

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

October 27, 2010

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

Re: SOAH Docket No. 582-10-0294; TCEQ Docket No.2008-1617-WR; In Re: Application No. 14-1318C 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 16, 2010. Any replies to exceptions or briefs must be filed in the same manner no later than November 29, 2010.

This matter has been designated **TCEQ Docket No. 2008-1617-WR; SOAH Docket No. 582-10-0294**. 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,

A handwritten signature in cursive script that reads "Sharon Cloninger".

Sharon Cloninger
Administrative Law Judge

SC/lh
Enclosures
cc: Mailing List

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STYLE/CASE: SAN ANGELO WATER SUPPLY CORP.
SOAH DOCKET NUMBER: 582-10-0294
REFERRING AGENCY CASE: 2008-1617-WR

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ SHARON CLONINGER**

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CONCHO RIVER BASIN WATER CONSERVANCY
ASSOCIATION

xc: Docket Clerk, State Office of Administrative Hearings

**SOAH DOCKET NO. 582-10-0294
TCEQ DOCKET NO. 2008-1617-WR**

**APPLICATION NO. 14-1318C 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) to modify Special Condition 5C in Certificate of Adjudication No. 14-1318 (Certificate or COA 14-1318).¹ The City seeks to replace the “normal flow” standard with an “inflows” standard and add language regarding the free passage of inflows from the Twin Buttes Reservoir (Reservoir) to lower appropriators on the Middle Concho River, Spring Creek, and South Concho River in the Colorado River Basin in Tom Green County.²

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) oppose the Application because it believes approval would be injurious to its members water rights.

Protestants further claim the City is entitled to impound only flood and storm water in the Reservoir under the Certificate, 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.³ As set out in Order No. 3, the

¹ The City has submitted the Application on behalf of the Certificate owner, the San Angelo Water Supply Corporation (SAWSC).

² For a map of the area, refer to ED 1318C Ex. 5 at 3.

³ Protestants’ Closing Argument at 2-4; 12-19; and 23-25. The Administrative Law Judge (ALJ) agrees with the ED’s position that even if the Commission’s predecessor agency had made a specific finding in its Final

Administrative Law Judge (ALJ) found the Permit had been superseded and its flood and storm water provisions were not incorrectly excluded from the Final Determination. Accordingly, the City's Motion to Strike Protestants' Pleadings related to the Permit, as contained in Protestants' Closing Argument, is granted. In addition, the ALJ will not take administrative notice of Permit No. 1949, which is not in evidence, as requested in Footnote No. 5 of Protestant's Closing Argument.

The ALJ concludes the Application meets all applicable standards and rules and should be approved.

II. PROCEDURAL HISTORY AND JURISDICTION

The Application, originally filed with TCEQ on March 30, 2005,⁴ requested an amendment to Special Condition 5C in part to change "normal flow" to "normal flow, as that may be scientifically defined."⁵ Notice of the Application was mailed to downstream water right holders within the Colorado River Basin on August 25, 2005, and was published in accordance with applicable TCEQ rules.⁶ On October 12, 2005, TCEQ staff requested that the City submit a "scientific definition" of normal flow.⁷ After conferring with its hydrologic consultant, the City reported to TCEQ staff that it knew of no scientifically-accepted definition of the term.⁸ The City instead proposed changing "normal flow" to "inflows" and added language to the requested amendment to address concerns raised by water rights holders who opposed the Application.⁹ In addition, the City notified TCEQ staff that the City proposed to include COA 14-1318, as amended by the changes sought in the Application, within the *City of San Angelo Water Rights*

Determination that the City was only entitled to impound storm and flood water and must pass through all normal flows, the City would not be barred from applying to amend its water right. ED's Response to Protestants' Closing Arguments at 2, citing TEX. WATER CODE § 11.122(a).

⁴ SA 1318C Ex. 1 at 6:18-21; Ex. ED-1318C-1 at 2:23.

⁵ ED 1318C Ex. A.

⁶ ED 1318C Ex. 5.

⁷ SA 1318C Ex. 3.

⁸ SA 1318C Ex. 3.

⁹ ED 1318C Ex. 7 at 1; SA 1318C Ex. 3.

Accounting Plan (Accounting Plan).¹⁰ TCEQ staff found the Accounting Plan to be acceptable¹¹ and recommended that it be approved.¹²

On February 9, 2006, TCEQ staff acknowledged the City's amendment to the Application.¹³ On April 5, 2006, TCEQ staff declared the amended Application to be administratively complete.¹⁴ On April 18, 2006, a revised notice of the amended Application was mailed to all downstream senior and superior appropriators¹⁵ and notice of the Application was published on April 28, 2006.¹⁶ On June 26, 2009, the Application was declared technically complete.¹⁷

Staff issued a draft amendment (1318C Draft Amendment) which, if approved, would remove the "normal flow" standard from Special Condition 5C and replace it with the defined "inflows" standard, as well as require the City to permit the passage of inflows of water through the Reservoir as determined by the Concho Watermaster (Watermaster) or the ED.¹⁸

After public notice of the Application was issued, TCEQ received several requests for a contested case hearing¹⁹ and the Commission referred the Application to the State Office of Administrative Hearings (SOAH).²⁰ At the October 27, 2009 preliminary hearing, the ED

¹⁰ SA 1318C Ex. 2-B.

¹¹ ED 1318C Ex. 15.

¹² ED 1318C Ex. 19 at 3:13-14.

¹³ SA 1318C Ex. 4; Tr. at 250:22 – 251:2.

¹⁴ ED 1318C Ex. 2:16-21; ED 1318C Ex. 5 at 1.

¹⁵ ED 1318C Ex. 1 at 2:27-28; ED Ex. A.

¹⁶ ED Ex. B.

¹⁷ ED 1318C Ex. 5 at 1, paragraph 4.

¹⁸ ED 1318C Ex. C; ED 1318C Ex. 1 at 3:12-17; SA 1318C Ex. 2 at 23:11-17; ED 1318C Ex. 7.

¹⁹ ED 1318C Ex. A and Ex. B.

²⁰ ED 1318C Ex. C.

submitted jurisdictional exhibits²¹ establishing SOAH's jurisdiction over the contested case and the ALJ admitted the following parties:

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

On January 22, 2010, the ALJ granted a written request by the South Concho Irrigation Company to withdraw as a party.²²

The hearing on the merits convened June 29, 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. The State of Texas owns all of the surface water in the state and holds it in trust for the benefit of its

²¹ ED 1318C Exhibits A through C.

²² SOAH Docket No. 582-10-0294, Order No. 2.

citizens.²³ The State Legislature charged TCEQ with the task of managing the use of state water, giving it the authority to grant permits for the right to use this water.²⁴ The ED is required to participate in all water rights hearings.²⁵

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 adversely impact other water right holders or the environment in a greater magnitude than under the existing permit or certificate of adjudication. TWC § 11.122(b) and 30 TAC § 297.45(b).

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 applicant also must show that it meets all “other applicable requirements” as found at TWC § 11.134(b) that “do not implicate effects on other water-rights holders or the on-stream environment” *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 108-109 (Tex. 2006).

Under TWC § 11.134(b),²⁶ 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; [and]
- (2) unappropriated water is available in the source of supply; [and]
- (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;

²³ TWC § 11.0235(a).

²⁴ TWC § 11.121.

²⁵ 30 TAC § 80.108(b)(1).

²⁶ See also 30 TAC § 297.41.

(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;²⁷ 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.

No water conservation and drought contingency plan was required because the Application does not increase the amount of authorized diversion, extend the term of an appropriation, change the place of use, or change the purpose of use.²⁸

IV. THE APPLICATION

The San Angelo Water Supply Corporation (SAWSC) owns COA 14-1318, as amended, which authorizes 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 on the Middle Concho River, Spring Creek, and South Concho River for agricultural purposes to irrigate 15,000 acres of land within the boundaries of Tom Green County Water Control and Improvement District No. 1. The Certificate also permits

²⁷ TWC § 11.147 does not apply to the Application because the Reservoir is more than 200 miles from the coast. ED 1318C Ex. 8 at 4:25-27. TWC § 11.151 does not apply because there is no change in Reservoir operations or the amount of water taken from the stream. SA 1318C Ex. 2 at 32:10-14.

²⁸ 30 TAC § 295.9; ED 1318C Ex. 16 at 4:7-19.

diversion and use of up to 29,000 acre feet of water per year from the Reservoir for municipal purposes.²⁹

Special Condition 5C of COA 14-1318 currently reads:

A conduit shall be constructed in the aforesaid 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 Department may determine lower appropriators are entitled.³⁰

The City seeks amendments to COA 14-1318 that, if granted, would address the ambiguity in the Certificate created by the use of the term “normal flow.”³¹ Also, the 1318C Draft Amendment would integrate the Accounting Plan directly into the terms and conditions of the water right itself,³² which would guide the Watermaster’s determination of how much water to pass through to lower appropriators.³³

The 1318C Draft Amendment³⁴ prepared by TCEQ staff modifies the language proposed by the City in its Application and amended Application to state:

A conduit shall be constructed in the aforementioned dam³⁵ with the inlet at elevation 1885.0 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate. Owner shall permit the free passage of inflows through Twin Buttes Reservoir via the conduit as required by Special Condition 2C of Certificate of Adjudication No. 14-1318C, and in such

²⁹ ED 1318C Ex. A at 1.

³⁰ ED 1318C Ex. A at 2.

³¹ City’s Closing Arguments at 2; SA 1318C Ex. 1 at 7:6-10.

³² ED 1318C Ex. 7 at 3, Special Condition 2C; SA 1318C Ex. 2 at 23:18-19.

³³ SA 1318C Ex. 2 at 13:15-19, 17:1-5, and 28:13-15.

³⁴ ED 1318C Ex. 7.

³⁵ The “aforementioned dam” referenced in the proposed language is the Twin Buttes Dam (Dam). SA 1318C Ex. 2 at 22:21-23.

amounts as determined by the Watermaster or the Executive Director for downstream water right holders and domestic and livestock users.³⁶

Special Condition 2C referenced in the 1318C Draft Amendment states:

Owner shall only store water in accordance with the City of San Angelo Water Rights Accounting Plan. Owner shall maintain electronic records (in spreadsheet or database format) of the accounting plan and shall submit them to the Executive Director upon request.

The City supports the language proposed in the 1318C Draft Amendment.³⁷

V. EVIDENCE

A. Normal Flow v. Inflows

The Certificate was issued by the Texas Water Commission in 1980 pursuant to the Water Rights Adjudication Act of 1967 (1967 Act)³⁸ as Applicant's final, adjudicated claims to storage and diversion rights in the Reservoir. COA 14-1318 was drafted to contain a reference to the "normal flow" of water coming into the Reservoir.³⁹

Through the years, the City has had difficulty in accurately quantifying the "normal flow" of water into the Reservoir in its efforts to properly administer the Certificate.⁴⁰ Applicant's expert witness Robert Brandes, Ph.D., an engineer and hydrologist with approximately 40 years

³⁶ ED 1318C Ex. 1 at 3:12-19; SA 1318C Ex. 1-E at 2. Note that the City has submitted a separate application to change the elevation of the conduit sill currently referenced in Special Condition 5C as 1,883.5 feet above mean sea level (msl) to reflect the as-built sill elevation of 1,885.0 feet above msl. *Application No. 14-1318B by City of San Angelo for Amendment to Certificate of Adjudication No. 14-1318*, SOAH Docket No. 582-10-0293, TCEQ Docket No. 2008-1616-WR (1318B Application). The 1318C Draft Amendment uses the elevation requested in the 1318B Application, but may be revised if the 1318B Application is not approved.

³⁷ SA 1318C Ex. 2 at 24:10-12.

³⁸ CONCHO 1318C Ex. 10 at 2.

³⁹ ED 1318C Ex. 3, Special Condition 5C.

⁴⁰ City's Closing Arguments at 2; SA 1318C Ex. 1 at 7:2 and 7:5-6; SA 1318C Ex. 2 at 13:1-5 and 13:15-19.

experience in Texas surface water rights and water resources management,⁴¹ explained that the problem with relying on the “normal flow” distinction occurs most commonly when the City attempts to determine what specific volumes of water it is required to pass through the Dam to satisfy downstream senior and superior water rights, because the term “normal flow” has no scientifically-accepted meaning.⁴² Over time, the City came to recognize that there exists no universally-accepted method for quantifying “normal flow” as the term is used in COA 14-1318.⁴³

Similarly, the ED’s witness Steve Densmore, a hydrologist in the Surface Water Availability and Interstate Compact Team of the Water Rights Permitting and Availability Section of TCEQ, stated there is no clear technical or hydrologic definition of “normal flow.”⁴⁴ He attempted to determine what “normal flow” would be in the applicable area of the Concho River, but could not.⁴⁵ The ED’s witness Kathy Alexander, Work Leader for the Surface Water Availability and Interstate Compacts Team, shared the same opinion.⁴⁶

Dr. Brandes, Mr. Densmore, and Ms. Alexander all agreed that “inflows,” as a hydrologic standard, is easy to comprehend:⁴⁷ as used in the context of the Application and the 1318C Draft Amendment, “inflows” is a term that describes 100 percent of the river flow that makes its way into the Reservoir at any given time.⁴⁸ Dr. Brandes testified that inflows are made up of “a whole host of inflow sources; including spring flows that are discharged into the streams that contribute to Twin Buttes, rainfall events that generate storm flows and flood flows, all of those sources of water contribute to inflows. If there [were] a wastewater treatment plant discharging

⁴¹ SA 1318C Ex. 2-A.

⁴² SA 1318C Ex. 2 at 13:11, Tr. at 32:3-6, 33:14, 49:16-17.

⁴³ SA 1318C Ex. 1 at 7:18 – 8:2; SA 1318C Ex. 2 at 13:1-11; SA 1318C Ex. 3.

⁴⁴ ED 1318C Ex. 12 at 3:21-23, 3:27-29, 4:1-8, Tr. at 307:24-308:1.

⁴⁵ ED Ex. 1318C Ex. 14 at 3.

⁴⁶ Tr. at 330:13-17.

⁴⁷ ED 1318C Ex. 12 at 3:23-26; Tr. at 327:12-13.

⁴⁸ Tr. at 40:17-25 and 327:12-13

effluent into one of the streams, that would be part of the inflows”⁴⁹ Ms Alexander defined “inflow,” as calculated in the Accounting Plan, as “the sum of the flow measured at the gage plus the ungaged flow.”⁵⁰

Even Protestants’ expert witness Barney Austin, Ph.D.,⁵¹ agreed there is no scientifically-accepted definition of “normal flow.”⁵² Dr. Austin, who is a hydrologist, acknowledged the ease of quantifying “inflow” into the Reservoir.⁵³ Dr. Austin admitted that the methods Dr. Brandes used in the Accounting Plan for quantifying Reservoir inflows were “reasonable.”⁵⁴ But in lieu of using “inflows,” Dr. Austin suggested that “base flow” could be quantified using computer software⁵⁵ to employ “mathematical techniques and algorithms”⁵⁶ to combine a “local minimums approach with a recession slope test.”⁵⁷ Dr. Brandes and Mr. Densmore did not agree with using a “base flow” approach.⁵⁸

Dr. Austin averred that “normal flows” has the same meaning as “base flows.” He defined “base flows” as “the volume of flow in a stream or river during dry conditions as opposed to conditions influenced by storm runoffs.”⁵⁹

The ED disagrees with Dr. Austin,⁶⁰ arguing that although there is a definition of “base flow or normal flow” in TCEQ rules,⁶¹ neither term is a workable definition for determining

⁴⁹ Tr. at 108:4 – 11

⁵⁰ ED 1318C Ex. 19 at 5:4 – 5.

⁵¹ CONCHO 1318C PFT Ex. 7-A.

⁵² CONCHO 1318C PFT Ex. 7 at 12:22.

⁵³ Tr. at 185:20-22.

⁵⁴ CONCHO 1318C PFT Ex. 7 at 13:32-33.

⁵⁵ CONCHO 1318C PFT Ex. 7 at 13:15-19.

⁵⁶ CONCHO 1318C PFT Ex. 7 at 13:3-5.

⁵⁷ CONCHO 1318C PFT Ex. 7 at 13:11-12.

⁵⁸ Tr. at 58:14-19 and ED 1318C Ex. 12 at 4:1-8.

⁵⁹ CONCHO 1318C PFT Ex. 7 at 12: 22 – 33.

⁶⁰ ED’s Closing Arguments at 5.

when flows should be released from a reservoir for downstream water right holders.⁶² Mr. Densmore testified that for water management purposes, normal flow cannot be considered base flow because base flow can be influenced by outside effects, and determining base flow requires historical knowledge of past flows. Therefore, most base flows are determined after the fact.⁶³ Dr. Brandes testified similarly.⁶⁴

Dr. Brandes testified further that inflows include base flows.⁶⁵ The ED's witness Ms. Alexander explained that inflows can exceed base flows.⁶⁶ She said, "Inflow is the water from all sources regardless of how you characterize them, and so if inflows are zero, that means that all those component sources would have to be zero, too." She concluded that without inflow, there can be no base flow.⁶⁷

The ED argues that requiring the passage of base flows as suggested by Dr. Austin—even if there were a requirement in the 1318C Draft Amendment that the City pass base flows to downstream senior water right holders "at all times"—would result in less flow to the downstream water right holders than passing "inflows" when they occur.⁶⁸ The ED points out that the evidence shows that base flows will not be available at all times because there are no base flows when there are no inflows.⁶⁹ A requirement to pass "inflows" is the most reasonable approach for this application, the ED concludes.⁷⁰

⁶¹ The portion of stream flow uninfluenced by recent rainfall or flood runoff and is comprised of spring flow, seepage, discharge from artesian wells or other groundwater sources, and the delayed drainage of large lakes and swamps. (Accountable effluent discharges from municipal, industrial, agricultural, or other uses of ground or surface waters may be included at times.) 30 TAC § 297.1(6)

⁶² Tr. p. 308:3 – 8.

⁶³ Tr. p. 308:3 – 8.

⁶⁴ Tr. at 58: 8 – 19.

⁶⁵ Tr. at 108:14 – 15.

⁶⁶ Tr. at 327:23 – 28:2.

⁶⁷ Tr. at 327:12 – 16.

⁶⁸ ED's Closing Arguments at 6.

⁶⁹ ED's Response to Protestants' Closing Argument at 3.

⁷⁰ ED's Closing Arguments at 6; ED's Response to Protestants' Closing Argument at 2.

Applicant claims that the “inflows” approach incorporated into the 1318C Draft Amendment would clarify COA 14-1318 not only by removing the ambiguous “normal flow” standard, but also by simplifying the methodology for determining the City’s impoundment rights and pass-through obligations. The various types of flow discussed throughout the hearing, whether the discussion centered on “normal flow,” “base flow,” “storm flow” or “average flow,” are all components of “inflow.”⁷¹ Approval of the 1318C Draft Amendment would result in the incorporation of the much simpler, standard procedure used throughout the Colorado River Basin and the State. Total flows—or inflows—would be assessed to the Reservoir and volumes of flow that the City may store and volumes of flow that it must pass through would be identified.⁷²

The ALJ finds that, unlike “normal flow,” “inflows” is a quantifiable hydrological standard. Therefore, replacing “normal flow” with “inflows” in the Certificate would require the City to use a scientifically-accepted standard in its administration of COA 14-1318 in conjunction with the additional conditions set forth in the 1318C Draft Amendment.

B. Accounting Plan

The Accounting Plan referenced in, and incorporated into, the 1318C Draft Amendment gives the City and the Watermaster a tool for calculating on a daily basis that the City is properly accounting for storage and diversions made pursuant to each of its water rights, and is therefore appropriating only the water to which it is entitled.⁷³ The Accounting Plan provides a multi-water rights holder like the City with a procedural mechanism for managing the terms and conditions of each water right covered by the plan.⁷⁴ For water rights in a river basin managed by a watermaster, as in the Concho River Basin, an accounting plan provides the watermaster

⁷¹ Tr. at 108:4-11 and 327:12-13.

⁷² Tr. at 50:16-19 and 59:25 – 60:4.

⁷³ ED 1318C Ex. 19 at 3:16-18 and 4:9-12.

⁷⁴ ED 1318C Ex. 19 at 3:20-23.

with a mechanism for ensuring that diversions, impoundments, and releases undertaken by the water rights holder are charged against the appropriate water rights.⁷⁵

Protestants argue that losses from inflows being released from Twin Buttes down to Lake Nasworthy and Lone Wolf, for downstream senior water rights, are not being calculated correctly under the Accounting Plan, which takes water away from them.⁷⁶ The ED disagrees because the Accounting Plan establishes a reasonable method for apportioning losses.⁷⁷ The ED points to the portion of the Accounting Plan that relates to losses:

Releases from Nasworthy Dam are subject to losses as they flow down the South Concho River, and additional water must be released from Lake Nasworthy to assure that the required quantities of water reach downstream users, including the City at its Lone Wolf water treatment plant. Two types of losses are accounted for in the accounting process. Natural channel losses are those that would occur naturally in the absence of the reservoirs that have been constructed by the City along the South Concho River, i.e., the Metcalfe, Ben Fieklin [sic] and Lone Wolf Reservoirs, and they include evaporation from the natural river channel, channel seepage losses, water uptake through evapotranspiration by plants, domestic and livestock use, and unauthorized diversions. Reservoir evaporation losses represent the additional evaporation losses that occur as a result of the three reservoirs that the City has constructed along this reach of the river. With water being impounded in the three reservoirs all of the time and with these reservoirs extending essentially along the entire length of the South Concho River from Nasworthy Dam downstream to the Bell Street Reservoir, the natural losses associated with the natural river channel are likely fairly constant.⁷⁸

The ED's witness Ms. Alexander testified that under the Accounting Plan, the losses begin to be apportioned between the City and downstream water right holders who have called for the water at Lake Nasworthy, the first impoundment downstream of the Reservoir. She stated that "[t]here is a certain portion of water that would naturally be lost in the channel, and so that natural loss is apportioned based on the percentage of water that's passed for downstream as opposed to the percentage that is passed for the City. In addition, any losses that would occur

⁷⁵ SA 1318C Ex. 2 at 16:16-18.

⁷⁶ Protestants' Closing Arguments at 27-28.

⁷⁷ ED's Response to Protestants' Closing Argument at 4.

⁷⁸ ED 1318C Ex. 21 at 5.

because of the City's intervening reservoirs—which would be Metcalfe and Ficklin and Lone Wolf—are apportioned only to the City's share of the water rights. . . . [H]ad the water flowed freely through the stream, it would have been lost anyway, so there is some very small share that's apportioned to the releases for the downstream water right owners."⁷⁹

Dr. Brandes testified that the City releases or passes through water from the Reservoir down to Lone Wolf to account for the losses associated with the City's portion of the water flowing in the stream and the losses that they are causing through that stretch.⁸⁰ Dr. Brandes testified that "[e]vaporative losses that are attributed to the small reservoirs that the City is authorized to impound between Nasworthy and Lone Wolf—and there are three—those evaporative losses are charged to the City, or the City accounts for those losses with over-releases or over pass-throughs, if you will, to cover those losses."⁸¹

Another concern expressed by Protestants is that they should be notified of changes, including nonsubstantive changes, to the Accounting Plan.⁸² But the Accounting Plan is not a separate water right; it does not, and cannot, be used to enhance the substantive impoundment or diversion authorizations made through the underlying water⁸³ right without triggering statutory notice requirements that are fundamental to water rights amendment efforts. The City is concerned that Protestants' requested notice could be used to hijack implementation of the Accounting Plan by attempts to block even nonsubstantive revisions to the Accounting Plan with protest efforts.⁸⁴

The ALJ finds that proposed modifications to the Accounting Plan that would substantively alter an underlying water right would be subject to the TWC and TCEQ rules that

⁷⁹ ED's Response to Protestant's Closing Argument at 4-5, citing Tr. at 322, lines 2-16.

⁸⁰ ED's Response to Protestant's Closing Argument at 5, citing Tr. at 86:21 – 87:1.

⁸¹ ED's Response to Protestants' Closing Argument at 5, citing Tr. at 88:4-10.

⁸² Protestants' Closing Arguments at 28; Protestants' Reply to Closing Arguments at 16-18.

⁸³ Tr. at 336:17-23.

⁸⁴ Applicant's Reply to Closing Arguments at 11.

afford potentially affected persons with notice and the opportunity to protest.⁸⁵ Therefore, the ALJ does not recommend that Protestants be notified of proposed nonsubstantive changes to the Accounting Plan as requested.

C. Watermaster's Use of the Accounting Plan

Protestants' witnesses indicated that senior water right holders downstream from the Reservoir have had problems with the river drying up and being unable to take water from the river.⁸⁶ The witnesses agreed that the situation has improved since a Watermaster Office was established for the Concho River.⁸⁷ Multiple fact witnesses offered by Protestants described their satisfaction with flow conditions in the Concho River downstream from the Dam over the past several years.⁸⁸ The general consensus of the witnesses was that the Watermaster was responsible for the good condition of the river⁸⁹ and they wanted to ensure that he had the tools to keep it that way.⁹⁰

The Watermaster has used the Accounting Plan since at least 2008 to account for the City's water storage in the Reservoir and to calculate the volume of inflows into the Reservoir that must be passed through to satisfy downstream senior and superior water rights under COA 14-1318.⁹¹ Therefore, since at least 2008, all water stored in and inflows passed through the Reservoir have been managed by the Watermaster in the same manner that storage and flow

⁸⁵ Tr. at 337:23 – 338:2, 339:1-11; TWC §§ 11.132, 11.122(a); 30 TAC ch. 295, subchapter C.

⁸⁶ Tr. at 115:13-23, for example.

⁸⁷ Tr. at 116:1-10, for example.

⁸⁸ CONCHO 1318C PFT Ex. 4 at 3:8-9, 3:34-36 (testimony of Scott Spoons noting improvement in the Concho River flow conditions); Tr. at 116:2-4 (testimony of A.J. Jones indicating satisfaction with the current general flow conditions of the Concho River); Tr. 154:6 (testimony of Steven Hoelscher stating that the Concho River "is in good shape now"); Tr. 161:15-16 (testimony of Mr. Spoons reiterating satisfactory flow conditions in the Concho River.)

⁸⁹ Tr. at 116:7-8, 126:3-6 (testimony of Mr. Jones stating that the Concho Watermaster was doing "an excellent job" in his "very, very efficient" administration of water rights in the Concho River Basin); Tr. 163:9-14 (testimony of Mr. Spoons attributing good condition of the Concho River to administration of water rights by the Watermaster.)

⁹⁰ Tr. at 163:23 - 164:1.

⁹¹ Tr. at 342:5-8, 342:18-20, 347:23-348:4, Tr. at 342:21-343:3 and Tr. at 348:9-12.

passage will be managed under the 1318C Draft Amendment if it is approved.⁹² The Accounting Plan has already been used by the Watermaster to the satisfaction of several Protestants.⁹³ In addition to the positive reports about the Watermaster's administration of the Accounting Plan from A. J. Jones and Steven Hoelscher, Scott Spoonts testified that because of the Watermaster, the river "has been kept going" for the City of Paint Rock since approximately 2006.⁹⁴

Notwithstanding the recent droughts in the area,⁹⁵ each of Protestants' fact witnesses indicated nothing but satisfaction with the Watermaster's management of flows and ensuring that they received the water to which they were legally entitled. Apparently Protestants' witnesses were not aware, until the hearing, that the Watermaster had been employing the Accounting Plan since at least 2008.⁹⁶

D. Measurement Gages

Protestants argue that the instream flow requirements proposed in the 1318C Draft Amendment should be measured at the Bell Street Dam on the Concho River instead of at the Lake Nasworthy Dam outlet on the South Concho River because, otherwise, there would be insufficient flows into the Concho River.⁹⁷ They point to Dr. Austin's testimony in support of

⁹² SA 1318C Ex. 2 at 23:1-5 (testimony of Dr. Brandes noting that proposed Special Condition 2C in the 1318C Draft Amendment requires the City to only store water in the Reservoir in accordance with the Accounting Plan); ED 1318C Ex. 19 at 4:26-5:1; Tr. at 317:22-318:4 (testimony of Ms. Alexander noting that the City would be authorized under the 1318C Draft Amendment to impound in the Reservoir only those flows that the Watermaster determines are not needed to satisfy downstream senior and superior water right holders and protect the environment).

⁹³ CONCHO 1318C PFT Ex. 4 at 3:8-9, 3:34-36 (testimony of Mr. Spoonts noting improvement in the Concho River flow conditions); Tr. at 116:2-4 (testimony of Mr. Jones indicating satisfaction with the current general flow conditions of the Concho River), Tr. at 154:6 (testimony of Mr. Hoelscher stating that the Concho River "is in good shape now"), Tr. at 161:15-16 (testimony of Mr. Spoonts reiterating satisfactory flow conditions in the Concho River).

⁹⁴ Tr. at 154:6.

⁹⁵ Tr. at 116:5-6.

⁹⁶ Tr. at 347:6-10, 23.

⁹⁷ Protestants' Closing Arguments at 26-27.

their position, but Dr. Austin admitted he is “not qualified or knowledgeable enough” to determine what constitutes sufficient environmental flows in the context of the Application.⁹⁸

No evidence in the record rebuts the testimony of Kaci Myrick, Aquatic Biologist on TCEQ’s Resource Protection Team for the Water Rights and Permitting Section.⁹⁹ She testified that the Lake Nasworthy Dam outlet is a superior instream flow requirement measuring point to the Bell Street Dam location advocated by Protestants. Ms. Myrick explained that measuring the flows at the Bell Street gage, which is downstream on the Concho River, would not protect the South Concho, and would not be accurate because flows would also be coming in from the North Concho River upstream. Also, the restrictions would not necessarily be protective on the Concho River because water right holders downstream of Bell Street can take this water under their water right.¹⁰⁰

Dr. Brandes agreed that Nasworthy Dam is the logical place to measure the flows for this environmental review for the stream impacted by the 1318C Draft Amendment.¹⁰¹

The ALJ finds that the weight of the evidence on this issue supports measuring instream flow at the Lake Nasworthy Dam outlet as proposed in the 1318C Draft Amendment.

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

The Application and the 1318C Draft Amendment propose no increase in the amount of water that is authorized to be stored or diverted under COA 14-1318.¹⁰² They each similarly propose no increase in any diversion rate that is associated with COA 14-1318.¹⁰³ The

⁹⁸ CONCHO 1318C PFT Ex. 7 at 19:1-3; Tr. at 200:23 - 201:1.

⁹⁹ ED 1318C Ex. 8 at 1 and ED 1318C Ex. 9.

¹⁰⁰ Tr. at 275:13 – 24, 277:1–24, 282:17–25, 293:7–18, and 331:13 – 332:25.

¹⁰¹ Tr. at 99:4 – 100:16.

¹⁰² SA 1318C Ex. 1 at 12:14; SA 1318C Ex. 2 at 14:1-3, 28:1-23; ED 1318C Ex. 12 at 3:18-19.

¹⁰³ SA 1318C Ex. 2 at 14:6-8 and 28:22 – 29:2; ED 1318C Ex. 12 at 3:18-19.

Application proposes a clarifying change to COA 14-1318¹⁰⁴ and the 1318C Draft Amendment reflects as much.¹⁰⁵ As a result, the changes requested in the Application, and proposed in the 1318C Draft Amendment, could not cause adverse impacts to any other water rights in the Concho River Basin.¹⁰⁶ For these reasons, and as further shown below, the Application complies with all applicable provisions of the Texas Water Code and TCEQ rules.¹⁰⁷

Because the Application does not contemplate any new or increased appropriation, not all provisions of TWC § 11.134 logically apply.¹⁰⁸ Nevertheless, the evidence demonstrates that the Application and 1318C Draft Amendment satisfy each provision of TWC § 11.134, as well as the corresponding TCEQ rules.¹⁰⁹

A. The Requested Amendment Requires No Unappropriated Water¹¹⁰

Under TWC § 11.134(b)(2), the Commission shall grant the Application if unappropriated water is available in the river basin.¹¹¹ Unappropriated water is a reference to streamflow at a particular location that is not currently legally appropriated by an existing water right.¹¹² 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.¹¹³

As set out above, the Application is not a request for any additional appropriation of State water, either by additional diversion authorization, additional storage authorization, or increasing

¹⁰⁴ SA 1318C Ex. 2 at 13:15-19 and 28:21-22.

¹⁰⁵ SA 1318C Ex. 2 at 23:1-11.

¹⁰⁶ ED 1318C Ex. 12 at 4:9-17

¹⁰⁷ SA 1318C Ex. 2 at 36:20 - 37:2.

¹⁰⁸ SA 1318C Ex. 2 at 30:4-6.

¹⁰⁹ SA 1318C Ex. 1 at 15:9-10; SA 1318C Ex. 2 at 36:9 – 37:1

¹¹⁰ TWC § 11.134(b)(2); 30 TAC § 297.41(a)(2).

¹¹¹ TWC § 11.134(b)(2).

¹¹² SA 1318C Ex. 2 at 30:9-11; 30 TAC § 297.1(54).

¹¹³ 30 TAC § 297.42(a).

any applicable diversion rate.¹¹⁴ Considered another way, the Application and the 1318C Draft Amendment require no unappropriated State water to accommodate the request.¹¹⁵ Accordingly, the requested amendment satisfies this statutory and corresponding regulatory requirement.

B. The Draft Amendment Proposes No Change in the City's Beneficial Use of Water Lawfully Impounded and Diverted Pursuant to COA 14-1318¹¹⁶

The evidence demonstrates that the Application and the 1318C Draft Amendment propose no change to the beneficial use of State water that has already been authorized pursuant to COA 14-1318. Therefore, there is no appropriation requested in the Application, or proposed by the 1318C Draft Amendment, that would offend TWC § 11.134(b)(3)(A). The requested amendment satisfies these statutory and corresponding regulatory requirements.

C. The Proposed Amendment Will Not Impair Existing Water Rights or Vested Riparian Rights¹¹⁷

As demonstrated throughout the hearing, the Application and the 1318C Draft Amendment propose no new or increased appropriation of State water.¹¹⁸ The language proposed in the 1318C Draft Amendment works instead to ensure that the City stores and diverts only the amount of water it is authorized to appropriate pursuant to COA 14-1318, and therefore passes all water to which downstream senior and superior water rights are entitled.¹¹⁹ In addition to the protections afforded to all water rights holders by the clarification requested by the Application, the 1318C Draft Amendment makes clear that the City can only store water in accordance with the Accounting Plan.¹²⁰ This protective feature in the 1318C Draft Amendment

¹¹⁴ SA 1318C Ex. 1 at 12:14; SA 1318C Ex. 2 at 14:1-3, 14:6-8 and 28:1-29:3; ED 1318C Ex. 12 at 3:15-26; see also *City of Marshall*, 206 S.W.3d 97, 108 (Tex. 2006).

¹¹⁵ SA 1318C Ex. 2 at 29:2-3, 30:14-17, 31:17-19; ED 1318C Ex. 12 at 3:18-19; Tr. at 25:20-23 and 336:11-23.

¹¹⁶ TWC § 11.134(b)(3)(A); 30 TAC § 297.41(a)(3)(A).

¹¹⁷ TWC § 11.134(b)(3)(B); 30 TAC § 297.45.

¹¹⁸ SA 1318C Ex. 1 at 12:14; SA 1318C Ex. 2 at 14:1-3, 14:6-8, 28:1-29:2; ED 1318C Ex. 12 at 3:18-19; Tr. at 25:20-23 and 336:11-23.

¹¹⁹ SA 1318C Ex. 2 at 17:1-5, 23:18-24:2; Tr. at 336:11-23.

¹²⁰ SA 1318C Ex. 1-E at 3.

is important, as the Watermaster will be charged with administering the Accounting Plan for this water right.¹²¹ As reiterated throughout the hearing on the Application, the Watermaster determines what water the City will be authorized to store and divert pursuant to its water rights, and what water senior and superior water right holders will be authorized to divert pursuant to their respective water rights.¹²² The Watermaster therefore provides protection from impairment to other water rights in the Concho River Basin,¹²³ and the Accounting Plan proposed in the 1318C Draft Amendment would give the Watermaster an effective tool to assist in managing the water rights within the basin.¹²⁴

The ED's witness Mr. Densmore conducted a "no injury" analysis that supports this conclusion.¹²⁵ He found that no other water rights will be harmed if 1318C Draft Amendment is approved because the Application does not request authorization to store or divert additional water; the Application relates to a water right in a Watermaster area; the 1318C Draft Amendment includes special conditions requiring maintenance of the gages used to measure inflow and specific procedures that the Applicant would follow if a gage or gages could not be used; and the Application is subject to an Accounting Plan.

Accordingly, the proposed 1318C 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.¹²⁶

¹²¹ ED 1318C Ex. 19 at 4:28; Tr. at 318:14-15.

¹²² Tr. at 34:4-7 and 318:15-17.

¹²³ SA 1318C Ex. 2 at 28:16-17.

¹²⁴ Tr. at 342:15-17.

¹²⁵ ED 1318C Ex. 12 at 4:9-20.

¹²⁶ SA 1318C Ex. 1 at 12:14; SA 1318C Ex. 2 at 14:1-3, 6-8, and 28:1-29:2; Tr. at 25:20-23, 336:11-23.

D. The Proposed Amendments Will Not be Detrimental to the Public Welfare¹²⁷

By resolving the “normal flow” ambiguity contained in COA 14-1318,¹²⁸ the City and other water right holders in the Concho River Basin stand to gain by clarification of which flows the City is entitled to store and which flows must be passed to satisfy downstream senior and superior water rights.¹²⁹ Water right holders will not be harmed by this Application because the Watermaster will enforce the Accounting Plan which will protect downstream water rights.¹³⁰ The 1318C Draft Amendment therefore benefits the public welfare.¹³¹ Accordingly, there is no appropriation proposed in either the Application or the 1318C Draft Amendment that would be detrimental to the public welfare, and they each satisfy these statutory and regulatory requirements.¹³²

E. The Proposed Amendments Satisfy the Requirements of TWC § 11.134(a)(3)(D) Regarding Environmental Protection¹³³

Neither the Application nor the 1318C Draft Amendment proposes any appropriation of water that would implicate or adversely affect instream flows, fish and wildlife habitat, water quality, or existing groundwater resources or groundwater recharge.¹³⁴ Notwithstanding this fact, the 1318C Draft Amendment would provide a minimum flow of water in the South Concho River at the Lake Nasworthy Dam outlet for the maintenance of instream uses.¹³⁵ These minimum flow requirements were designed by TCEQ staff based on water quality, aquatic and riparian habitat, and recreational use considerations.¹³⁶ These minimum flow requirements help

¹²⁷ TWC § 11.134(b)(3)(C); 30 TAC § 297.41(a)(3)(C).

¹²⁸ SA 1318C Ex. 2 at 24:13-18.

¹²⁹ SA 1318C Ex. 1 at 8:4-10, 15:10-13; SA 1318C Ex. 2 at 13:8-11; Tr. at 106:6-14.

¹³⁰ ED's Closing Arguments at 8.

¹³¹ SA 1318C Ex. 2 at 32:2-9.

¹³² SA 1318C Ex. 2 at 32:2-3.

¹³³ TWC § 11.143(b)(3)(D); 30 TAC § 297.41(a)(3)(D).

¹³⁴ SA 1318C Ex. 2 at 32:10-14.

¹³⁵ SA 1318C Ex. 1-E at 4.

¹³⁶ Tr. at 283:1-7, 283:16-20.

ensure that instream uses of the South Concho River, including fish and wildlife habitat, are maintained following the issuance of the 1318C Draft Amendment.¹³⁷ The requested amendment accordingly satisfies these statutory and regulatory requirements.¹³⁸

Protestants point statements by John Botros, Aquatic Scientist with TCEQ's Resource Protection Team, in his January 9, 2007 memorandum that Applicant's proposed language deleting the phrase "at all times" "does not necessarily provide protection of the environment as well as the existing language."¹³⁹ The ED's witness Ms. Myrick testified that she agrees with Mr. Botros' conclusions and a requirement for instream flows, but did not say that she necessarily agreed with every statement in Mr. Botros' memorandum. However, Ms. Myrick agreed that streamflow restrictions were necessary to protect the South Concho River, which is the point of impact from the Application, because "there could be a possible impact to the environment."¹⁴⁰

Under Section 11.134(b)(3)(D), the TCEQ must find that the proposed appropriation 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. The only possible applicable section to this application is Section 11.147(d), which requires the Commission "in its consideration of an application to store, take, or divert water," to "include in the permit, to the extent practicable when considering all public interest, those conditions considered by the Commission necessary to maintain existing instream uses and water quality of the stream or river to which the application applies."

Although this application is not to "store, take or divert" new water, Ms. Myrick performed an environmental review of the Application. She recommended that a minimum streamflow be kept in the river at the location of the City's diversion because the special condition relating to flows passed to downstream water rights was being re-worded. She used

¹³⁷ SA 1318C Ex. 2 at 28:3-6.

¹³⁸ SA 1318C Ex. 2 at 32:10-14.

¹³⁹ ED 1318C Ex. 10 at 3-4. Mr. Botros is no longer employed with TCEQ. ED 1318C Ex. 8 at 3:6-10.

¹⁴⁰ Tr. at 267: 9-11.

the Lyon's method to calculate these flows. The Lyon's method uses 40 percent and 60 percent of median flows at the nearest downstream gage. In October through February, 40 percent of the median flow must remain in the river, and in the other months, 60 percent of the median flow must remain in the river. The Lyon's method was compared to the 7Q2 flow, which is used by the Water Quality Section of the TCEQ, to calculate limits on pollutants for wastewater discharge permits. The Lyon's numbers were more stringent, and therefore were recommended for the streamflow restriction in the 1318C Draft Amendment.¹⁴¹

The 1318C Draft Amendment states that, in order to provide sufficient flows for the maintenance of instream uses, TCEQ staff concluded that the amendment requested in the Application should be accompanied by a requirement to pass all inflows into the Reservoir necessary to maintain stream flow at the Lake Nasworthy Dam outlet equal to or exceeding the following values in cfs:

Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
0.9	1.0	1.7	1.3	2.3	2.3	1.7	1.3	1.7	1.3	1.3	1.0

All inflows up to these amounts must be passed downstream for the environment.¹⁴²

F. The Proposed Amendments Are Consistent with the State and the Approved Region F Regional Water Plans¹⁴³

Each of the Concho River Basin watercourse segments relevant to the Application are entirely within Tom Green County and Irion County.¹⁴⁴ In addition, the City is located within Tom Green County, where it serves as the county seat.¹⁴⁵ Tom Green County and Irion County

¹⁴¹ ED 1318C Ex. 8 at 3:19 – 4:24. Note that Mr. Botros prepared the initial analysis and memorandum for this application.

¹⁴² ED 1318C Ex. 7 at 4, Special Condition H of 1318C Draft Amendment.

¹⁴³ TWC § 11.134(b)(3)(E), (c); 30 TAC § 297.41(a)(3)(E) and (b).

¹⁴⁴ SA 1318C Ex. 2 at 33:4-6.

¹⁴⁵ SA 1318C Ex. 2 at 33:4.

are each wholly within the Region F Regional Water Planning area, as defined by the Texas Water Development Board (the TWDB).¹⁴⁶ The most recent regional water plan required of Region F was approved by the TWDB in 2006 and incorporated into the State Water Plan in 2007.¹⁴⁷

The evidence admitted during this contested case demonstrates that the amendment requested in the Application and proposed in the 1318B Draft Amendment does not conflict with any provision in the approved Region F Regional Water Plan or the State Water Plan.¹⁴⁸ Indeed, the requested amendment helps the City address its water supply needs in a manner that is consistent with both the approved Region F Regional Water Plan and the State Water Plan.¹⁴⁹ The amendment requested in the Application and proposed in the 1318B Draft Amendment, therefore satisfy these statutory and corresponding regulatory requirements.

G. The City Has Provided Evidence that Reasonable Diligence Will Be Used to Avoid Waste and Achieve Water Conservation¹⁵⁰

The City has demonstrated that it will use reasonable diligence to avoid waste and to achieve water conservation through its Water Utilities Department.¹⁵¹ 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.¹⁵² The City currently uses and will continue to use—pursuant to the 1318C Draft Amendment—water appropriated under COA 14-1318 for municipal purposes within its municipal water supply service area.¹⁵³ 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.¹⁵⁴

¹⁴⁶ SA 1318C Ex. 2 at 33:7-9.

¹⁴⁷ SA 1318C Ex. 2 at 33:13-17.

¹⁴⁸ SA 1318C Ex. 1 at 12:18-20; SA 1318C Ex. 2 at 32:14-18; ED 1318C Ex. 16 at 5:20-26.

¹⁴⁹ SA 1318C Ex. 1 at 12:14-16, 12:18-20; SA 1318C Ex. 2 at 32:18-21; ED 1318C Ex. 16 at 5:24-26.

¹⁵⁰ TWC § 11.134(b)(4); 30 TAC § 297.41(a)(4).

¹⁵¹ SA 1318C Ex. 1 at 11:4-7; SA 1318C Ex. 2 at 35:16-17.

¹⁵² SA 1318C Ex. 2 at 34:3-4.

¹⁵³ SA 1318C Ex. 1 at 9:16-18.

The proposed 1318C Draft Amendment, therefore satisfies these statutory and corresponding regulatory requirements.

VII. CONCLUSION

The ALJ finds that Applicant has met its burden of proving that 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. The ALJ further finds that issuance of Draft Amendment 14-1318C will not adversely impact the environment in the Concho River Basin or downstream water rights, which are protected by the Watermaster, the City's Accounting Plan, and the law. The Application should be granted.

The 1318C Draft Amendment, if approved, would not only remove the nebulous "normal flow" provision from the Certificate and replace it with the quantifiable "inflow" provision, but would also instill a series of additional protective features that would provide the Watermaster with the tools needed to ensure that water rights and the environment in the Concho River Basin are appropriately protected from impairment.

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 1318C Draft Amendment.

SIGNED October 27, 2010.



SHARON CLONINGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

¹⁵⁴ ED 1318C Ex. 16 at 4:20 – 5:19; SA 1318C Ex. 1 at 9:16-20 and 10:14-15; SA 1318C Ex. 1-D; SA 1318C Ex. 2 at 35:19-20.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



ORDER Application of the City of San Angelo to Amend Certificate of Adjudication No. 14-1318; SOAH Docket No. 582-10-0294; TCEQ Docket No. 2008-1617-WR

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) 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 29, 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. The San Angelo Water Supply Corporation (SAWSC) is the owner of Certificate of Adjudication 14-1318 (COA 14-1318).

2. COA 14-1318 authorizes the owner to maintain a dam and a 170,000 acre-foot 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.
3. The reservoir authorized by COA 14-1318 is known as Twin Buttes Reservoir (Reservoir).
4. The dam authorized by COA 14-1318 is known as Twin Buttes Dam (Dam).
5. 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.
6. The City is a wholesale and a retail water supplier.
7. The City has managed the Reservoir and its water supplies since the inception of the SAWSC.
8. The City acts on behalf of the SAWSC on many matters, including issues that involve COA 14-1318.
9. 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.
10. COA 14-1318 was issued by the Texas Water Commission in 1980 as a reflection of the owners' final, adjudicated claims to storage and diversion rights in the Reservoir.
11. Since it was issued in 1980, COA 14-1318 has contained Special Condition 5C, that currently states:

a conduit shall be constructed in the [Dam] with the inlet at elevation 1883.5 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate for the purpose of permitting the free passage of normal flow through the dam at all times and the passage of those waters to which the Department may determine lower appropriators are entitled.
12. The "Department" referenced in Special Condition 5C is a reference to the Texas Department of Water Resources, a predecessor agency to TCEQ.
13. In administering COA 14-1318, the City has had great difficulty quantifying "normal flow," as referenced in Special Condition 5C, in each and every instance that such a quantification was required.

14. With no scientifically-accepted meaning, the “normal flow” standard provides the City with no true means of consistently quantifying the precise volumes of water that it either is entitled to store in the Reservoir or is obligated to pass through the Dam to satisfy downstream senior and superior water rights.
15. According to the April 18, 2006 Revised Notice of an Application to Amend a Certificate of Adjudication, the City seeks to amend Special Condition 5C to state:

A conduit shall be constructed in the aforementioned dam with the inlet at elevation 1885.0 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate. Certificate holder shall permit and provide for the free passage of inflows to Twin Buttes Reservoir through the conduit in amounts to which lower appropriators are entitled as determined by the Watermaster or the commission based on streamflow gages located on upstream watercourses that the Watermaster or the commission considers appropriate for making such determinations.
16. According to the October 6, 2009 Notice of Hearing, the City seeks to amend Special Condition 5C to state:

A conduit shall be constructed in the aforementioned dam with the inlet at elevation 1885.0 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate. Owner shall permit the free passage of inflows through the Twin Buttes Reservoir via the conduit in such amounts as determined by the Watermaster or the Executive Director for downstream water right holders and domestic and livestock users.
17. Each of the Concho River Basin watercourse segments that are relevant to the Application are found entirely within Tom Green County and Irion County.
18. The City is located within Tom Green County, where it serves as the county seat.
19. 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 (the TWDB).
20. The most recent regional water plan required of Region F was submitted to the TWDB in 2006.
21. 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.
22. The City has completed and returned all TWDB groundwater and surface water use surveys undertaken by the TWDB since September 1, 2001.

PROCEDURAL HISTORY

23. On behalf of the SAWSC, the City filed "Application No. 14-1318C to Amend Certificate of Adjudication No. 14-1318, Middle Concho River, Colorado River Basin, Tom Green County" (Application) with the TCEQ on March 30, 2005.
24. Public notice of the Application was mailed to the 936 downstream water right holders within the Colorado River Basin on August 25, 2005.
25. The Commission received requests for a public hearing on the Application.
26. On October 12, 2005, TCEQ staff requested that the City submit a "scientific definition" of normal flow.
27. After conferring with its hydrologic consultant, the City reported to TCEQ staff that it knew of no scientifically-accepted definition of "normal flow." The City instead proposed language to TCEQ staff designed to accommodate the concerns of those who had protested the Application.
28. On February 9, 2006, TCEQ staff acknowledged the City's amendment to the Application.
29. On April 5, 2006, TCEQ staff declared the Application as amended to be administratively complete.
30. TCEQ staff filed the Application with the Office of the Chief Clerk on April 5, 2006.
31. On April 18, 2006, a revised notice of the amended Application was mailed to downstream water right owners in the Colorado River Basin.
32. Notice of the Application was published in the *San Angelo Standard-Times*, a daily newspaper published in Tom Green County, Texas, on April 28, 2006.
33. In response to the Application, TCEQ staff issued a proposed draft amendment to COA 14-1318 (the 1318C Draft Amendment).
34. The Commission referred the Application to the State Office of Administrative Hearings (SOAH) for a contested case hearing.
35. Notice of the preliminary hearing was mailed on October 6, 2009, to all persons who had requested a hearing on the Application.
36. 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.

37. On January 20, 2010, the South Concho Irrigation Company withdrew as a party to the proceeding.
38. The evidentiary hearing was held June 29, 2010, in Austin, Texas.
39. The record closed August 30, 2010, after the parties submitted written closing arguments and replies.

THE APPLICATION

40. The Application includes a request to amend COA 14-1318 to clarify what water the City is authorized to store in the Reservoir and what flows the City is obligated to pass to those downstream diverters who are legally entitled to them.
41. The Application does not request a new or additional appropriation of State water.
42. The Application does not request any change to any maximum diversion rates currently authorized by COA 14-318.
43. The Application does not request the authority to impound any additional volumes of State water than are currently authorized by COA 14-1318.
44. The Application does not propose a change in the beneficial use of water to which COA 14-1318 already authorizes.
45. 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.
46. As part of the Application, the City submitted the *City of San Angelo Water Rights Accounting Plan* (Accounting Plan).
47. As part of the Application, the City also submitted the *City of San Angelo Water Conservation and Drought Contingency Plan* (Water Conservation Plan).
48. Multiple members of the TCEQ technical staff conducted independent reviews of the Application during the technical review process.
49. As part of the technical review of the Application, TCEQ staff conducted an analysis of the potential impacts from the City's requested amendments on water rights within the Colorado River Basin, also known as a "no injury" analysis.
50. TCEQ staff, as part of their technical review of the Application, attempted to determine what "normal flow" would be on the Concho River at the Reservoir, but could not quantify "normal flow" in that context.

51. As part of the technical review of the Application, TCEQ staff compared “normal flow” with “base flow” and determined that, under both approaches, quantification of flows was difficult.
52. TCEQ staff recognized that the same difficulties inherent in quantifying “normal flows” were addressed in the adjudication process required by the Water Rights Adjudication Act of 1967.
53. As part of the technical review, TCEQ staff also conducted an assessment of potential environmental impacts that might be attributable to the amendment requested in the Application.
54. TCEQ staff considered the Lyons’ method in their evaluation of minimum stream flows that must be maintained in the stream segments to protect instream uses.
55. TCEQ staff also considered the 7Q2 method in the evaluation of potential water quality impacts that might be attributable to the amendment requested in the Application.
56. TCEQ staff concluded that the point of potential environmental impact that might be attributable to the amendment requested in the Application would be at the Dam.
57. In considering the potential environmental impacts that might be attributable to the amendment requested in the Application, TCEQ staff considered water quality, aquatic and riparian habitat, and recreational uses.
58. Using a combination of Lyons’ method and 7Q2, TCEQ staff calculated minimum instream flow requirements that it concluded would appropriately address any potential environmental impacts that might be attributable to the amendments requested in the Application.
59. TCEQ staff determined that the Lake Nasworthy Dam outlet would be a superior point to measure the minimum instream flow requirements that it determined were appropriate during its review of the Application, as it was the nearest measuring device downstream from the Dam.
60. In order to provide sufficient flows for the maintenance of instream uses, TCEQ staff concluded that the amendment requested in the Application should be accompanied by a requirement to pass all inflows into the Reservoir necessary to maintain stream flow at the Lake Nasworthy Dam outlet equal to or exceeding the following values in cfs:

Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
0.9	1.0	1.7	1.3	2.3	2.3	1.7	1.3	1.7	1.3	1.3	1.0

61. The minimum instream flow requirements were developed to ensure that fish and wildlife habitat, water quality, and instream uses in the Colorado River Basin would not be adversely impacted by the amendment proposed in the Application, and were developed to require that such flows be passed at all times to the extent such inflows into the Reservoir equaled or exceeded those values.
62. TCEQ staff reviewed the Accounting Plan as part of its technical review of the Application and TCEQ hydrology staff determined that the Accounting Plan proposed by the City in its Application is acceptable.
63. The Accounting Plan establishes a reliable, consistent methodology for calculating the specific quantities of water that the City would be entitled to store in the Reservoir, and that it would be obligated to pass through the Dam to satisfy the calls of downstream senior and superior water rights.
64. The Accounting Plan is a water rights accounting tool that provides a multi-water rights holder like the City with a procedural mechanism for managing the terms and conditions of each water right covered by the plan.
65. The Concho Watermaster (Watermaster) will administer the Accounting Plan.
66. The Accounting Plan provides the Watermaster with an efficient mechanism for ensuring that diversions, impoundments, and releases undertaken by the City are charged against the appropriate water rights.
67. The Accounting Plan ensures that other water rights in the Concho River Basin are not impacted by the City's exercise of its own water rights.
68. The reliable, consistent methodology established in the Accounting Plan is based on the determination of Total Reservoir Flow, or "inflows," flowing into the Reservoir.
69. The term "inflows" in the context of the Application and the 1318C Draft Amendment is a term used to describe 100 percent of the river flow that makes its way into the Reservoir at any given time.
70. The various types of flow that make up a river flow hydrograph—"normal flow," "base flow," "storm flow" or "average flow"—are subcomponents of "inflow."
71. The Accounting Plan, in coordination with the 1318C Draft Amendment, would remove the requirement of continually parsing the "normal flow" component of the total flows into the Reservoir, and would replace it with the much simpler, standard procedure used throughout the Colorado River Basin and the State.

72. The Accounting Plan relates to the amendment requested in the Application by helping to calculate, and account for, how much of the inflows the City would be authorized to impound in the Reservoir and how much of the inflows the City would be obligated to pass through the Dam to meet the calls of downstream senior and superior water rights.
73. TCEQ staff and the Watermaster reviewed the Accounting Plan and agreed that the Accounting Plan gives the City and the Watermaster the necessary tools for determining on a daily basis that the City is properly accounting for storage and diversions made pursuant to each of its water rights, and is therefore diverting and impounding only the water to which it is entitled.
74. A Water Conservation Plan review was not required for the Application. Nevertheless, the City's Water Conservation Plan meets the requirements of the Texas Water Code and the TCEQ rules.
75. The amendment requested in the Application and proposed in the 1318C Draft Amendment does not conflict with any provision in the approved Region F Regional Water Plan, or the State Water Plan.
76. The amendment requested in the Application and proposed in the 1318C Draft Amendment is consistent with the State Water Plan and the approved Region F Regional Water Plan.
77. Following TCEQ staff's technical review of the Application, the staff issued the 1318C Draft Amendment and recommended that the Application be approved.

THE 1318C DRAFT AMENDMENT

78. The 1318C Draft Amendment prepared by TCEQ staff would revise COA 14-1318 Special Condition 5C to state:

A conduit shall be constructed in the aforementioned dam with the inlet at elevation 1,885.0 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate. Owner shall permit the free passage of inflows through Twin Buttes Reservoir via the conduit as required by Special Condition 2.C. of Certificate of Adjudication No. 14-1318C, and in such amounts as determined by the Watermaster or the Executive Director for downstream water right holders and livestock users.

79. The City supports the language proposed by TCEQ staff in the 1318C Draft Amendment.

80. The “inflow” approach incorporated into the 1318C Draft Amendment would clarify the scope of COA 14-1318 not only by removing the ambiguous “normal flow” standard, but also by simplifying the methodology for determining the City’s impoundment rights and pass-through obligations.
81. The 1318C Draft Amendment would incorporate the Accounting Plan directly into the terms of the amended certificate.
82. The integration of the Accounting Plan into the 1318C Draft Amendment would provide the Concho Watermaster with a clearly defined diversion, storage, and pass-through protocol for determining what flows must be passed to satisfy the calls of downstream senior and superior water rights.
83. The 1318C Draft Amendment requires the City to take certain steps to fully restore, or find suitable substitutes, for the gages referenced in the Accounting Plan if any such gage becomes inoperable. The 1318C Draft Amendment then requires the City to revise the Accounting Plan under such circumstances and notify the TCEQ of such changes.
84. The 1318C Draft Amendment includes proposed minimum instream flow requirements, to be measured at the Lake Nasworthy Dam outlet, that are designed to ensure that the instream uses of the South Concho River are maintained after issuance and implementation of the 1318C Draft Amendment.
85. The 1318C Draft Amendment makes clear that the City must coordinate with, and obtain approval from, the Watermaster before the City may make any diversions of State water pursuant to the amended certificate.
86. The 1318C Draft Amendment allows the City to only impound water in the Reservoir in accordance with the protocol established in the Accounting Plan.
87. The Watermaster cannot authorize any diversions or impoundments under the 1318C Draft Amendment if doing so would result in the impairment of other water rights or contravene the terms and conditions of the amended certificate or the Accounting Plan.
88. Resolving the “normal flows” ambiguity in COA 14-1318 through issuance of the 1318C Draft Amendment will clarify which flows the City is entitled to store and which flows must be passed through to satisfy downstream senior and superior water rights.

CONCLUSIONS OF LAW

1. The 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 on TCEQ contested cases referred to it by the TCEQ pursuant to TEX. GOV'T CODE ANN. § 2003.047 and TEX. WATER CODE ANN. § 5.311.
3. The State of Texas owns all water in every river, natural stream, and lake in the state, which includes the South Concho River, tributary to the Colorado River, Colorado River Basin. TEX. WATER CODE ANN. § 5.311.
4. The City must obtain authority from the TCEQ to amend COA 14-1318 in the manner provided for in the Application and in the 1318C Draft Amendment. TEX. WATER CODE ANN. § 11.122.
5. The Commission is required to approve a water right amendment application if the application 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).
6. 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 Application. TEX. WATER CODE ANN. § 11.134(b)(2) and 30 TAC § 297.41(a)(2).
7. 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).
8. The City will beneficially use water diverted pursuant to the terms and conditions of the 1318C Draft Amendment, and the amendments made therein are not detrimental to the public welfare. TEX. WATER CODE ANN. § 11.134(b)(3)(A) and 30 TAC § 297.41(a)(3)(A).
9. The terms and conditions of the 1318C 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)(3)(B) and 30 TAC § 297.41(a)(3)(B).
10. The terms and conditions of the 1318C Draft Amendment are not detrimental to the public welfare. TEX. WATER CODE ANN. § 11.134(b)(3)(C) and 30 TAC § 297.41(a)(3)(C).

11. The amendment requested in the Application and proposed in the 1318C Draft Amendment will not adversely affect instream flows, fish and wildlife habitat, water quality, or existing groundwater resources or groundwater recharge. TEX. WATER CODE ANN. § 11.134(b)(3)(D) and 30 TAC § 297.41(a)(3)(D).
12. The amendment requested in the Application and proposed in the 1318C 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(b)(3)(E) and 30 TAC § 297.41(a)(3)(E).
13. 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. TEX. WATER CODE ANN. § 11.134(b)(4) and 30 TAC § 297.41(a)(4).
14. 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).
15. 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).
16. Pursuant to the terms and conditions of the 1318C 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).
17. The City has demonstrated that the Application satisfies each applicable statutory and regulatory requirement.
18. The evidence admitted in this case supports granting the Application and issuing the 1318C Draft Amendment.

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

1. The Application be approved in accordance with the attached Draft Amendment.
2. The Chief Clerk of the Commission will 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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**DRAFT**AMENDMENT TO
CERTIFICATE OF ADJUDICATION

CERTIFICATE NO. 14-1318C

TYPE: 11.122

Owner:	San Angelo Water Supply Corporation	Address:	P.O. Box 1928 San Angelo, Texas 76902
Filed:	April 5, 2006	Granted:	
Purpose:	Municipal and Agricultural (Irrigation)	County:	Tom Green
Watercourse:	Middle Concho River, Spring Creek, and South Concho River, Tribinaries of the Colorado River	Watershed:	Colorado River Basin

WHEREAS, Certificate of Adjudication No. 14-1318 authorizes the Owner to divert and use not to exceed 25,000 acre-feet of water per year from Twin Buttes Reservoir on the Middle Concho River, Spring Creek, and the South Concho River 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

WHEREAS, Owner is also authorized to divert and use not to exceed 29,000 acre-feet of water per year from Twin Buttes Reservoir for municipal purposes; and

WHEREAS, the time priority of this water right is May 6, 1959; and

WHEREAS, Certificate of Adjudication No. 14-1318 contains multiple special conditions; and

WHEREAS, Special Condition 5.C. of the Certificate states that a conduit shall be constructed in the aforesaid dam with the inlet at elevation 1,885.00 feet above mean sea level, having an opening of 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; and

WHEREAS, on March 30, 2005, the Owner submitted an application to amend Certificate of Adjudication No. 14-1318 in order to modify Special Condition 5.C. to read "a conduit shall be constructed in the aforementioned dam with the inlet at elevation 1,885.0 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate. Certificate holder shall permit and provide for the free passage of inflows to Twin Buttes Reservoir through the conduit in amounts to which lower appropriators are entitled as determined by the Watermaster or the commission based on streamflow gages located on upstream watercourses that the Watermaster or the commission considers appropriate for making such determinations"; and

Original Exhibit

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EXHIBIT

14-1318C-7

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WHEREAS, the Texas Commission on Environmental Quality finds that jurisdiction over the application is established; and

WHEREAS, this amendment, if granted, is subject to requirements and orders of the Concho Watermaster; and

WHEREAS, the Executive Director recommends the Commission grant Certificate of Adjudication No. 14-1318C if Special Condition 5.C. is modified to read "A conduit shall be constructed in the aforementioned dam with the inlet at elevation 1,885.0 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate. Owner shall permit the free passage of inflows through Twin Buttes Reservoir via the conduit as required by Special Condition 2.C. of Certificate of Adjudication No. 14-1318C, and in such amounts as determined by the Watermaster or the Executive Director for downstream water right holders and domestic and livestock users"; and

WHEREAS, the Executive Director recommends additional special conditions be included in the permit; and

WHEREAS, the Owner submitted an accounting plan, the *City of San Angelo Water Rights Accounting Plan* that includes a method for determining inflows to Twin Buttes Reservoir; and

WHEREAS, review of the *City of San Angelo Water Rights Accounting Plan* has been conducted by staff including the Concho Watermaster and it is agreed that the plan will serve to clearly define a diversion process for the City and will give the Watermaster the ability to adjust for possible effects in the System; and

WHEREAS, the Executive Director recommends that the existing accounting plan be modified further by the Watermaster as needed to incorporate any additional accounting requirements necessary to ensure efficient administration of water rights; and

WHEREAS, forty-four (44) contested case hearing requests have been received; and

WHEREAS, the Commission has complied with the requirements of the Texas Water Code (TWC) and Rules of the Texas Commission on Environmental Quality in issuing this amendment;

NOW, THEREFORE, this amendment to Certificate of Adjudication No. 14-1318, designated Certificate of Adjudication No. 14-1318C, is issued to San Angelo Water Supply Corporation subject to the following terms and conditions:

1. CONSERVATION

Owner shall implement water conservation plans that provide for the utilization of those practices, techniques, and technologies that reduce or maintain the consumption of water, prevent or reduce the loss of waste or maintain or improve the efficiency in the use of water, increase the recycling and reuse of water, or prevent the pollution of water, so that a water supply is made available for future use or alternative uses. Such plans shall include a requirement that in every wholesale water contract entered into, on or after the effective date of this amendment, including any contract extension or renewal, that each successive wholesale customer develop and implement conservation measures. If the

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customer intends to resell the water, then the contract for resale of the water must have water conservation requirements so that each successive wholesale customer in the resale of the water shall be required to implement water conservation measures.

2. SPECIAL CONDITIONS

- A. Owner shall install measuring devices which accounts for, within 5% accuracy, the quantity of water diverted at each diversion point. Owner shall allow representatives of the TCEQ Concho Watermaster reasonable access to the property to inspect the measuring device.
- B. In lieu of Special Condition 5.C. in Certificate of Adjudication No. 14-1318, Special Condition 5.C. now states that a conduit shall be constructed in the aforementioned dam with the inlet at elevation 1,885.0 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate. Owner shall permit for the free passage of inflows through Twin Buttes Reservoir via the conduit as required by Special Condition 2.C. of Certificate of Adjudication No. 14-1318C, and in such amounts as determined by the Watermaster or the Executive Director for downstream water right holders and domestic and livestock users.
- C. Owner shall only store water in accordance with the *City of San Angelo Water Rights Accounting Plan*. Owner shall maintain electronic records (in spreadsheet or database format) of the accounting plan and shall submit them to the Executive Director upon request.
- D. The *City of San Angelo Water Rights Accounting Plan* may be modified at any time by the Watermaster or the Executive Director in pursuance of their statutory duties under Chapter 11 of the Texas Water Code, with prior notice to the Owner, if any modifications are deemed necessary. Should the accounting plan be modified, the modified accounting plan will supersede the accounting plan that was in effect prior to the modifications.
- E. This amendment is issued contingent upon the Owner's maintenance of and compliance with the *City of San Angelo Water Rights Accounting Plan*. Any modifications to the *City of San Angelo Water Rights Accounting Plan* shall be approved by Watermaster or any other Executive Director staff. Any modification of the plan that changes the Certificate terms must be in the form of an amendment to the Certificate. Should the Owner fail to maintain the accounting plan or notify the Executive Director of any modifications to the plan, Owner shall immediately cease diversion operations and either apply to amend the certificate, or voluntarily forfeit this amendment. If Owner fails to amend the accounting plan or forfeit this amendment, the Commission may begin proceedings to cancel the amendment. The Commission shall be notified immediately by the Owner upon modification of the accounting plan and provided with copies of the appropriate documents effectuating such changes.

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F. Owner shall ensure that the USGS stream gages, 08128000, 08128400, 08130700, and 08131400, referenced in the accounting plan in Special Condition 2.C. above and used in determining the inflow into Twin Buttes Reservoir, be maintained through the owner's existing contractual arrangement with the U.S. Geological Survey (USGS) or another owner of the gages. Should owner fail to ensure through owner's contractual arrangement with the USGS, or another owner of the gages, that the gages are adequately maintained as necessary to comply with the accounting plan, the Commission may begin enforcement proceedings against the owner.

G. Authorization herein is subject to the continued compliance with Special Condition 2.F. above. Should the gages used in the accounting plan become inoperable, Owner shall immediately notify the Commission, and submit an interim alternative plan for calculating inflow into Twin Buttes Reservoir during the period while the gages are inoperable. Within 20 days following the initial notice to the Commission of inoperable gages, Owner shall submit to the Commission a plan and schedule for either fully restoring the inoperable gages or using different gages for calculating inflows into Twin Buttes Reservoir. Should different gages be used, Owner shall, within 10 days, develop and submit a revision to the *City of San Angelo Water Rights Accounting Plan* incorporating the new gages and the Commission shall be provided with copies of the appropriate documents effecting such changes.

H. In order to provide sufficient flows for the maintenance of instream uses, the Owner shall pass all inflows into Twin Buttes Reservoir necessary to maintain streamflow at the Lake Nasworthy dam outlet equal to or exceeding the following values in cubic feet per second:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
0.9	1.0	1.7	1.3	2.3	2.3	1.7	1.3	1.7	1.3	1.3	1.0

I. Owner shall contact the Concho Watermaster prior to diversion of the authorized water.

This amendment is issued subject to all terms, conditions, and provisions contained in Certificate of Adjudication No. 14-1318, as amended, except as specifically amended herein.

This amendment is issued subject to all superior and senior water rights in the Colorado River Basin.

Owner agrees to be bound by the terms, conditions, and provisions contained herein and such agreement is a condition precedent to the granting of this amendment.

All other matters requested in the application which are not specifically granted by this amendment are denied.

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This amendment is issued subject to the Rules of the Texas Commission on Environmental Quality and to the right of continuing supervision of State water resources exercised by the Commission.

~~For the Counties of~~
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