore, the bottom of the intake portion of the conduit through the Dam—referred to by BuRec and throughout the hearing as the conduit "sill"²⁷—was constructed with an elevation that was set precisely where TBWE had required it to be: 1,885.0 feet above msl.²⁸

The City's expert witness Robert J. Brandes testified that as the inlet proceeds to the Dam, the elevation drops to 1,880.4 feet above msl at the bottom of the Dam's three floodgates. Each floodgate has a 2' x 2' opening with a bottom elevation of 1,883.4 feet msl, about three feet above the bottom of the floodgates. The floodgates and 2' x 2' conduits are opened and closed by a regulating stem gate mechanism. The 2' x 2' conduits are normally used for low flow releases. If more water needs to be released, the larger floodgates are opened.²⁹

On March 12, 1980, following adjudication of water rights within the Concho River Basin in accordance with the Water Rights Adjudication Act of 1967, the Texas Water Commission issued COA 14-1318 to the Applicant. COA 14-1318 is the water right issued in

²⁴ Tr. at 129:24 – 130:4; ED 1318B Ex. 9 at 2;

²⁵ SA 1318B Ex. 2-D at 3-17.

²⁶ SA 1318B Ex. 2-D.

²⁷ Tr. at 47:9-10, 116:12-14, 129:11-13.

²⁸ Tr. at 116:13-14.

²⁹ Tr. at 122-127; Tr. at 61-62; *see also* testimony of Will Wilde, City Manager, Tr. at 12-14, 15-17, 34:6-25 to 35:1-25.

response to the adjudication of the Applicant's claims based on the TBWE's authorization for the Dam and Reservoir.³⁰

Notwithstanding TBWE's clear mandate to construct the Dam conduit to have an opening at elevation 1,885.0 feet above msl, and notwithstanding BuRec's clear compliance with the TBWE's requirements, the Texas Water Commission issued COA 14-1318 with a reference to the incorrect sill height elevation some 17 years after construction on the Dam was completed.³¹

The discrepancy was realized 40 years after the Dam began operation as the result of a TCEQ investigation conducted in 2004.³² As a consequence of the error in COA 14-1318, and in an effort to ensure that one of its primary water rights reflects the actual, approved, physical condition of the Dam, the City filed the Application in November 2004 to change the inlet structure sill elevation referenced in COA 14-1318 from 1,883.5 feet above msl to the approved, as-built elevation of 1,885.00 feet above msl.³³

V. PARTY POSITIONS AND ALJ'S RECOMMENDATION

A. Party Positions

The City contends the Application is not a request for a new or additional appropriation of State water, and it is not a request to increase any diversion rate. Accordingly, the City argues, the requested amendment would not impair any water rights or the environment in the Concho River Basin.

Protestants disagree with the City. Protestants aver that amending COA 14-1318 to incorporate the existing elevation of the inlet structure at 1,885.0 above msl would allow the

³⁰ SA 1318B Ex. 2-E.

³¹ SA 1318B Ex. 2-E.

³² Tr. at 46:14-17; Concho 1318B PFT Ex. 7 at 10:23-36 through 11:1-26.

³³ SA 1318B Ex. 1 at 2:6-10, 13:11-14; SA 1318B Ex. 2 at 12:3-5; *see*, ED 1318B Ex. 9.

impoundment of normal flows that may enter the Reservoir when the elevation of water in the Reservoir is between 1,883.5 and 1,885.0 feet—a full 1.5 feet of storage—resulting in an additional appropriation of water through the impoundment of additional normal flows that otherwise would have passed through the Dam for downstream use.³⁴ Therefore, Protestants conclude, because the Draft Amendment involves appropriation of water, TWC § 11.134 applies to this case.

Protestants also are concerned that at times, water in the Reservoir's South Pool will be too low to flow through the Equalization Channel to the Reservoir's North Pool. The failure to flow would occur when the water elevation in the South Pool is lower than the bottom elevation of the Equalization Channel, which is approximately 1,920 to 1,925 feet above msl.³⁵ When water from the South Pool cannot flow into the North Pool, where the Dam gates are located, water from the South Pool naturally cannot be passed through to downstream water right holders, Protestants argue.

The ED states that Protestants are incorrect in asserting there will be less water going to downstream water right holders if the Application is granted,³⁶ because the Commission or Watermaster will determine the amount of water to be passed to downstream water right holders based on the City's water right, the Twin Buttes Accounting Plan, and the law.³⁷ The ED further points out that if the Draft Amendment is granted, the City will be required to operate the regulating gate "for the purpose of permitting the free passage of the normal flow through the dam at all times and the passage of those waters to which the Commission may determine lower appropriators are entitled."³⁸ This would allow the Commissioners to require the passage of flows downstream that are required by the City's COA, the Accounting Plan, and the law, regardless of how much water passes through the Equalization Channel, the ED concludes.

³⁴ Protestants' Closing Argument at 7.

³⁵ Tr. at 98:9-25 and 99:1-9.

³⁶ ED's Response to Protestants' Closing Arguments at 1.

³⁷ Tr. at 181:17-182:14; ED Ex. 1318B-7 at 3:15-24.

³⁸ ED 1318B Ex. 6 at 2.

Indeed, the testimony of City Manager Will Wilde established that the City has pumped water over the Dam into the South Concho in the past³⁹ and would pass water downstream through or over the Dam by whatever means necessary for downstream users.⁴⁰

The City's expert witness Dr. Brandes confirmed that regardless of the elevation of the inlet structure, the Watermaster could require the City to pass water through the Dam gates or by other means such as pumping, even if water in the South Pool is too low to flow through the Equalization Channel.

But Protestants raised the possibility that junior water right holders—who would otherwise be entitled to the passage of water through the Dam when the water level of the North Pool was at an elevation of at least 1,883.5 feet above msl but was too low to cross the sill at 1,885.0 feet above msl—would not be afforded protection of their rights by the Watermaster, the City's Accounting Plan, the Draft Amendment, or the law.

B. ALJ's Recommendation

Despite the TBWE's approval of the current sill elevation for the inlet to the conduit through the Dam,⁴¹ and its affirmative amendment of the underlying authorization for the construction of the Dam in the Concho River Basin,⁴² the Texas Water Commission nevertheless included a reference to the incorrect sill elevation in COA 14-1318.⁴³ The Application submitted by the City is nothing more than a request to amend COA 14-1318 to reflect the correct,⁴⁴ approved⁴⁵ sill elevation of 1,885.0 feet above msl.⁴⁶ The City does not request any additional

³⁹ Tr. at 31, 32:19-25; Tr. at 41:4-25.

⁴⁰ Tr. at 42:1-23; Tr. at 45:1-16.

⁴¹ SA 1318B Ex. 2-C at 11-13.

⁴² SA 1318B Ex. 2-C at 13.

⁴³ SA 1318B Ex. 2-E at 2.

⁴⁴ SA 1318B Ex. 2 at 24:10-17.

⁴⁵ SA 1318B Ex. 2-C at 13.

appropriation of State water⁴⁷ and does not request the construction or permitting of new water supplies.⁴⁸ nor does it propose any change to any diversion rate associated with COA 14-1318.⁴⁹

The ALJ concludes that adequate legal and enforcement mechanisms are in place to ensure that the rights of downstream junior water right holders are protected. So long as that is so, the ALJ fails to see how amending the permit to conform to the stated elevation of 1,885 feet above msl as built and previously approved, would harm those junior downstream water right holders.

Simply stated, the Application and the Draft Amendment propose to resolve the reference to the incorrect sill elevation.⁵⁰ As a result, the changes requested in the Application, and proposed in the Draft Amendment, could not cause adverse impacts to any other water rights in the Concho River Basin.⁵¹ For these reasons, and as further shown below, the ALJ finds that the Application complies with all applicable provisions of the TWC and TCEQ rules.

The ALJ further finds that issuance of Draft Amendment 14-1318B will not adversely impact downstream water rights, which are protected by the Watermaster, the City's Accounting Plan, and the law. The Application should be granted.

⁴⁶ SA 1318B Ex. 1 at 7:4-5.

⁴⁷ SA 1318B Ex. 1 at 11:18-19; SA 1318B Ex. 2 at 17:18 – 18:3, 24:10-17, 26:4-5, 26:12-13, 27:5-7; ED-1318B Ex. 7 at 3:9-10, 3:19-20; Tr. at 175:18-23.

⁴⁸ SA 1318B Ex. 1 at 11:18-19; SA 1318B Ex. 2 at 22:5-10, 26:17-19; Tr. at 43:20 – 44:4.

⁴⁹ SA 1318B Ex. 2 at 18:6-8, 24:14-15.

⁵⁰ SA 1318B Ex. 2 at 22:5-7; SA 1318B Ex. 2-E.

⁵¹ SA 1318B Ex. 2 at 21:19 – 22:3, 22:13-14, 27:10-12; ED 1318B Ex. 7 at 3:19-20; Tr. at 112:22 – 113:6, 113:10-16, 176:23 – 177:4, 182:7-11.

VI. COMPLIANCE WITH APPLICABLE SUBSTANTIVE WATER RIGHTS PROVISIONS OF THE TWC

Because the Application proposes only an administrative change to COA 14-1318, not all provisions of TWC § 11.134 logically apply.⁵² Nevertheless, as demonstrated by the overwhelming evidence admitted in the hearing, the Application and Draft Amendment satisfy each provision of TWC § 11.134 as well as the corresponding TCEQ rules.

A. The Requested Amendment Requires No Unappropriated Water⁵³

Under TWC § 11.134(b)(2), the Commission shall grant the Application if unappropriated water is available in the river basin.⁵⁴ Unappropriated water is a reference to streamflow at a particular location that is not currently legally appropriated by an existing water right.⁵⁵ Under TCEQ rules, applications for new or increased appropriations of State water must be denied unless there is a sufficient amount of unappropriated State water available for a sufficient amount of time to account for the request.⁵⁶

As demonstrated above, the Application is not a request for any additional appropriation of State water, either through additional diversion authorization, additional storage authorization, or by increasing any applicable diversion rate.⁵⁷ Therefore, from a hydrologic perspective, whether unappropriated water is available in the Concho River Basin is irrelevant to the Application.⁵⁸ Considered another way, the Application and the Draft Amendment do not

⁵² SA 1318B Ex. 2 at 25:17-19.

⁵³ TWC § 11.134(b)(2); 30 TAC § 297.41(a)(2).

⁵⁴ TWC § 11.134(b)(2).

⁵⁵ SA 1318B Ex. 2 at 25:22 – 26:1; 30 TAC § 297.1(54).

⁵⁶ 30 TAC § 297.42(a).

⁵⁷ SA 1318B Ex. 1 at 11:18-19; SA 1318B Ex. 2 at 17:18 – 18:3, 24:10-17, 26:4-5, 26:12-13, 27:5-7; ED 1318B Ex. 7 at 3:9-10, 3:19-20; Tr. at 175:18-23.

⁵⁸ SA 1318B Ex. 2 at 26:7-8.

require appropriated State water to accommodate the request.⁵⁹ Accordingly, the requested amendment satisfies these statutory and corresponding regulatory requirements.

B. The Requested Amendment Proposes No Change In the City's Beneficial Use of Water Lawfully Impounded and Diverted Pursuant to COA 14-1318⁶⁰

The record demonstrates that the Application and the Draft Amendment propose no change to the beneficial use of State water that has already been authorized pursuant to COA 14-1318.⁶¹ Therefore, there is no appropriation requested in the Application, or proposed by the Draft Amendment, that would require analysis under TWC § 11.134(b)(3)(A).⁶² The requested amendment satisfies these statutory and corresponding regulatory requirements.

C. The Proposed Amendment Will Not Impair Existing Water Rights or Vested Riparian Rights⁶³

As shown throughout the hearing, the Application and the Draft Amendment propose no new or increased appropriation of State water.⁶⁴ In fact, nothing about the Dam, or the Reservoir's authorized storage capacity, will change when the Draft Amendment is issued.⁶⁵ As a direct result, the amendment requested in the Application, and proposed in the Draft Amendment, will not impair, or have any adverse impact on, existing water rights, including superior—or riparian domestic and livestock—water rights in the Concho River Basin.⁶⁶

⁵⁹ SA 1318B Ex. 2 at 26:12-13; ED 1318B Ex. 7 at 3:9-10; Tr. at 113:12-16, 175:18-20.

⁶⁰ TWC § 11.134(b)(3)(A); 30 TAC § 297.41(a)(3)(A).

⁶¹ SA 1318B Ex. 2 at 27:7-9; SA 1318B Ex. 2-E.

⁶² SA 1318B Ex. 2 at 26:21 – 27:9.

⁶³ TWC § 11.134(b)(3)(B); 30 TAC § 297.45.

⁶⁴ SA 1318B Ex. 1 at 11:18-19; SA 1318B Ex. 2 at 17:18 – 18:3, 24:10-17, 26:4-5, 26:12-13, 27:5-7; ED-1318B Ex. 7 at 3:9-10, 3:19-20; Tr. at 175:18-23.

⁶⁵ SA 1318B Ex. 2 at 22:7-12.

⁶⁶ SA 1318B Ex. 2 at 21:19 – 22:3, 22:13-14, 27:10-12; ED-1318B Ex. 7 at 3:19-20; Tr. at 112:22 – 113:6, 113:10-16, 176:23 – 177:4, 182:7-11.

Stephen Densmore, TCEQ's hydrologist in the Surface Water Availability and Interstate Compacts Team of the ED's Water Rights Permitting and Availability Section, reviewed the Application and determined that no other water right holders would be harmed if the Application is granted, because the elevation of the sill does not affect the amount of water that downstream water right holders will receive. He testified that the Watermaster for the area will ensure that downstream water rights holders and domestic and livestock users receive the amount of water to which they are legally entitled under COA 14-1318.⁶⁷

Barney Austin, Ph.D., a hydrologist who testified for Protestants, stated that if the conduit is at 1,883.5 feet above msl, as stated in COA 14-1318, instead of its as-built level of 1,885.0 feet above msl, more water would be able to pass through the Dam to downstream water right holders.⁶⁸ He testified, based upon available U. S. Geological Survey data for 2000 through the end of 2004, the water level in the North Pool of the Reservoir dropped below 1,885 feet above msl during the latter part of 2000 and 2001. He said when the water level was below 1,885 feet above msl, water could not flow over the sill into the inlet to the Dam even if there were inflows into the Reservoir, so there would be no water for use downstream even if the Dam gate were operable and open.⁶⁹ However, as Mr. Densmore testified, the Watermaster and the City will ensure that the downstream water right holders receive the water they are entitled to under the law.⁷⁰

Accordingly, the ALJ finds that the requested amendment thoroughly satisfies these statutory and corresponding regulatory requirements.⁷¹

⁶⁷ ED-1318B Ex. 7 at 3:6-28.

⁶⁸ Concho PFT 1318B Ex. 7 at 14:3-11.

⁶⁹ Concho 1318B PFT Ex. 7 at 11:35-36 through 13:1-19 and 14:18-23; Concho 1318B PFT Ex. 7-B.

⁷⁰ Tr. at 181:17 through 182:14; ED 1318B Ex. 7 at 3: 15-24.

⁷¹ See SA 1318B Ex. 2 at 21:19 – 22:3, 22:13-14; ED 1318B Ex. 7 at 3:15-20.

D. The Proposed Amendment Will Not be Detrimental to the Public Welfare⁷²

As testified to during the hearing, the Application, if granted, and the Draft Amendment, if issued, would authorize no appropriation of State water that would be detrimental to the public welfare.⁷³ Indeed, both the Application and the Draft Amendment would benefit the public welfare by correcting COA 14-1318 to reflect the elevation of the conduit inlet that was actually authorized by the State of Texas.⁷⁴ In addition, the Draft Amendment includes proposed additional terms and conditions for COA 14-1318 that are designed to enhance the practical enforceability of the water right.⁷⁵ Perhaps the most consequential condition in the Draft Amendment is the proposed clarifying condition that makes all impoundments, releases, pass-throughs, and diversions undertaken pursuant to COA 14-1318 expressly subject to the administrative requirements of the Concho Watermaster (Watermaster).⁷⁶ The Watermaster provides the ultimate protection to water rights in the Concho River Basin.⁷⁷ The Application, therefore, proposes changes to COA 14-1318 that would be beneficial—not detrimental—to the public welfare.⁷⁸

Therefore, the ALJ finds that the requested amendment satisfies these statutory and corresponding regulatory requirements.

⁷² TWC § 11.134(b)(3)(C); 30 TAC § 297.41(a)(3)(C).

⁷³ SA 1318B Ex. 2 at 27:13-14.

⁷⁴ SA 1318B Ex. 2 at 27:14-16.

⁷⁵ SA 1318B Ex. 2 at 22:17-22.

⁷⁶ SA 1318B Ex. 2 at 23:18-21.

⁷⁷ SA 1318B Ex. 2 at 24:1-6.

⁷⁸ SA 1318B Ex. 2 at 27:14-16.

E. The Proposed Amendment Satisfies the Requirements of TWC § 11.134(a)(3)(D) Regarding Environmental Protection⁷⁹

Because the Application proposes no new or additional appropriation of State water,⁸⁰ and would have no effect on how the Dam and the Reservoir are operated,⁸¹ the proposed amendment requests no appropriation that is susceptible to any environmental flow requirements.⁸² Furthermore, the amendment proposed in the Application and in the Draft Amendment seek no appropriation that would implicate or adversely affect instream flows, fish and wildlife habitat, water quality, or existing groundwater resources or groundwater recharge.⁸³

For the above reasons, the ALJ finds the requested amendment satisfies these statutory and corresponding regulatory requirements.

F. The Proposed Amendment Is Consistent with the State and the Approved Region F Regional Water Plans⁸⁴

Each of the Concho River Basin watercourse segments that are relevant to the Application are found entirely within Tom Green County and Irion County.⁸⁵ In addition, the City is located within Tom Green County, where it serves as the county seat.⁸⁶ Tom Green County and Irion County are each wholly within the Region F Regional Water Planning area, as defined by the Texas Water Development Board (TWDB).⁸⁷ The most recent regional water

⁷⁹ TWC § 11.143(b)(3)(D); 30 TAC § 297.41(a)(3)(D).

⁸⁰ SA 1318B Ex. 2 at 17:18 – 18:3, 18:6-8.

⁸¹ SA 1318B Ex. 2 at 22:7-10.

⁸² SA 1318B Ex. 2 at 27:16-20.

⁸³ SA 1318B Ex. 2 at 21:19 – 22:3, 27:16-20.

⁸⁴ TWC § 11.143(b)(3)(E), (c); 30 TAC § 297.41(a)(3)(E), (b).

⁸⁵ SA 1318B Ex. 2 at 28:8-11.

⁸⁶ SA 1318B Ex. 2 at 28:8.

⁸⁷ SA 1318B Ex. 2 at 28:11-13.

plan required of Region F was submitted to the TWDB in 2006.⁸⁸ It was subsequently approved by the TWDB in 2006 and incorporated into the State Water Plan in 2007.⁸⁹

The evidence admitted during this contested case demonstrates that the amendment requested in the Application and proposed in the Draft Amendment does not conflict with any provision in the approved Region F Regional Water Plan or the State Water Plan.⁹⁰ The amendment requested in the Application and proposed in the Draft Amendment, therefore, satisfies these statutory and corresponding regulatory requirements.

G. The City Has Provided Evidence that Reasonable Diligence Will Be Used to Avoid Waste and Achieve Water Conservation⁹¹

During the hearing, the City was able to show that, through its Water Utilities Department, it intends to use reasonable diligence to avoid waste and to achieve water conservation.⁹² At its essence, the term “waste” in the water rights context in Texas means the use of water that is not for a beneficial purpose.⁹³ The City uses and intends to continue to use water appropriated pursuant to COA 14-1318, as amended by the Draft Amendment, for municipal purposes within its municipal water supply service area.⁹⁴ This means that the City’s use of such water will be subject to the City’s water conservation and drought contingency plan, as approved by TCEQ.⁹⁵ The amendment requested in the Application, and proposed in the Draft Amendment, therefore satisfies these statutory and corresponding regulatory requirements.

⁸⁸ SA 1318B Ex. 2 at 28:17-19.

⁸⁹ SA 1318B Ex. 2 at 28:19-20.

⁹⁰ Tr. at 190:24-25; SA 1318B Ex 1 at 11:22 – 12:2; SA 1318B Ex. 2 at 27:20 – 28:1; ED 1318B Ex. 10 at 5:20-26.

⁹¹ TWC § 11.143(b)(4); 30 TAC § 297.41(a)(4).

⁹² SA 1318B Ex. 1 at 9:5-6; SA 1318B Ex. 2 at 31:3-5.

⁹³ SA 1318B Ex. 2 at 29:7-8.

⁹⁴ SA 1318B Ex. 1 at 9:2-5.

⁹⁵ SA 1318B Ex. 1 at 9:2-5, 9:15-17, 10:8-11; SA 1318B Ex. 2 at 30:21 – 31:3.

H. The City Has Completed and Returned All TWDB Water Use Surveys

In addition to the above requirements, applicable statutes and TCEQ rules require the City to have completed and returned all TWDB groundwater and surface water use surveys undertaken by the TWDB since September 1, 2001.⁹⁶ As demonstrated during the hearing on the merits of the Application, the City has in fact completed and returned all such surveys.⁹⁷ The City has therefore satisfied these statutory and corresponding regulatory requirements.

VII. CONCLUSION

The Application submitted by the City proposes to make only one change to COA 14-1318. It proposes to rectify a discrepancy between what ultimately appeared in the terms of COA 14-1318 regarding the elevation of the conduit inlet in the Dam, and what was actually authorized by the TBWE about 50 years ago. The City does not request any additional or new appropriation of State water. Approval of the Application would neither alter the volume of water that the City is authorized to divert from or store in the Reservoir nor increase any previously authorized rate of diversion. And importantly, granting the Draft Amendment would not adversely impact any other water rights or the environment in the Concho River Basin. The Application, if granted, would make administrative changes to the terms of COA 14-1318, as reflected in the Draft Amendment.

The evidence does not support Protestants' contention that the Draft Amendment, if issued, would limit the City's ability to pass inflows into the Reservoir to which downstream senior and superior water rights are entitled. Nor is there any credible evidence to support Protestants' argument that the Draft Amendment, if issued, would increase the City's storage of water in the Reservoir. There is, however, overwhelming evidence provided by Dr. Brandes that the Draft Amendment will not authorize the City to impound any greater amount of water in the

⁹⁶ TWC § 16.012; 30 TAC § 297.41(a)(5).

⁹⁷ SA 1318B Ex. 1 at 11:1-11.

Reservoir than it already is authorized to store under its existing certificate.⁹⁸ Likewise, the proposed Draft Amendment, if issued, will not change the City's obligations to pass inflows through the Dam to which downstream senior and superior water rights are entitled.⁹⁹ Dr. Brandes' opinion is shared by Mr. Densmore.¹⁰⁰

In addition, even when the water level of the Reservoir falls below the 1,885.0 feet above msl of the conduit sill,¹⁰¹ the overwhelming weight of the evidence is that Protestants' water rights will not be adversely affected by issuance of the Draft Amendment, because the City would still be obligated to pass inflows as determined by the Watermaster.¹⁰²

Similarly, even during the "very infrequent" occurrence when water from the South Pool does not flow into the Reservoir's North Pool, the City is still required to pass all flows coming into the Reservoir through the Dam to the downstream water right holders entitled to the water—regardless of which pool of the Reservoir is receiving flows that the City is not authorized to impound.¹⁰³

Along these lines, Protestants have proposed that further special conditions be placed on the Draft Amendment. Because the Watermaster program instituted by the Texas Legislature¹⁰⁴ will protect downstream senior and superior water right holders from any potential adverse

⁹⁸ SA 1318B Ex. 2 at 22:10-11; Tr. at 112:22-113:4.

⁹⁹ SA 1318B Ex. 2 at 22:13-14; Tr. at 107:8-11.

¹⁰⁰ ED 1318B Ex. 7 at 3:19-20 (indicating that the Draft Amendment would not affect the amount of water that the City may use or store in the Reservoir), 3:21-24 (noting that, regardless of the level of the Dam conduit sill, the City is still required to pass inflows to which the Watermaster determines downstream senior and superior water rights are entitled); Tr. at 175:18-20, 177:1-4.

¹⁰¹ CONCHO 1318B PFT Ex. 7-B (depicting the infrequent occurrence of water levels dropping below 1,885.0 feet above msl since January 2000); Tr. at 112:15-21, 114:11-21 (testimony of Dr. Brandes agreeing that the water level in the Reservoir falls below 1,885.0 feet above msl infrequently).

¹⁰² ED 1318B Ex. 7 at 3:15-24; Tr. at 107:8-11; 176:23-177:4, 182:12-14.

¹⁰³ Tr. at 104:9-15, 107:8-11, 115:14-22, 120:13-24, and 128:10-13.

¹⁰⁴ TWC §§ 11.551-11.561.

impact that could result from granting the Application,¹⁰⁵ the ALJ rejects Protestants' proposed special conditions.

The ALJ concludes that because the City has demonstrated that the Application satisfies each applicable statutory and regulatory requirement, the evidence admitted in this case supports granting of the Application and issuance of the Draft Amendment.

SIGNED October 22, 2010.



SHARON CLONINGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

¹⁰⁵ Tr. at 182:12-14.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



ORDER Application of the City of San Angelo to Amend Certificate of Adjudication No. 14-1318; SOAH Docket No. 582-10-0293; TCEQ Docket No. 2008-1616-WR

On _____, the Texas Commission on Environmental Quality (Commission) considered the application of the City of San Angelo (the City) to amend Certificate of Adjudication No. 14-1318 to modify Special Condition 5C of the original Certificate. Administrative Law Judge (ALJ) Sharon Cloninger conducted a hearing on the application on June 28, 2010. The following were parties to the proceeding: the City; Concho River Basin Water Conservancy Association (Protestants); the Public Interest Counsel (OPIC); and the Executive Director (ED) of the Commission.

After considering the ALJ's Proposal for Decision (PFD) and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

BACKGROUND

1. On February 3, 1960, the Board of Water Engineers of the State of Texas (TBWE) issued to San Angelo Water Supply Corporation (SAWSC) a permit that allowed for the United States Department of the Interior, Bureau of Reclamation (BuRec) to construct a dam approximately nine miles southwest of San Angelo, Texas, to impound waters of the

State on the Middle Concho River, Spring Creek, and the South Concho River, tributaries to the Concho River, tributary to the Colorado River, Colorado River Basin.

2. The dam would become known as the Twin Buttes Dam (Dam).
3. The reservoir created by the impoundment behind the Dam would become known as the Twin Buttes Reservoir (Reservoir).
4. TBWE's original authorization for the Dam included a provision specifying that the structure was to be constructed with a conduit running through the Dam.
5. The referenced conduit was to be built so that it measured at least five feet in diameter and was equipped with a gate mechanism that provided for the controlled passage of flows through the Twin Buttes Dam.
6. Under TBWE's original authorization, the bottom of the inlet for this conduit structure was to be constructed at an elevation of 1,883.5 feet above mean sea level (msl).
7. TBWE's original authorization for the Dam provided that "All construction work shall be done in accordance with plans approved by [the TBWE] and any changes or alterations made in said plans shall be filed with the [TBWE] and its approval obtained before construction. The permit herein granted may be amended in accordance with such changes or alterations."
8. On April 4, 1960, the TBWE took up and considered approval of the proposed final construction plans for the Dam.
9. Within the final plans submitted to TBWE was a proposal to change the authorized elevation of the bottom of the inlet to the conduit structure from the originally authorized elevation of 1,883.5 feet above msl to a revised elevation of 1,885.0 feet above msl.
10. After considering the issue, the TBWE approved the final construction plans for the Dam and affirmatively amended its original authorization to require the bottom of the inlet to the conduit through the Dam to be built at elevation 1,885.0 feet above msl.
11. Construction of the Dam began in May 1960 and was completed by February 1963.
12. Following completion of the Dam in February 1963, BuRec published *Twin Buttes Dam: Technical Record of Design and Construction* (Twin Buttes Dam Technical Record)

wherein it describes in great detail all aspects of the Dam project purpose, citing preliminary studies, design, and construction.

13. The Twin Buttes Dam Technical Record indicates that the bottom of the intake portion of the conduit through the Dam—referred to by BuRec as the conduit “sill”—was constructed at an elevation that was set precisely where TBWE had required it to be: 1,885.0 feet above msl.
14. On March 12, 1980, following adjudication of water rights within the Concho River Basin in accordance with the Water Rights Adjudication Act of 1967, the Texas Water Commission issued Certificate of Adjudication No. 14-1318 (COA 14-1318).
15. COA 14-1318 is the water right issued in response to the adjudication of claims made by the SAWSC based on the TBWE’s authorization for the Dam and Reservoir.
16. Notwithstanding TBWE’s clear mandate to construct the conduit through the Dam to have an opening at elevation 1,885.0 feet above msl, and notwithstanding BuRec’s compliance with the TBWE’s requirements, the Texas Water Commission issued COA 14-1318 with a reference in Special Condition 5C to the incorrect sill height elevation, some 17 years after construction on the Dam was completed.
17. Special Condition 5C references an inlet to the conduit at Twin Buttes Reservoir at 1,883.5 feet above mean sea level; the actual height of the inlet, as built, is 1,885 feet above mean sea level.
18. The City seeks to amend Special Condition 5C to reflect the actual 1,885-foot height of the inlet.
19. The discrepancy between the approved, as-built elevation of the conduit sill—1,885.00 feet above msl—and the elevation referenced in COA 14-1318—1,883.5 feet above msl—was never realized until after nearly 40 years of operation of the Dam.
20. The Dam is constructed with three conduits that each has an opening of at least 15 feet in diameter.
21. The conduits through the Dam are constructed with regulating gates designed so that they can at all times be used to permit the free passage of flows coming into the Reservoir.
22. The SAWSC is the owner of COA 14-1318.

23. COA 14-1318 today authorizes the owner to maintain the the Dam and the 170,000 acre-foot capacity Reservoir in the Middle Concho River, Spring Creek, and the South Concho River, tributaries to the Concho River, tributary to the Colorado River, in the Colorado River Basin.
24. The SAWSC was created in 1954 for the purpose of holding water rights in what would become the Reservoir on behalf of the City in order to comply with Federal requirements applicable at that time.
25. The City is a wholesale and a retail water supplier.
26. The City has managed the Reservoir and its water supplies since the inception of the SAWSC.
27. The City acts on behalf of the SAWSC on many matters, including issues that involve COA 14-1318.
28. COA 14-1318 also authorizes the owner to divert and use a maximum of 25,000 acre-feet of water each year from the Reservoir for irrigation purposes and 29,000 acre-feet each year from the Reservoir for municipal purposes. This amount includes a maximum of 25,000 acre-feet each year that may be diverted from Lake Nasworthy downstream of the Reservoir under Certificate of Adjudication No. 14-1319.
29. Each of the Concho River Basin watercourse segments that are relevant to the Application are found entirely within Tom Green County and Irion County.
30. The City is located within Tom Green County, where it serves as the county seat.
31. Tom Green County and Irion County are each wholly within the Region F Regional Water Planning area, as defined by the Texas Water Development Board (TWDB).
32. The most recent regional water plan required of Region F was submitted to the TWDB in 2006.
33. The most recent regional water plan required of Region F was subsequently approved by the TWDB in 2006 and incorporated into the State Water Plan in 2007.
34. The City has completed and returned all TWDB groundwater and surface water use surveys undertaken by the TWDB since September 1, 2001.

PROCEDURAL HISTORY

35. On behalf of the SAWSC, the City filed "Application No. 14-1318B to Amend Certificate of Adjudication No. 14-1318, Middle Concho River, Colorado River Basin, Tom Green County" with the Texas Commission on Environmental Quality (TCEQ) on November 29, 2004 (Application).
36. TCEQ staff declared the Application to be administratively complete on April 19, 2005.
37. TCEQ staff filed the Application with the Office of the Chief Clerk on April 19, 2005.
38. In response to the Application, TCEQ staff issued a draft certificate amending COA 14-1318 to reflect the as-built sill elevation of the conduit through the Dam (Draft Amendment).
39. Public notice of the Application was issued on June 21, 2005, and was mailed to downstream water rights owners in the Colorado River Basin.
40. Notice of the Application was published on June 28, 2005, in the *San Angelo Standard-Times*, a daily newspaper published in Tom Green County, Texas.
41. The Commission received 42 requests for a public hearing on the Application.
42. The Commission's Chief Clerk referred the Application to the State Office of Administrative Hearings (SOAH) for a contested case, where a preliminary hearing was held on October 27, 2009.
43. Notice of the preliminary hearing was mailed on October 6, 2009, to all persons who had requested a hearing on the Application.
44. At the October 27, 2009 preliminary hearing held in Austin, Texas, the ALJ considered the jurisdictional exhibits submitted by the ED and admitted the City, Protestants, the South Concho Irrigation Company, the ED, and OPIC as parties.
45. On January 20, 2010, the South Concho Irrigation Company withdrew as a party to the proceeding.
46. The evidentiary hearing was held June 28, 2010, in Austin, Texas.

47. The record closed on August 30, 2010, after the parties submitted written closing arguments and replies.

THE APPLICATION

48. The Application is a request for an administrative change to the Dam inlet structure sill elevation referenced in COA 14-1318 from the incorrect reference of 1,883.5 feet above msl to the approved, as-built elevation of 1,885.00 feet above msl.
49. The Application does not request a new or additional appropriation of State water.
50. The Application does not request any change to any maximum diversion rates associated with COA 14-318.
51. The Application does not request the authority to impound any additional volumes of State water than are currently authorized by COA 14-1318.
52. The Application does not propose a change in the beneficial use of water to which COA 14-1318 already authorizes.
53. The City has adopted conservation ordinances that are intended to encourage the use of practices, techniques, and technologies designed to reduce the consumption of water, reduce the loss or waste of water, and improve the efficiency in the use of water.
54. As part of the Application, the City also submitted the *City of San Angelo Water Conservation and Drought Contingency Plan* (Water Conservation Plan).
55. Multiple members of the TCEQ technical staff conducted independent reviews of the Application during the technical review process.
56. As part of the TCEQ staff's technical review of the Application, the potential impacts from the City's requested amendments on water rights within the Colorado River Basin, also known as a "no injury" analysis, were analyzed.

57. Changing the referenced conduit sill elevation in COA 14-1318 to the correct, as-built elevation of 1,885.0 feet above msl will not affect the amount of water that can be stored in the Reservoir.
58. The amendment requested in the Application would not change the City's obligations to pass inflows through the Dam to which downstream senior and superior water rights are entitled.
59. Regardless of the elevation of the conduit sill in the Dam, the City would still be required under the amendment requested in the Application to pass inflows through the Dam to which downstream senior and superior water rights are entitled.
60. Other water rights holders in the Colorado River Basin will not be harmed if the conduit sill is left at its approved, as-built elevation of 1,885.00 feet above msl.
61. The Concho Watermaster will be responsible for ensuring that all inflows to which downstream senior and superior water rights are entitled are passed through the Dam, regardless of the elevation of the conduit sill.
62. A Water Conservation Plan review is not required for the Application.
63. Nevertheless, the Water Conservation Plan meets the requirements of the Texas Water Code and the TCEQ rules.
64. The amendment requested in the Application and proposed in the Draft Amendment does not conflict with any provision in the approved Region F Regional Water Plan or the State Water Plan.
65. The amendment requested in the Application and proposed in the Draft Amendment is consistent with the State Water Plan and the approved Region F Regional Water Plan.
66. Following TCEQ staff's technical review of the Application, the staff issued the Draft Amendment and recommended that the Application be approved.

THE DRAFT AMENDMENT

67. The Draft Amendment would revise COA 14-1318 Special Condition 5C. to reflect the correct, approved, as-built conduit sill elevation of 1,885.00 feet above msl.

68. The Draft Amendment also makes clear that the impoundments, releases, diversions and pass-through of flows into the Reservoir made pursuant to the terms and conditions of the amended certificate are subject to the administrative requirements of the Concho Watermaster.
69. The Concho Watermaster cannot authorize any diversions under the Draft Amendment if doing so would result in the impairment of other water rights or contravene the terms and conditions of the amended certificate.
70. The Draft Amendment would not affect the amount of water that COA 14-1318 currently authorizes to be stored in the Reservoir.
71. The Draft Amendment would not affect the conservation pool capacity in the Reservoir.
72. The Draft Amendment would not affect downstream senior or superior water rights, as the City's obligations to pass flows to which they are entitled does not change, regardless of the water level in the Reservoir.
73. The Application and the Draft Amendment would benefit the public welfare by correcting COA 14-1318 to reflect the elevation of the conduit inlet that was actually authorized by the State of Texas. In addition, the Draft Amendment serves the public welfare including additional terms and conditions for COA 14-1318 that are designed to enhance the practical enforceability of the water right.
74. The Application and the Draft Amendment propose no new or additional appropriation of State water and have no effect on how the Dam or the Reservoir are operated.
75. The Draft Amendment proposes no appropriation that would implicate or adversely affect instream flows, fish and wildlife habitat, water quality, or existing groundwater resources or groundwater recharge.
76. The Draft Amendment proposes no appropriation that is susceptible to any environmental flow requirements.

CONCLUSIONS OF LAW

1. TCEQ has subject matter jurisdiction over this proceeding pursuant to TEX. WATER CODE ANN. §§ 5.013(a)(1), 11.122, and 11.134.

2. SOAH has jurisdiction to conduct a hearing and to prepare a PFD in this matter pursuant to TEX. GOV'T CODE ANN. § 2003.047 and TEX. WATER CODE ANN. § 5.311.
3. The City must obtain authority from the TCEQ to amend COA 14-1318 in the manner provided for in the Application and in the Draft Amendment. TEX. WATER CODE ANN. § 11.122.
4. The Commission is required to approve a water right amendment application if the application to amend meets all applicable requirements for an amendment and the required change will not cause adverse impact on other water rights holders or the environment on the stream of greater magnitude than under circumstances in which the COA that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment. TEX. WATER CODE ANN. § 11.122(b) and 30 TEX. ADMIN. CODE (TAC) § 297.45(b).
5. Because the Application does not request a new or increased appropriation, or an increase in any authorized diversion rates, the City is not required to demonstrate that unappropriated water is available in the source of supply before the Commission may grant the Application. TEX. WATER CODE ANN. § 11.122(b) and 30 TAC § 297.45(b).
6. The Application is administratively complete, was accompanied by all required fees, and was properly noticed pursuant to 30 TAC § 295.158 and therefore complies with 30 TAC § 297.41(a)(1).
7. The City will beneficially use water diverted pursuant to the terms and conditions of the Draft Amendment, and the amendments made therein are not detrimental to the public welfare. 30 TAC § 297.41(a)(3)(A).
8. The terms and conditions of the Draft Amendment will not substantially affect the continuation of stream conditions as they would exist with the full, legal exercise of COA 14-1318 at the time the water right was granted.
9. The terms and conditions of the Draft Amendment will not cause an adverse impact on other water right holders or the environment of the stream of greater magnitude than under circumstances in which COA 14-1318 was fully exercised according to its terms and conditions as they existed before the change requested in the Application, and thus will not impair existing water rights or vested riparian rights. TEX. WATER CODE ANN. § 11.134(b)(2) and 30 TAC § 297.41(a)(3)(B).
10. The City will use reasonable diligence to avoid waste and encourage the use of practices, techniques, and technologies designed to reduce the consumption of water, reduce the loss or waste of water, and improve the efficiency in the use of water. 30 TAC § 297.41(a)(4).

11. The City has completed and returned all TWDB groundwater and surface water use surveys undertaken by the TWDB since September 1, 2001. 30 TAC § 297.41(a)(5).
12. The Draft Amendment would address a water supply need in a manner that is consistent with the State water plan and the approved Region F Regional Water Plan. TEX. WATER CODE ANN. § 11.134(c) and 30 TAC § 297.41(a)(3)(E).
13. As of the date that Application was deemed administratively complete, and since that time, the Reservoir and the City are each wholly within a region subject to a regional water plan that has been approved in accordance with TEX. WATER CODE ANN. § 16.053(i).
14. Pursuant to the terms and conditions of the Draft Amendment, the amended certificate would authorize the municipal use of State water in a region that has an approved regional water plan in accordance with TEX. WATER CODE ANN. § 16.053(i).
15. The City has demonstrated that the Application satisfies each applicable statutory and regulatory requirement. TEX. WATER CODE ANN. § 11.134 and 30 TAC § 297.41.
16. The evidence admitted in this case supports granting the Application and issuing the Draft Amendment.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The Application be approved in accordance with the Draft Amendment.
2. The Chief Clerk of the Commission forward a copy of this Order and attached Draft Amendment to all parties and, subject to the filing of motions for rehearing, issue the attached Draft Amendment.
3. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

4. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.

Issue Date:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman