State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

October 29, 2010

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

Re: SOAH Docket No. 582-10-0292; TCEQ Docket No.2009-0185-WR; In Re: Application No. 14-1298B by City of San Angelo for Amendment to Certificate of Adjudication No. 14-1298

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 18, 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. 2009-0185-WR; SOAH Docket No. 582-10-0292**. 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

Sharon Cloninger
Administrative Law Judge

SC/lh
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cc: Mailing List

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STYLE/CASE: CITY OF SAN ANGELO

SOAH DOCKET NUMBER: 582-10-0292

REFERRING AGENCY CASE: 2009-0185-WR

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ADMINISTRATIVE LAW JUDGE
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CONCHO RIVER BASIN WATER CONSERVANCY ASSOCIATION

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xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-10-0292
TCEQ DOCKET NO. 2009-0185-WR

APPLICATION NO. 14-1298B BY CITY OF SAN ANGELO FOR AMENDMENT TO CERTIFICATE OF ADJUDICATION NO. 14-1298	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

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APPLICATION NO. 14-1298B BY CITY OF SAN ANGELO FOR AMENDMENT TO CERTIFICATE OF ADJUDICATION NO. 14-1298	**§ § § § §**	**BEFORE THE STATE OFFICE OF 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 amend Certificate of Adjudication 14-1298 (Certificate or COA 14-1298). The City seeks to add a downstream diversion point on the west bank of the South Concho River, a tributary of the Concho River and the Colorado River, in the Colorado River Basin, and add the City's Municipal Water Supply System service area in Tom Green County as the place of use for the diverted water.[1]

The Executive Director (ED) of the Commission and the Office of Public Interest Counsel (OPIC) support the Application if additional language is added to the draft amendment (1298B Draft Amendment).[2] The Concho River Basin Water Conservancy Association and South Concho Irrigation Company (collectively, Protestants) oppose the Application because they believe its approval would be injurious to their water rights. Should approval of the Application be recommended, Protestants support the inclusion of OPIC's proposed language in the 1298B Draft Amendment and also propose additional language of their own.[3]

The Administrative Law Judge (ALJ) concludes the Application meets all applicable standards and rules and should be approved with the language as proposed by OPIC and the ED

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[1] *See* area maps at SA 1298B Ex. 2-C and SA 1298B Ex. 7.

[2] ED's Reply to Closing Arguments at 8; OPIC's Closing Arguments at 7.

[3] Protestants' Closing Arguments at 23-24; Protestants' Replies to Closing Arguments at 4-5, 8, and 10-11.

added to the 1298B Draft Amendment. For reasons set out below, the ALJ does not recommend inclusion of Protestants' proposed language in the 1298B Draft Amendment.

II. PROCEDURAL HISTORY AND JURISDICTION

The Application, filed with TCEQ on October 3, 2005,[4] requests an amendment to COA 14-1298 to add a downstream diversion point and add the City's Municipal Water Supply System service area in Tom Green County as the place of use.[5] On June 7, 2006, TCEQ staff declared the Application to be administratively complete.[6]

Staff issued the 1298B Draft Amendment which, if approved, would authorize the City to add the requested diversion point and use the diverted water for municipal purposes within the City's Municipal Water Supply System service area in Tom Green County under certain terms and conditions.[7]

Notice of the Application was mailed to interjacent water rights holders[8] on July 31, 2006.[9] TCEQ received requests for a contested case hearing and the Commission referred the Application to the State Office of Administrative Hearings (SOAH). Notice of the preliminary hearing was issued October 6, 2009.[10] At the October 27, 2009 preliminary hearing, the ED

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[4] Ex. ED-1298B-1 at 2:11-16; Ex ED-1298B-4.

[5] Ex. ED-1298B-A.

[6] Ex. ED-1298B-1 at 2:11-12; Ex. ED-1298B-4.

[7] Ex. ED-1298B-3.

[8] An interjacent water right holder is any person or entity that owns a water right between the previous diversion point and the requested new diversion point. Because the City's requested new diversion point is downstream from the existing diversion point, notice was sent to all water right owners between the furthest upstream diversion point and the requested new diversion point. Ex. ED-1298B-1 at 2:25-30.

[9] Ex. ED-1298B-1 at 2:19-24; Ex. ED-1298B-4.

[10] Ex. ED-1298B-A.

submitted jurisdictional exhibits[11] establishing the Commission's and SOAH's jurisdiction over the contested case and the ALJ admitted the following parties:

Party	Representative
City	Martin Rochelle and Jason Hill, Attorneys
Protestants	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 30, 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 Protestants; 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.[12]

III. THE APPLICATION

The City owns water rights under COA 14-1298, which authorizes diversion and use of 252.1 acre-feet of water per year at three distinct diversion points along the South Concho

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[11] Ex. ED-1298B-A and Ex. ED-1298-B.

[12] The ED asks the ALJ not to consider Protestants' closing arguments related to the concept referred to interchangeably in pre-filed testimony as carriage, conveyance, and transportation losses. ED's Reply to Protestants' Closing Arguments at 1. Prior to the hearing on the merits, the aforementioned pre-filed testimony was ruled irrelevant and stricken from the record. *See* Order No. 7 and Order No. 8. The ALJ will not consider Protestants' irrelevant argument and notes that the official record of evidence to be considered by the Commission does not include information as to carriage, conveyance, and transportation losses. *See* Protestants' Closing Arguments at 12, 22-23 and ED's Reply to Protestants' Closing Arguments at 2-6.

River.[13] The Certificate authorizes diversion for agricultural use of not to exceed 128.1 acre feet of water per year from a 50-acre-foot capacity reservoir on the South Concho River, by any of the owners singly or in aggregate, with a priority date of July 29, 1914.[14] The City may also divert the water for municipal purposes once a place of use is established. The Certificate further authorizes diversion of 124 acre-feet per year from two points on the South Concho River, with a priority date of October 8, 1931.[15]

Notwithstanding the appropriation made through COA 14-1298, the Certificate expressly prohibits the City from undertaking any diversions of the authorized 252.1 acre-feet until the City "submits an application to amend [COA 14-1298] to establish a place of use for the authorized water, and such application is subsequently granted."[16] The Application requests authorization for the City to divert all or a portion of the 252.1 acre-feet through the City's raw water intake facilities at Lone Wolf Reservoir. That is a point along the South Concho River where the City diverts water, pursuant to multiple water rights it holds, for purposes of drinking water treatment and subsequent distribution throughout its municipal water supply system.[17] This additional requested diversion point, if authorized, would become Diversion Point No. 4 (DP 4) in COA 14-1298.[18]

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[13] SA 1298B Ex. 2 at 13:15-18; SA 1298B Ex. 4 at 6:8-26; *see* COA 14-1298, as issued March 12, 1980, to one of its approximately 35 owners, and COA 14-1298A, issued October 27, 2004. Ex. ED-1298B-3. The evidence of record variously shows "between 20-30," "26," and "35" as the number of water right owners who are authorized to use the first diversion point.

[14] Ex. ED-1298B-A.

[15] Ex. ED-1298B-A.

[16] Ex. ED-1298B-A; SA 1298B Ex. 2 at 15:3-6; *see* page 3 of COA 14-1298A at Ex. ED-1298B-3.

[17] SA 1298B Ex. 2 at 15:22 – 16:5. The proposed diversion point is located on the west bank of the South Concho River bearing S85°E, 1,700 feet from the northwest corner of the Emil Hermes Survey No. 174, Abstract No. 349 in Tom Green County, also being at Latitude 31.447°N, Longitude 100.426°W. Ex. ED-1298B-A.

[18] SA 1298B Ex. 2 at 15:19-21.

The City does not request an increase in the diversion rate or the amount of water diverted.[19] With respect to the maximum diversion rate assigned to the 128.1 acre-foot portion of the authorization at the first diversion point, the Application is not a request for any increase in the City's shared 15.11 cubic feet per second (cfs) diversion rate.[20] Similarly, with respect to the remaining 124 acre-foot portion of the authorization, the Application is not a request for any increase in the City's authorized maximum 2.67 cfs and 1.0 cfs diversion rates at the second and third diversion points, respectively.[21]

IV. 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 citizens.[22] 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.[23] The ED is required to participate in all water rights hearings.[24]

A. Amendment Required to Change Diversion Point

TWC § 11.122(a) requires an amendment to change the point of diversion and place of use for a water right.

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[19] Ex. ED-1298B-A; SA 1298B Ex. 2 at 18:4-13; SA 1298B Ex. 4; Tr. at 76:13-19.

[20] SA 1298B Ex. 2 at 18:11-13; Tr. at 303:18-21.

[21] SA 1298B Ex. 2 at 18:11-13; Tr. at 303:18-21.

[22] TWC § 11.0235(a).

[23] TWC § 11.121.

[24] 30 TAC § 80.108(b)(1).

B. Criteria for Approval of Application

The Commission shall approve an amendment to an existing water right that does not increase the amount of water authorized for diversion or the authorized rate of diversion, as long as the requested change would not cause adverse impacts to other water rights holders or the environment of a greater magnitude than under the existing permit or certificate of adjudication. TWC § 11.122(b); 30 TAC § 297.45(b). Approval of an application under TWC § 11.122(b) is subject to the amendment meeting "all other applicable requirements."[25]

C. "No Injury" Rule

The "No Injury" Rule, found at 30 TAC § 297.45(a),[26] requires that the granting of an amendment to a water right shall not cause an adverse impact to an existing water right. Adverse impact to another appropriator includes:

- the possibility of depriving an appropriator of the equivalent quantity or quality of water that was available with the full, legal exercise of the existing water right before the change;
- increasing an appropriator's legal obligation to a senior water right holder; or
- otherwise substantially affecting the continuation of stream conditions as they would exist with the full, legal exercise of the existing water right at the time the appropriator's water right was granted.

D. Burden of Proof

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

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[25] *City of Marshall v. City of Uncertain et. al.*, 206 S.W.3d 97, 108-109 (Tex. 2006) (listing portions of TWC § 11.134(b) that apply to water rights amendments reviewed under TWC § 11.122(b)).

[26] *See also* TWC § 11.122(b).

E. "All Other Applicable Requirements" for Approval of the Application

Under TWC § 11.134(b),[27] the Commission may grant an 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;[28]

(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.

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[27] *See also* 30 TAC § 297.41.

[28] *See also* 30 TAC § 297.46.

F. Conditions and Restrictions

The Commission shall include conditions or restrictions in any water right or certificate of adjudication that, to the extent practicable when considering all public interests, are necessary to maintain existing instream uses and water quality of the applicable stream or river. TWC § 11.147(d); 30 TAC § 297.56. TCEQ shall also include conditions necessary to maintain fish and wildlife habitats. TWC § 11.147(e). The TCEQ may place stream flow restrictions and other conditions in the permit to protect the priority of senior water rights holders. TWC § 11.1351; 30 TAC § 297.45(e).

G. Water Conservation Plan

An applicant for an amendment to a water right must submit a water conservation plan to the Commission. TWC § 11.1271(a). Amendment applications seeking a change in place of use must include a water conservation plan. 30 TAC § 295.9(4)(d). The TCEQ rule found at 30 TAC § 297.50 outlines requirements for water conservation plans submitted with water rights applications.

V. BACKGROUND AND OVERVIEW

COA 14-1298 currently authorizes the diversion of water from three distinct diversion points: Diversion Point No. 1 (DP 1), Diversion Point No. 2 (DP 2), and Diversion Point No. 3 (DP 3).[29] The Certificate allows the City to divert up to 128.1 of the authorized 252.1 acre-feet each year from DP 1 under a priority date of July 29, 1914.[30] COA 14-1298 authorizes the City

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[29] SA 1298B Ex. 2 at 13:15 – 14:3; SA 1298B Ex. 4.

[30] SA 1298B Ex. 2 at 13:20-22; SA 1298B Ex. 4.

to divert the remaining authorized 124 acre feet from any combination of DP 2 and DP 3.[31] Diversions made from DP 2 and DP 3 each have a priority date of October 8, 1931.[32]

A. DP 1

DP 1—the furthest upstream of the three diversion points in COA 14-1298[33]—is located along the perimeter of a 50 acre-foot reservoir on the South Concho River.[34] As was described during the hearing, the diversion point itself is the headgate to a canal (Canal) that runs off-channel from the South Concho River for several miles before emptying back into the river upstream of Twin Buttes Reservoir.[35] Water diverted at DP 1 runs through the Canal and is available for irrigation use by the individual water right holders under the Certificate, including the City.[36] The Canal is managed by the South Concho Irrigation Company for its 35 members. The Canal also serves other users who take water from the Canal for domestic and livestock purposes.[37]

The City is currently authorized to use the diverted water for municipal purposes. If it is to treat and distribute the diverted water to its municipal customers, however, the City needs the proposed amendment, which will allow it to divert the water at proposed DP 4, where its raw water intake facilities are located, instead of at DP 1, DP 2, or DP 3.

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[31] SA 1298B Ex. 2 at 14:1-5; SA 1298B Ex. 4.

[32] SA 1298B Ex. 2 at 14:1-3; SA 1298B Ex. 4.

[33] SA 1298B Ex. 2-C.

[34] SA 1298B Ex. 2 at 14:6-7.

[35] Tr. at 66:18-22, SA 1298B Ex. 7.

[36] SA 1298B Ex. 2 at 14:6-12; Tr. at 67:25 – 68:1.

[37] Protestants 1298B PFT Ex. 1 at 1-3; Protestants 1298B PFT Ex. 1-A.

The Certificate expressly authorizes the water right holders singly or in combination to divert from DP 1 at a maximum rate of 15.11 cfs.[38] Regardless of how many of the individual water right owners are using water from the Canal at any given moment, the total aggregated rate of water being diverted into the Canal through DP 1 cannot exceed 15.11 cfs.[39]

Similarly, if only one of the individual water right owners—including the City—is using water from the Canal at a given moment, that individual water right owner would have the legal authority to use the entire authorized diversion rate for DP 1 of 15.11 cfs.[40] If the Application is approved, the City would be authorized to use the 15.11 cfs diversion rate, subject to approval by the Concho Watermaster (Watermaster), at the new DP 4.[41]

B. DP 2

DP 2 is located on the perimeter of an 8.44 acre-foot impoundment on the South Concho River between DP 1 and the point downstream where the Canal empties back into the river.[42] The City is currently authorized to divert a maximum aggregated volume of 124 acre-feet from DP 2 and DP 3.[43] COA 14-1298 expressly limits the maximum diversion rate at DP 2 to 2.67 cfs.[44] Unlike the City's maximum diversion rate at DP 1, the City does not share the 2.67 cfs maximum diversion rate at DP 2 with any other water right owner.[45]

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[38] SA 1298B Ex. 2 at 14:12-15; SA 1298B Ex. 4.

[39] SA 1298B Ex. 2 at 14:15-18; Tr. at 68:4-8.

[40] Tr. at 90:25 – 91:4, 91:12-15, 338:20-23, 340:16-20.

[41] Tr. at 339:18-23, 340:16 – 341:4.

[42] SA 1298B Ex. 2 at 14:18-20; SA 1298B Ex. 2-B.

[43] SA 1298B Ex. 2 at 14:3 -5; SA 1298B Ex. 4.

[44] SA 1298B Ex. 2 at 14:22 – 15:1; SA 1298B Ex. 4.

[45] SA 1298B Ex. 2 at 14:20-22; SA 1298B Ex. 4.

C. DP 3

DP 3 is located adjacent to DP 2 on the perimeter of the same 8.44 acre-foot impoundment.[46] Under COA 14-1298, the City is currently authorized to divert from DP 3 at a maximum rate of 1.0 cfs.[47] The City does not share the 1.0 cfs maximum diversion rate at DP 1 with any other water right owner.[48]

D. Proposed DP 4

DP 4, as proposed in the Application, is an existing diversion point that the City currently uses to divert raw water for treatment purposes from the South Concho River, pursuant to the terms of other water rights it owns.[49] The diversion point itself consists of two raw water intake structures[50] located on the west bank of an authorized impoundment known as the Lone Wolf Reservoir.[51] Through these intake facilities, the City diverts the volumes of State water that it has been appropriated through various water rights, treats the water, then distributes potable water throughout the City's municipal water supply system service area.[52] The City seeks through the Application the necessary amendment that would allow it to divert State water from DP 4 that has already been appropriated to the City through COA 14-1298, treat that water to applicable drinking water standards, and use it for municipal purposes throughout its municipal water supply system service area.[53]

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[46] SA 1298B Ex. 2 at 14:18-20; SA 1298B Ex. 2-B; SA 1298B Ex. 4.

[47] SA 1298B Ex. 2 at 15:1-2; SA 1298B Ex. 4.

[48] SA 1298B Ex. 2 at 14:20-22; SA 1298B Ex. 4.

[49] SA 1298B Ex. 1 at 7:8-10; SA 1298B Ex. 2 at 16:3-5, 9-11; Tr. at 44:15-24.

[50] Tr. at 33:9, 33:12-14.

[51] SA 1298B Ex. 2 at 16:9-11; SA 1298B Ex. 7; Tr. at 33:9.

[52] SA 1298B Ex. 2 at 16:3-11.

[53] SA 1298B Ex. 1 at 9:8-12; SA 1298B Ex. 2 at 16:6-8.

VI. COMPLIANCE WITH APPLICABLE LAW

A. Application Meets "No Injury" Rule Requirements

The amendments sought by the City would authorize it to divert State water already appropriated to it under COA 14-1298 at its existing raw water treatment plant intake facilities[54] to use for municipal purposes within the City's municipal water supply system service area.[55] Therefore, the Application, as reflected in the 1298B Draft Amendment, does not seek a new or additional appropriation of State water[56] and it does not seek any change to the existing maximum diversion rates already authorized by COA 14-1298.[57] As a result, the City argues, the amendments sought in the Application pose no adverse impact to water rights or the environment within the Colorado River Basin.[58]

TCEQ staff's technical review of the Application confirms that it poses no adverse impact on water rights or the environment.[59] The ED's Water Supply Division staff analyzed the potential impact of the City's requested amendments on water rights within the Colorado River Basin,[60] in part by using the TCEQ's Water Availability Model for the Colorado River Basin (WAM).[61]

In the opinion of both the ED's and the Applicant's hydrology experts, each of whom testified as to their respective intimate familiarity with it, the WAM is the best tool available for

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[54] SA 1298B Ex. 2 at 15:22 – 16:3.

[55] SA 1298B Ex. 2 at 15:13-21.

[56] SA 1298B Ex. 2 at 18:7-8, 32:11-14; Ex. ED-1298B-8 at 1; Tr. at 76:13-19.

[57] SA 1298B Ex. 2 at 18:11-13; Ex. ED-1298B-8 at 1; Tr. at 93:14-23.

[58] City's Closing Argument at 9, citing SA 1298B Ex. 2 at 37:10-12, 39:7-9, 40:1-5, 40:11-12, 41:5-6.

[59] SA 1298B Ex. 2 at 25:11-16, 35:18-22; Ex. ED-1298B-1 at 3:27 – 4:10; Ex. ED-1298B-5A at 5:1-30; Ex. ED-1298B-8 at 2; Ex. ED-1298B-9; Ex, ED-1298B-10.

[60] Ex. ED-1298B-8.

[61] Ex. ED-1298B-8 at 2.

assessing hydrological impacts of water rights amendment applications.[62] The WAM is a reliable indicator of how proposed amendments to current water rights might impact other water right holders in the river basin of concern.[63] When the ED's hydrology staff analyzes how other water rights might be impacted by an amendment, two WAM simulations are conducted. The first simulation does not include the requested amendment. The second includes information simulating the action requested to be authorized by the amendment.[64] The two simulations allow hydrologists to compare reliability for all water rights holders in the basin with and without the existence of the amendment. If the second simulation indicates some adverse impact, hydrology staff may either recommend that the application be denied or that certain special conditions be added to the certificate of adjudication to protect all senior water rights.[65]

To assess the impacts this Application would have on existing water rights, the ED's staff utilized a Full Authorization Simulation, also known as a WAM Run 3.[66] The Full Authorization Simulation models stream conditions as they would exist if all water right users in the Colorado River Basin utilized their maximum authorized amounts while returning none of the water into the basin.[67] By assuming full authorization, the model can predict whether the activity authorized by the Amendment would impact water resources throughout the basin in such a way as to impair the reliability of water for satisfaction of all other water rights.[68] After comparing reliability for all other water rights in the basin when the City diverts its water at DP 1, DP 2, and DP 3, and when the City diverts at DP 4, TCEQ staff found that the 1298B Draft Amendment

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[62] Tr. at 342:21-343:20.

[63] ED's Closing Argument at 6, citing Kathy Alexander Martin & Todd Chenoweth, *Determining Surface Water Availability*, *in* ESSENTIALS OF TEXAS WATER RESOURCES , note 24 at 220-21 (Mary K. Sahs, ed. 2009).

[64] ED's Closing Argument at 6, citing Alexander Martin & Chenoweth, *supra,* note 24 at 220.

[65] TWC § 11.1351.

[66] Tr. at 342:21-343:20.

[67] Ex. ED-1298B- 8 at 2. The ALJ notes that the WAM analysis takes into account all necessary and relevant channel loss data. ED' s Reply to Closing Arguments at 3, citing Alexander Martin & Chenoworth, *supra*, at 216.

[68] Ex. ED-1298B-8 at 2.

will have no practical impact on other water rights in the Colorado River Basin, including the rights claimed by Protestants.[69]

Despite the finding that the 1298B Draft Amendment would cause no injury to any other water right holder, the ED's hydrology staff recommended that certain special conditions be added to the 1298B Draft Amendment.[70] As pointed out by the City's expert witness, hydrologist Robert Brandes, Ph.D., the 1298B Draft Amendment developed by TCEQ staff contains multiple layers of protection designed to ensure that the City's exercise of the amended water right will not adversely impact water rights or the environment within the basin.[71] The special conditions recommended by the hydrology staff require that the City coordinate with and obtain approval from the Watermaster before diverting water under COA 14-1298;[72] that diversions only occur when there are inflows to Lone Wolf Reservoir; that diversions only occur at times when water is available at the three upstream diversion points;[73] that the City comply with *The City of San Angelo Water Rights Accounting Plan* (Accounting Plan);[74] and that any alteration to the Accounting Plan that would change the terms of COA 14-1298 must be made in the form of a formal water right amendment.[75] Due to the unique nature of COA 14-1298 with respect to the diversion rate at DP 1 shared with other water rights, TCEQ hydrology staff additionally recommended that the Certificate be expressly made junior in time priority to the water rights that share DP 1 and the 15.11 cfs diversion rate.[76]

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[69] Ex. ED-1298B-8 at 2; Tr. at 346:23 – 347:6.

[70] Ex. ED-1298B-8 at 2; Ex. ED-1298B-9 and Ex. ED-1298B-10.

[71] SA 1298B Ex. 2 at 27:16-18.

[72] SA 1298B Ex. 2 at 28:18-21; Tr. at 153:21-23. The Watermaster cannot authorize any diversions under the 1298B Draft Amendment if doing so would result in the impairment of other water rights or be in contravention to the terms and conditions of the amended Certificate. SA 1298B Ex. 2 at 30:16-22.

[73] SA 1298B Ex. 1-E, Special Condition 5.D.; SA 1298B Ex. 2 at 28:14-17.

[74] SA 1298B Ex. 1-E, Special Condition 5.F.; SA 1298B Ex. 2 at 30:7-15; SA 1298B Ex. 2-D.

[75] Ex. ED-1298B-3 at 3-4.

[76] SA 1298B Ex. 1-E at 2; SA 1298B Ex. 2 at 27:18-22; Tr. at 121:21-25.

Another unique aspect of the 1298B Draft Amendment is that it will neither authorize impoundment in Lone Wolf Reservoir nor authorize a diversion of stored water from Lone Wolf Reservoir. The requirement that there be inflows into Lone Wolf Reservoir when the City diverts water under COA 14-1298 is necessary to assure that the City does not divert stored water either intentionally or inadvertently. As testified to by Applicant's expert, water must be spilling over Lone Wolf Dam before and after a diversion under COA 14-1298 takes place at DP 4.[77] Under the Accounting Plan incorporated into the 1298B Draft Amendment, the City would be prohibited from diverting at DP 4 pursuant to the amended Certificate unless water were flowing over both the 50 acre-foot reservoir at DP 1 and the 8.44 acre-foot reservoir at DP 2 and DP 3.[78] In addition, the City would not be authorized to divert from DP 4 under the 1298B Draft Amendment unless specified minimum instream flow requirements were first satisfied upstream at the Lake Nasworthy Dam outlet.[79] Essentially, the City cannot divert water under the 1298B Draft Amendment unless Lone Wolf Reservoir is full and the river is flowing.[80]

The great weight of the evidence supports the City's and ED's expert witnesses' opinions that other water right holders would not be injured if the Application is granted. The ALJ finds that based on the WAM results and the special conditions included in the 1298B Draft Amendment, other water rights and the environment will not be adversely impacted if the Application is granted.

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[77] Tr. at 123:15 - 124:16; SA 1298B Revised Ex. 2-D, Page 28 of 30 (accord Tr. at 60:8-14); Tr. at 114:22 – 115:9.

[78] SA 1298B Ex. 2 at 28:21-23; SA 1298B Revised Ex. 2-D, Page 28 of 30 (accord Tr. at 60:8-14); Tr. at 96:17-21, 114:22 – 115:5.

[79] SA 1298B Ex. 1-E, Special Condition 5.E; *see* revised language at Tr. at 293:1-10, which states: "In order to provide sufficient flows for the maintenance of instream uses, diversions shall be limited to times when the stream flow at the Lake Nasworthy Dam outlet equals or exceeds the following values in cfs:" The values listed in the 1298B Draft Amendment were not revised,

[80] SA 1298B Ex. 1-E; SA 1298B Ex. 2 at 28:11-13.

B. Application Meets "All Other Applicable Requirements" Under TWC § 11.134(b)

1. Unappropriated Water Is Not Requested in the Application

Under TWC § 11.134(b)(2), unappropriated water must be available in the source of supply before a water right application may be granted by the Commission following a hearing.[81] Unappropriated water is a reference to stream flow at a particular location that is not currently legally appropriated by an existing water right.[82] 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.[83]

The Application is not a request for any additional appropriation of State water, either through additional authorized diversions or through an increase in any of the diversion rates associated with COA 14-1298.[84] The Texas Supreme Court has ruled that TWC § 11.134(b)(2) does not apply to an application for an amendment which will not increase the amount of water, or the rate at which the water is, to be diverted.[85] Therefore, from both a legal and a hydrologic perspective, whether unappropriated water is available in the Concho River Basin is not a factor relevant to the Application.[86]

Because the Application only requests the addition of a diversion point and a change in the place of use of water, and does not request a new appropriation of State water, the ED

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[81] *See also* 30 TAC § 297.41(a)(2).

[82] SA 1298B Ex. 2 at 31:21-22; 30 TAC § 297.1(54).

[83] 30 TAC § 297.42(a).

[84] SA 1298B Ex. 2 at 31:3-14, 32:16-20, 43:18-19; Ex. ED-1298B-8 at 1; Tr. at 76:13-19, 151:7-13, 167:19-21.

[85] *City of Marshall v. City of Uncertain,* 206 S.W.3d 97,108 (Tex. 2006).

[86] SA 1298B Ex. 2 at 32:11-14.

performed no analysis and made no determination regarding the availability of unappropriated water in his review.[87]

Based on the above evidence, the ALJ finds the Application does not request the use of unappropriated State water.

2. Water Diverted From DP 4 Is Intended for a Beneficial Use[88]

The municipal and irrigation uses currently authorized by COA 14-1298 have been found to be beneficial, as that term is defined by TWC § 11.002(4),[89] as evidenced by the Commission's previous authorization. The Application does not seek to change the purpose of use of State water authorized by COA 14-1298. Rather, the Application merely seeks to add locations for diversion and use to effectuate the previously-authorized addition of municipal use to the water right as amended in 2004.[90]

The City intends to use the water diverted from DP4 pursuant to the 1298B Draft Amendment for municipal use, which includes the use of water within the City's municipal water supply system service area for domestic, recreational, commercial or industrial purposes or for the watering of golf courses, parks and parkways.[91] This type of water use falls squarely within the types of uses of State water that are authorized by law.[92]

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[87] The titles of Exhibits ED-1298B-8, Ed-1298B-9, and ED-1298B-10 ("Water Availability Analysis" and "Water Availability Review Addendum") reflect an agency practice in labeling all hydrology memos with this title regardless of whether the memo reflects an actual analysis of water availability as that term is used in the TWC, agency rules, and applicable case law. ED's Closing Argument and Initial Post-Hearing Brief at 4, FN 18.

[88] TWC § 11.134(b)(3)(A); 30 TAC § 297.41(a)(3)(A).

[89] *See also* 30 TAC § 297.1(8).

[90] Certificate No. 14-1298A at Ex. ED-1298B-3.

[91] SA 1298B Ex. 2 at 33:11-21.

[92] SA 1298B Ex. 2 at 34:1-14.

Accordingly, the ALJ finds the Application and 1298B Draft Amendment satisfy this statutory and corresponding regulatory requirement.

3. The Proposed Amendments Will Not Impair Existing Water Rights or Vested Riparian Rights[93]

The City's expert hydrologist Dr. Brandes[94] and the ED's technical experts who reviewed the Application and considered its potential impacts on other water rights[95] determined the amendments sought in the Application would neither increase any appropriation already made to the City under COA 14-1298[96] nor increase any of the authorized diversion rates.[97] TCEQ staff's analysis confirmed the requested amendments would not impair any senior or superior water rights.[98]

Even so, the 1298B Draft Amendment contains protective features to ensure that the proposed amendments will not impair any water rights in the Concho River Basin.[99] In addition to the layers of protection directly expressed in the 1298B Draft Amendment, the proposed amended Certificate would also incorporate the Accounting Plan and its multiple additional protective features.[100] Also, the Watermaster, who administers the various water rights in the Concho River basin,[101] will decide whether the City is authorized to divert from DP 4 pursuant to the terms of the 1298B Draft Amendment.[102] Water right holders will not be harmed by this

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[93] TWC § 11.134(b)(3)(B); 30 TAC § 297.45(a) – (b).

[94] SA 1298B Ex. 2 at 35:13-18.

[95] SA 1298B Ex. 2 at 35:18-22; Ex. ED-1298B-8 at 2; Ex. ED-1298B-9 at 1.

[96] SA 1298B Ex. 2 at 18:7-8, 18:11-13, 31:3-7, 31:11-14; Ex. ED-1298B-8 at 1.

[97] SA 1298B Ex. 2 at 18:11-13, 31:11-14

[98] Tr. at 346:23 – 347:6.

[99] *See* "No Injury" Rule discussion at Section VI. A. of this Proposal for Decision, *supra*; *see also* SA 1298B Ex. 1-E; SA 1298B Ex. 2 at 27:4-8, 27:16-18, 35:13-18.

[100] SA 1298B Ex. 2 at 28:21-23; SA 1298B Revised Ex. 2-D at 28 (accord Tr. at 60:8-14); Tr. at 96:17-21, 114:22 – 115:5, 124:1-8.

[101] SA 1298B Ex. 2 at 30:20 – 31:2.

[102] Tr. at 42:25 – 43:13, 45:12-14.

Application in part because the Watermaster will enforce the Accounting Plan, which will ensure that the City will not divert or use water to which it is not legally entitled.

Therefore, the ALJ finds that the Application and 1298B Draft Amendment will not impair existing water rights or vested riparian rights.

4. The Proposed Amendments Will Not be Detrimental to the Public Welfare[103]

If approved, the Application and 1298B Draft Amendment would allow the City to make effective, beneficial use of the water appropriated to it through COA 14-1298.[104] By bringing this source of water online for the City, and by making diversions of COA 14-1298 water subject to the Accounting Plan, the City would be positioned to effectively use the 252.1 acre-feet appropriation to help serve thousands of retail and wholesale potable water customers in a cost-effective manner that is protective of other water rights and the environment within the Concho River Basin.[105] The proposed amendments to the Certificate would, therefore, not be detrimental to the public welfare.[106] To the contrary, the proposed amendments would be beneficial to the public welfare.[107]

The ED concurs with the City's position. Following a full review of the Application, the ED did not find that the 1298B Draft Amendment would be detrimental to the public welfare if granted.[108]

Based on the record in this case, the ALJ finds that granting this Application would not be detrimental to the public welfare.

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[103] TWC § 11.134(b)(3)(C); 30 TAC § 297.41(a)(3)(C).

[104] SA 1298B Ex. 1 at 6:12-16, 6:17-19.

[105] SA 1298B Ex. 2 at 38:7-17.

[106] SA 1298B Ex. 2 at 39:10-12.

[107] SA 1298B Ex. 2 at 39:10-12.

[108] ED's Closing Argument and Initial Post-Hearing Brief at 8.

5. The Proposed Amendments Are Protective of the Environment[109]

The Commission must consider any applicable environmental flow standards established pursuant to TWC § 11.1471 when deciding whether to approve a water rights amendment application.[110] The Commission has yet to adopt any such rule pending recommendations of the Environmental Flows Advisory Group as required by TWC § 11.0236.[111] Consequently, the requirement in TWC § 11.134(b) that an application comply with TWC § 11.1471 does not apply to this Application.

In addition, TWC § 11.143(b)(3)(D) requires the Commission to consider any assessments performed pursuant to TWC § 11.147(d) and (e), as well as TWC §§ 11.150, 11.151, and 11.152. Accordingly, during the technical review of the Application, TCEQ staff considered the potential impacts to instream uses, water quality, and fish and wildlife habitat in the South Concho River that might be attributable to the amendments sought in the Application.[112]

TCEQ staff located the point of any potential environmental impact from the requested amendments to be within the South Concho River between the Lake Nasworthy Dam outlet and proposed DP 4.[113] TCEQ staff ascertained there would be no potential environmental impact attributable to the amendments requested in the Application below DP 4, because there would be no change in the volume of water passing DP 4 if the amendments were approved.[114]

Consequently, the ED's Resource Protection staff recommended inclusion of a special condition in the 1298B Draft Amendment that would prohibit the City from diverting water

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[109] TWC § 11.143(b)(3)(D); 30 TAC § 297.41(a)(3)(D).

[110] TWC § 11.143(b)(3)(D).

[111] ED's Closing Arguments and Initial Post-Hearing Brief at 8.

[112] Ex. ED-1298B-14.

[113] Tr. at 312:22-24.

[114] Tr. at 315:20-23, 326:8-11.

appropriated under COA 14-1298 from DP 4 unless stream flow at the Lake Nasworthy Dam outlet equals or exceeds specified instream flow values.[115]

The recommended restrictions, deemed necessary to maintain instream uses and water quality of the river, were incorporated as Special Condition 5.E. in the 1298B Draft Amendment.[116] Special Condition 5.E. in the 1298B Draft Amendment states:

> In order to provide sufficient flows for the maintenance of instream uses, diversions shall be limited to times when streamflow at the Lake Nasworthy Dam outlet equals or exceeds 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

TCEQ staff concluded that the recommended flow restrictions would provide sufficient maintenance flows to the aquatic and riparian habitats in the South Concho River below Lake Nasworthy Dam under the terms of the 1298B Draft Amendment.[117] The City does not agree that the instream flow requirements are necessary for the 1298B Draft Amendment,[118] but can and will comply with the requirements if they remain incorporated into the 1298B Draft Amendment upon its issuance.

Protestants argue that streamflow should not be measured at Lake Nasworthy, which is upstream from DP 4, but should be measured downstream from DP 4, at the Bell Street Dam, if the main Concho River is to be protected.[119] The South Concho leaves Lone Wolf Reservoir and converges with the North Concho River, becoming the Concho River, before reaching the Bell

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[115] Ex. ED-1298B-13 at 2-3; Ex. ED-1298B-14 at 2; SA 1298B Ex. 1-E, Special Condition 5.E. as revised at hearing per Tr. at 292:9 - 293:10

[116] TWC §§ 11.147(d) and 11.150; Ex. ED-1298B-3 as revised at hearing per Tr. at 60:8-14.

[117] Ex. ED-1298B-13 at 3; Ex. ED-1298B-14 at 2.

[118] City's Reply to Closing Arguments at 13; SA 1298B Ex. 2 at 29:9-19.

[119] Protestants' Closing Arguments at 17-20.

Street Reservoir and Bell Street Dam.[120] Protestants rely on the testimony of the City's witnesses Dr. Brandes and City Manager Will Wilde that the environmental flow restrictions listed in the 1298B Draft Amendment are in place to protect not only the instream uses on the Concho River, but also downstream water rights.[121] But a review of the testimony of Dr. Brandes and Mr. Wilde shows they are referring to the instream flow restrictions to be measured at the Lake Nasworthy Dam and are not advocating that the measurements should be taken at the USGS gauge at the Bell Street Dam.

As the ED's witness Kaci Myrick explained, the proposed instream requirements are designed to address the only area of potential environmental impact associated with the Application: the small segment of the South Concho River between the Lake Nasworthy Dam and DP 4.[122] And, as acknowledged by Protestants' expert witness, hydrologist Barney Austin, Ph.D., and testified to by Ms. Myrick, instream flow requirements measured at the Bell Street Dam could be entirely satisfied by flows from the North Concho River, guaranteeing no environmental flow protection in the South Concho.[123]

The Commission also is directed to include in water rights permits any practicable conditions it considers necessary to protect fish and wildlife habitats.[124] In conducting the review described above, the ED's Resource Protection staff considered potential impacts to "Riparian Habitats" and "Recreational Uses" by the Application.[125] TCEQ staff found that habitats would be protected by streamflow restrictions recommended and incorporated as Special

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[120] *See* map at SA 1298B Ex. 7; Tr. 34:12-18.

[121] SA 1298B Ex. 1 at 13:16-19; SA 1298B Ex. 2 at 29:5-11.

[122] Tr. at 312:13-19, 312:22-24, 314: 25 – 315:2, 320:16-19.

[123] Tr. 272:6-17; Tr. at 322:1-6.

[124] TWC § 11.147(e).

[125] Ex. ED-1298B-13 at 2 and 4.

Condition 5.E.[126] Further, staff found that the 1298B Draft Amendment would have negligible impacts to recreational uses.[127]

The ALJ notes that the requirement in TWC § 11.134(b) that an application comply with TWC § 11.152 does not apply to this Application. TWC § 11.152 applies to applications to divert water in excess of 5,000 acre feet per year; COA 14-1298 authorizes diversion of only 252.1 acre feet per year.

In addition, because of the 700-mile separation between DP 4 and the Gulf of Mexico, the amendments requested in the Application would have negligible impacts on bay and estuary health.[128]

Finally, the amendments proposed in the Application and the 1298B Draft Amendment do not implicate groundwater production or groundwater recharge, so will not affect groundwater or groundwater recharge.[129] Dr. Brandes testified that impacts to groundwater or groundwater recharge are unlikely under the 1298B Draft Amendment.[130] Because there are no effects on groundwater or groundwater recharge, TCEQ staff did not generate any specific analysis summary for impacts to groundwater or groundwater recharge.

Based on the above evidence, the ALJ finds that streamflow should be measured at the Lake Nasworthy Dam, as recommended by TCEQ staff. The ALJ further finds that diversions made pursuant to the 1298B Draft Amendment, if issued, would not adversely impact any instream uses, water quality, or fish and wildlife habitat within the Concho River basin.[131]

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[126] Ex. ED-1298B-14 at 2.

[127] Ex. ED-1298B-13 at 4; Ex. ED-1298B-11 at 4:7-9.

[128] SA 1298B Ex. 2 at 36:17-23; Ex. ED-1298B-11 at 4:4-5.

[129] TWC § 11.151; SA 1298B Ex. 2 at 40:14-15, 41:1-6.

[130] SA 1298B Ex. 2 at 40:6 – 41:6.

[131] SA 1298B Ex. 2 at 36:7-13, 37:10-12, 39:7-9, 40:1-5.

Accordingly, the ALJ finds that the amendments requested in the Application, and proposed in the 1298B Draft Amendment, are protective of the environment.

6. The Proposed Amendments Are Consistent with the State and the Approved Region F Regional Water Plans[132]

All of the segments of the South Concho River relevant to the Application and the 1298B Draft Amendment are within the Region F Regional Water Planning area as defined by the Texas Water Development Board (TWDB).[133] The City is located within Tom Green County,[134] which is entirely within the Region F Regional Water Planning area.[135] The most recent regional water plan required of Region F was submitted to the TWDB in 2006,[136] approved by the TWDB in 2006, and incorporated into the State Water Plan in 2007.[137]

The ED's water conservation program staff verified that the water supply need addressed by the Application is consistent with the State Water Plan and the applicable regional water plan.[138] The evidence admitted during this contested case demonstrates that the amendments requested in the Application, and proposed in the 1298B Draft Amendment, do not conflict with any provision of the approved Region F Regional Water Plan or the State Water Plan.[139] Instead the requested amendments will aid the City in addressing its water supply needs in a manner consistent with both the Region F Regional Water Plan and the State Water Plan.[140]

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[132] TWC §§ 11.143(b)(3)(E) and 11.134(c); 30 TAC §§ 297.41(a)(3)(E) and 297.41 (b).

[133] SA 1298B Ex. 2 at 41:13-15.

[134] SA 1298B Ex. 2 at 41:13.

[135] SA 1298B Ex. 2 at 41:15-17.

[136] SA 1298B Ex. 2 at 41:21-23.

[137] SA 1298B Ex. 2 at 41:23 – 42:3.

[138] Ex. ED-1298B-15 at 2-3; SA 1298B Ex. 2 at 43:20-22.

[139] SA 1298B Ex. 1 at 12:13-14; Ex. ED-1298B-15 at 3:1; Ex. ED-1298B-17 at 2.

[140] SA 1298B Ex. 2 at 43:20-22.

The ALJ therefore finds that the proposed amendments are consistent with the State Water Plan and the Region F Regional Water Plan in satisfaction of this statutory and corresponding regulatory requirement.

7. The City Has Provided Evidence that Reasonable Diligence Will Be Used to Avoid Waste and Achieve Water Conservation[141]

The City demonstrated its intention to use reasonable diligence to avoid waste and to achieve water conservation in its use of State water throughout its municipal water supply system.[142] 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.[143] The City intends to use the water appropriated pursuant to COA 14-1298, as amended by the 1298B Draft Amendment, for municipal purposes within its municipal water supply service area.[144] The City's use of the appropriated water will be subject to the City's water conservation and drought contingency plan, as approved by TCEQ.[145]

The ALJ finds that the amendments requested in the Application, and proposed in the 1298B Draft Amendment, therefore satisfy the statutory and corresponding regulatory requirement that the City demonstrate it will use reasonable diligence to avoid waste and to achieve water conservation.

C. City's Water Conservation Plan Complies with Applicable Law

Pursuant to TWC § 11.1271 and 30 TAC § 295.9(4)(d), the ED required the City to submit a water conservation plan with the Application.[146] A Water Conservation Specialist on

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[141] TWC § 11.143(b)(4); 30 TAC § 297.41(a)(4).

[142] SA 1298B Ex. 1 at 9:11-12; SA 1298B Ex. 2 at 46:8-10.

[143] SA 1298B Ex.2 at 44:11-12.

[144] SA 1298B Ex. 2 at 33:11-13.

[145] SA 1298B Ex. 1 at 9:7-12; SA 1298B Ex. 1-C; SA 1298B Ex. 1-D; SA 1298B Ex. 2 at 46:5-7.

[146] Ex. ED-1298B-15 at 2:26-29; TWC §§ 11.1271(a), 11.134(b)(4); 30 TAC §9 (4)(d).

the ED's staff reviewed the City's water conservation plan and determined that it complied with the requirements of the Water Code and all relevant administrative rules.[147]

Therefore, the ALJ finds the City's Water Conservation Plan complies with applicable law.

D. The City Has Completed and Returned All TWDB Water Use Surveys [148]

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.[149] As demonstrated during the hearing on the merits of the Application, the City has in fact completed and returned all such surveys.[150]

Therefore, the ALJ finds the City has satisfied these statutory and corresponding regulatory requirements.

VII. PROPOSED LANGUAGE CHANGES TO THE 1298B DRAFT AMENDMENT

A. Clarification of the Diversion Rate at DP 4

OPIC is concerned that the 1298B Draft Amendment does not contain language that specifically states the diversion rate for the proposed DP 4.[151] The relevant language in the 1298B Draft Amendment describes the location of DP 4, but does not specify the City's authorized diversion rate at DP 4. OPIC argues that the lack of specificity leaves the

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[147] Ex. ED-1298B-15 at 2:26-29; Ex. ED-1298B-17 at 1; *see* 30 TAC § 297.50.

[148] TWC § 16.012; 30 TAC § 297.41(a)(5).

[149] TWC § 16.012; 30 TAC § 297.41(a)(5).

[150] SA 1298B Ex. 1 at 11:12-18.

[151] OPIC Closing Argument at 4-7.

Watermaster with the task of extrapolating the correct diversion rate for the City based on the diversion rates at the three upstream diversion points.

The City is currently authorized to divert 128.1 acre-feet of water per year from DP 1 at a rate of 15.11 cfs, either singly or in aggregate with other water rights holders that divert water from DP 1. The City is also authorized to divert 124 acre-feet of water per year at a maximum rate of 2.67 cfs and 1.0 cfs, respectively, from DP 2 and DP 3.[152] If the Application is granted, water that the City is authorized to divert at DP 1, DP 2, and DP 3 will instead be diverted at the new DP 4.[153]

Diversions made by the City under the 1298B Draft Amendment would be limited to the diversion rates that currently exist for upstream diversion points.[154] If the City diverts water from DP 4 that previously would have been authorized for diversion at DP 2, the City would be limited to diverting that water at the diversion rate authorized for DP 2, or 2.67 cfs.[155] Water diverted at DP 4 that would have been previously diverted at DP 1 could only be withdrawn at a rate to be determined by the Watermaster, as the 15.11 cfs limit must be shared among other water rights holders.[156] Having to arrive at a correct diversion rate for DP 4 based on three upstream, differing rates, could lead to an increase in the amount or rate of water being diverted, OPIC argues.

Therefore, OPIC proposes adding additional language to the 1298B Draft Amendment to clarify the diversion rate for DP 4. OPIC concludes that with the addition of the proposed

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[152] Ex. ED-1298-3 at 6.

[153] Ex. ED-1298-3 at 2.

[154] Ex. ED-1298-3 at 1.

[155] The City would also be limited to the 124 acre-feet per year limit between Diversion Point 2 and 3 as well as several other conditions, including Special Conditions A through H in COA 14-1298B. *See* Ex. ED-1298-3.

[156] SA 1298B Ex. 2 at 14:12-18.

language, the 1298B Draft Amendment would not adversely impact other water right holders or the environment at a greater magnitude than under the existing permit.[157]

OPIC proposes the following additional language to Section 2 of the 1298B Draft Amendment:[158]

2. DIVERSION

A. Additional Diversion Point

[existing provision adding DP 4]

B. Location

In addition to Diversion Points 1, 2, and 3 as defined in Certificate of Adjudication 14-1298, Owner is authorized to divert from a downstream diversion point (Diversion Point 4) located on the west bank of the South Concho River bearing S85°E, 1,700 feet from the northwest corner of the Emil Hermes Survey No. 174, Abstract No. 349 in Tom Green County, also being at Latitude 31.447°N, Longitude 100.426°W.

C. Rate

For the 128.1 acre-feet of water per year authorized at a priority date of July 29, 1914, the maximum diversion rate at Diversion Point 4 is 15.11 cfs in combination with other owners of Diversion Point 1 (Owners of Certificates of Adjudication Nos. 14-1280 through 14-1297, 14-1299 through 14-1303, 14-1314, 14-1403, and 14-1404). For the 124 acre-feet of water per year authorized at a priority date of October 8, 1931, the maximum diversion rate at Diversion Point 4 is 2.67 cfs.

OPIC argues that the inclusion of the proposed language in the 1298B Draft Amendment would ensure the amendment will not inadvertently authorize an increase in the diversion rate at

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[157] OPIC Closing Argument at 7.

[158] OPIC Closing Argument at 5-6.

DP4; would aid the Watermaster in authorizing diversions under the amendment; and would directly address Protestants' concerns related to a specific diversion rate at DP 4.[159]

The ED has reviewed the suggested language and does not object to the ALJ proposing that the diversion rates for DP 4 be specifically stated in the amendment.[160] But the ED proposes one additional change, specifically that the diversion rate for the 124 acre-foot portion be stated as "3.67 cfs" instead of "2.67 cfs." The Certificate authorizes diversion of the 124 acre-foot portion at two points having diversion rates of 1.00 cfs and 2.67 cfs, respectively. The ED points out that there is no restriction preventing the City from diverting water from both diversion points simultaneously. Consequently, the effective diversion rate for that portion of water is 3.67 cfs. The ED recommends that OPIC's offered language substituted by the Commission in its final form with an authorization of a 3.67 cfs diversion rate for the 124 acre-foot portion at DP 4.[161]

Protestants support OPIC's proposed language except for one additional condition. Protestants recommend that the City's maximum diversion rate at DP 1 should be 1.5 cfs, which is the existing diversion rate of COA 1298 being exercised by the South Concho Irrigation Canal Company.[162] However, COA 1298 and COA 1298A contain no maximum diversion rate other than the shared rate of 15.11 cfs.[163] Therefore, the ALJ declines to recommend that the City's maximum diversion rate at DP 1 should be 1.5 cfs.

Having reviewed and considered the parties' arguments, the ALJ finds OPIC's proposed language with the ED's suggested modification should be incorporated in the 1298B Draft Amendment.

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[159] Tr. at 207:1 – 208:11, 209:8-24, 213:9-15.

[160] ED's Reply to Closing Arguments at 7.

[161] ED's Reply to Closing Arguments at 7-8.

[162] Protestants' Closing Arguments at 16; *see* Concho 1298B PFT Ex. 1 at 5-8:2; Concho 1298 PFT Ex. 1B-1E.

[163] Ex. ED-1298B-3 at 5-10.

B. Substitution of Time Priority Language Related to DP 1

The 1298B Draft Amendment is expressly junior in time priority to "the interjacent water right holders of record between the two existing diversion points and downstream diversion point authorized by this amendment as they existed on the filing date of this amendment, June 7, 2006."[164] Protestants' request that the final issued version of the Certificate specifically delineate all water rights sharing DP 1 as "interjacent" for purposes of the time priority clause.[165]

The ED does not object to making such a clarification and can support the following language as a substitute for Section 3. A. on page 2 of the 1298B Draft Amendment:[166]

> 3. TIME PRIORITY
>
> A. The time priority for the right to divert and use the first 128.1 acre-feet of water per year from the diversion point authorized by this amendment is July 29, 1914 except that it is junior in priority to the interjacent water right holders of record between the two existing diversion points and downstream diversion point authorized by this amendment as they existed on the filing date of this amendment, July 7, 2006. Such interjacent owners include all water rights that share diversion point 1.

The ALJ finds the ED's proposed language to be a reasonable response to Protestants' request for clarification and recommends its inclusion in the 1298B Draft Amendment.

C. Substitution of Time Priority Language Related to DP 2 and DP 3 Is Not Necessary

Protestants also request that the Certificate as approved specifically delineate all water rights sharing DP 1 as being considered "interjacent" for purposes of assigning time priority to the 124 acre-foot portion diverted at DP 2 and DP 3.[167]

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[164] Ex. ED-1298-3 at 2.

[165] Protestants' Closing Arguments at 13-14.

[166] ED's Reply to Closing Arguments at 6.

But, as the ED points out, DP 2 and DP 3 are downstream from the shared DP 1, which is located at the Canal headgate. No user on the Canal would have access to water available at DP 2 and DP 3, because the water at DP 2 and DP 3 would have already flowed past DP 1. Therefore, users along the Canal are not interjacent between DP 2 and DP 3, and DP 4.[168]

Further, the ED argues, the priority date assigned to the City's 124 acre-foot portion related to DP 2 and DP 3 is October 8, 1931. All water rights that share DP 1 and the associated 15.11 cfs diversion rate are assigned a priority date of July 29, 1914. Those water rights are already senior in priority to the 124 acre-foot portion diverted at DP 2 and DP 3. Therefore, the ED concludes, there is no reason to alter the priority date language in the 1298B Draft Amendment.[169]

The ALJ adopts the ED's position that no change to the time priority language is necessary for that portion of the water authorized for use at DP 2 and DP 3 under the Certificate. The ALJ therefore does not recommend inclusion of Protestants' requested changes to Section 2. B. of the 1298B Draft Amendment.

VIII. CONCLUSION

The City has demonstrated that the Application satisfies each applicable statutory and regulatory requirement. The evidence admitted in this case supports granting the Application and issuing the 1298B Draft Amendment with the "diversion rate" language proposed by OPIC with the ED's suggested modification and the "time priority" language related to DP 1 proposed by the ED. No evidence presented in this proceeding demonstrates any need for any other requested changes.

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[167] Protestants' Closing Argument, at 13-14.

[168] ED's Reply to Protestants' Closing Argument at 7; SA 1298B Exhibit 2 at 14:18-22; *see* SA 1298B Exhibit 7.

[169] ED's Reply to Closing Arguments at 7.

The ALJ therefore recommends that the Commission grant the Application and approve the 1298B Draft Amendment with the incorporation of the recommended "diversion rate" and the DP 1 "time priority" language.

SIGNED October 29, 2010.

SHARON CLONINGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

ORDER Application of the City of San Angelo to Amend Certificate of Adjudication No. 14-1298; SOAH Docket No. 582-10-0292; TCEQ Docket No. 2009-0185-WR

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the application (Application) of the City of San Angelo (City) to amend Certificate of Adjudication No. 14-1298 (Certificate). Administrative Law Judge (ALJ) Sharon Cloninger conducted a hearing on the application on June 30, 2010. The following were parties to the proceeding: the City; Concho River Basin Water Conservancy Association and South Concho Irrigation Company (collectively, 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 City of San Angelo (City) is the owner of Certificate of Adjudication (COA) 14-1298, as amended in 2004.

2. COA 14-1298 is a run-of-river right that authorizes the annual diversion and use not to exceed 252.1 acre-feet of water from the South Concho River, tributary of the Concho

River, tributary of the Colorado River, in the Colorado River Basin, for agricultural and municipal purposes.

3. COA 14-1298 currently authorizes the diversion of water from three distinct diversion points: Diversion Point No. 1 (DP 1), Diversion Point No. 2 (DP 2), and Diversion Point No. 3 (DP 3).

4. COA 14-1298 describes DP 1 as a point on the north bank of the South Concho River on the perimeter of a 50 acre-foot capacity reservoir located S 85° E, 855 feet from the northwest corner of the J. Zerbach Survey 1827, Abstract 4217, near Christoval, Texas, that is also authorized by COA 14-1280 through 14-1297, 14-1299 through 14-1303, 14-1314, 14-1403, and 14-1404.

5. COA 14-1298 describes DP 2 as a point on the east bank of the South Concho River on the perimeter of an 8.44 acre-foot capacity reservoir located N 20° E, 600 feet from the southwest corner of the C. S. Jackson Survey 1823, Abstract 1539, approximately 4 miles north of Christoval, Texas.

6. COA 14-1298 describes DP 3 as a point on the east bank of the South Concho River located N 13° E, 1,500 feet from the southwest corner of the C. S. Jackson Survey 1823, Abstract 1539, approximately 4.2 miles north of Christoval, Texas.

7. COA 14-1298 currently allows the City to divert up to 128.1 of the authorized 252.1 acre-feet each year from DP 1 under a priority date of July 29, 1914.

8. COA 14-1298 authorizes the City to divert the remaining 124 acre feet of the authorized 252.1 acre feet from any combination of DP 2 and DP 3.

9. Diversions made from DP 2 and DP 3 each have a priority date of October 8, 1931.

10. DP 1 is the furthest upstream of the three diversion points in COA 14-1298, and is located along the perimeter of a 50 acre-foot reservoir on the South Concho River upstream of Christoval, Texas.

11. DP 1 is the headgate to a canal (Canal) that runs off-channel from the South Concho River for several miles before emptying back into the South Concho River upstream of Twin Buttes Reservoir.

12. Water diverted at DP 1—the Canal headgate—runs through the Canal and is available for irrigation use for 20-35 individual water rights holders, including the City by virtue of COA 14-1298.

13. COA 14-1298 authorizes the City either singly or in aggregate with the other water right owners to divert an amount not to exceed 128.1 acre-feet per year from DP 1 at a maximum rate of 15.11 cubic feet per second (cfs).

14. The City shares its maximum diversion rate of 15.11 cfs with the other 20-30 individual water rights owners that are also authorized to use water from the Canal diverted from DP 1.

15. DP 2 is located on the perimeter of an 8.44 acre-foot impoundment on the South Concho River between DP 1 and the point downstream where the Canal empties back into the South Concho River.

16. COA 14-1298 limits the maximum diversion rate at DP 2 to 2.67 cfs.

17. Unlike the City's maximum diversion rate at DP 1, the City does not share the 2.67 cfs maximum diversion rate at DP 2 with any other water right owner.

18. DP 3 is located adjacent to DP 2 on the perimeter of the same 8.44 acre-foot impoundment.

19. Under COA 14-1298, the City is currently authorized to divert from DP 3 at a maximum rate of 1.0 cfs.

20. The City does not share the 1.0 cfs maximum diversion rate at DP 3 with any other water right owners.

21. COA 14-1298, as amended in 2004, contains a special condition that requires the City to apply for, and receive, an amendment to the Certificate that identifies an authorized place of use.

22. The City is located within Tom Green County, where it serves as the county seat.

23. Tom Green County is wholly within the Region F Regional Water Planning area, as defined by the Texas Water Development Board (TWDB).

24. All Concho River Basin watercourse segments that are relevant to the Application are found entirely within the Region F regional planning area, as defined by the TWDB.

25. The City of San Angelo Municipal Water System service area is located wholly within the Region F regional water planning area, as defined by the TWDB.

26. The most recent regional water plan required of Region F was submitted to the TWDB in 2006.

27. 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.

28. The City has completed and returned all TWDB groundwater and surface water use surveys undertaken by the TWDB since September 1, 2001.

PROCEDURAL HISTORY

29. The City filed "Application No. 14-1298B to Amend Certificate of Adjudication No. 14-1298, South Concho River, Colorado River Basin, Tom Green County" with the Texas Commission on Environmental Quality (TCEQ) on October 3, 2005.

30. TCEQ staff declared the Application to be administratively complete on June 7, 2006.

31. TCEQ staff filed the Application with the Office of the Chief Clerk on June 7, 2006.

32. On July 31, 2006, the Chief Clerk mailed notice of the Application to the water right holders of record between the existing and proposed diversion points in the Colorado River Basin.

33. In response to the Application, TCEQ staff issued a proposed draft amendment to COA 14-1298 (1298B Draft Amendment) on October 17, 2008.

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. During the October 27, 2009 preliminary hearing, the ALJ considered the jurisdictional exhibits submitted by the ED and admitted the City, Protestants, OPIC, and the ED as parties.

37. The hearing on the merits was held June 30-July 1, 2010, at SOAH, William P. Clements State Office Building, 300 West 15 th Street, Austin, Texas. All parties appeared and participated in the proceeding. The record closed August 30, 2010, after the parties submitted written closing arguments.

THE APPLICATION

38. The Application includes a request to amend COA 14-1298 to identify the City of San Angelo Municipal Water Supply System service area as an authorized place of use of water diverted pursuant to its terms.

39. The Application also includes a request to amend COA 14-1298 by adding a fourth authorized diversion point (DP 4) from which the City could divert up to the 252.1 acre-feet per year that has already been appropriated to the City in COA 14-1298.

40. The City has described proposed DP 4 as a point on the west bank of the South Concho River bearing S 85° E, 1,700 feet from the northwest corner of the Emil Hermes Survey No. 174, Abstract No. 349 in Tom Green County, also being at Latitude 31.447°N,

Longitude 100.426°W, that is also authorized by Certificate of Adjudication No. 14-1325.

41. DP 4 is the location of the City's raw water treatment plant intake facilities.

42. The City has infrastructure in place to divert State water at proposed DP4, to treat the water for drinking water purposes, and to distribute it throughout the City's municipal water supply system service area.

43. Proposed DP 4 is located on the perimeter of an authorized impoundment know as Lone Wolf Reservoir.

44. The Application does not request a new or additional appropriation of State water.

45. The Application does not request any change to the existing maximum diversion rates currently authorized by COA 14-1298.

46. The City intends to use the diversions undertaken by the amendments requested in the Application for domestic, recreational, commercial and industrial purposes, including the watering of golf courses, parks, and parkways, within its service area.

47. 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.

48. As part of the Application, the City submitted the *City of San Angelo Water Rights Accounting Plan* (Accounting Plan).

49. As part of the Application, the City also submitted the *City of San Angelo Water Conservation and Drought Contingency Plan* (Water Conservation Plan).

50. Multiple members of the TCEQ technical staff conducted independent reviews of the Application during the technical review process.

51. As part of the technical review of the Application, TCEQ staff analyzed the potential impacts from the City's requested amendments on water rights within the Colorado River Basin, also known as a "no injury" analysis.

52. Part of the TCEQ staff's "no injury" analysis involved modeling impacts from the amendments proposed in the Application on water rights in the Colorado River Basin using the TCEQ's Water Availability Model (WAM) for the Colorado River Basin.

53. The WAM is a tool that the TCEQ routinely relies upon to determine whether a requested water right amendment would adversely affect water rights in the applicable river basin.

54. The WAM is the best hydrologic model available to the TCEQ today to assess potential impacts to water right amendments such as those proposed in the Application.

55. The WAM was conducted using a "full authorization simulation," wherein the model assumed that all diversions authorized in the Colorado River Basin were being exercised to their maximum legal extent with no return flows.

56. The WAM was conducted using all of the relevant and necessary information for determining whether the City could divert water appropriated through COA 14-1298 at DP 4 without adversely impacting other water rights in the Colorado River Basin.

57. After comparing the modeled results of pre- and post-amendment diversions under COA 14-1298, TCEQ staff concluded that the amendments sought in the Application would not impair any water rights within the Colorado River Basin.

58. As part of the technical review, TCEQ staff also assessed potential environmental impacts that might be attributable to the amendments requested in the Application.

59. TCEQ staff considered the Lyons' method in evaluating minimum streamflows that must be maintained in the stream segments to protect instream uses.

60. TCEQ staff also considered the 7Q2 method in evaluating potential water quality impacts that might be attributable to the amendments requested in the Application.

61. Using a combination of Lyons' method and 7Q2, TCEQ staff calculated minimum instream flow requirements that would appropriately address any potential environmental impacts that might be attributable to the amendments requested in the Application.

62. The only potential area of environmental impact that might be attributable to the amendments requested in the Application is along the segment of the South Concho River between the Lake Nasworthy Dam outlet and DP 4.

63. There will be no environmental impact attributable to the amendments requested in the Application below DP 4 because there will be no change in the amount of water passing DP 4 under the amendments requested in the Application.

64. The Lake Nasworthy Dam outlet would be a superior point to measure the minimum instream flow requirements that are appropriate.

65. In order to provide for sufficient flows for the maintenance of instream uses, diversions from the proposed DP 4 under the amendments requested in the Application should be limited to times when streamflow at the Lake Nasworthy Dam outlet equals or exceeds 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

66. The minimum instream flow requirements would ensure that fish and wildlife habitat, water quality, and instream uses in the Colorado River Basin would not be adversely impacted by the uses proposed to be made pursuant to the terms of the 1298B Draft Amendment.

67. TCEQ staff reviewed the Accounting Plan as part of the technical review of the Application.

68. 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.

69. Since the Concho River Basin is managed by the Concho Watermaster (Watermaster), the Accounting Plan will provide the Concho Watermaster with an efficient mechanism for ensuring that diversions, impoundments, and releases undertaken by the City are charged against the appropriate water rights.

70. By setting out what is required for the City to comply with the terms and conditions of each applicable water right identified in the plan, the Accounting Plan is a tool that can be used by the Watermaster to ensure that other water rights in the Concho River Basin are not impacted by the City's exercise of its own water rights.

71. TCEQ staff conducted a review of the Accounting Plan during its technical review of the Application.

72. The Accounting Plan relates to the amendments requested in the Application by determining how much water is available to the City under the proposed amended certificate at DP 4.

73. The Accounting Plan contains multiple layers of protective requirements that each must be satisfied before the City would be authorized by the Watermaster to divert under the proposed amended certificate at DP 4.

74. The Watermaster will be responsible for administering the Accounting Plan.

75. The Accounting Plan defines a diversion process for the City and gives the Watermaster the ability to adjust for changed hydrologic conditions in the Concho River Basin.

76. The City's Accounting Plan is acceptable.

77. The City's Water Conservation Plan satisfied the applicable requirements of the Texas Water Code and the TCEQ rules.

78. The amendments requested in the Application are not encouraged or discouraged in the approved State Water Plan or the Region F Regional Water Plan.

79. The amendments requested in the Application are not included in the State Water Plan or the Region F Regional Water Plan because of their insignificant impact.

80. The amendments requested in the Application are not inconsistent with the approved State Water Plan or the Region F Regional Water Plan.

81. Upon completion of the Application's technical review, TCEQ staff issued the 1298B Draft Amendment and recommended that the Application be approved.

THE 1298B DRAFT AMENDMENT

82. Under the 1298B Draft Amendment, the City would be authorized to divert an amount not to exceed 128.1 acre-feet of the 252.1 acre-feet per year from DP 4 that the City is currently authorized to divert at DP 1 under COA 14-1298.

83. Under the 1298B Draft Amendment, the maximum diversion rate for diverting the first 128.1 acre-feet of the 252.1 acre-feet of water per year from DP 4 will be 15.11 cfs in combination with the owners of DP 1.

84. Under the 1298B Draft Amendment, the time priority for the right to divert and use the first 128.1 acre-feet of water per year from DP 4 is July 29, 1914, except that it will be junior in priority to the interjacent water right holders of record between DP 1 and DP 4, including the other owners of DP 1, as they existed on June 7, 2006, the date TCEQ staff declared the Application to be administratively complete and filed it with the Chief Clerk.

85. Under the 1298B Draft Amendment, the City would also be authorized to divert from DP 4 the remaining 124 acre-feet of the 252.1 acre-feet per year that the City is currently authorized to divert at DP 2 and DP 3 under COA 14-1298.

86. Under the 1298B Draft Amendment, the maximum diversion rate for diverting the remaining 124 acre-feet of the 252.1 acre-feet of water per year from DP 4 shall be 3.67 cfs in combination with diversions made at DP 2 and DP 3.

87. Under the 1298B Draft Amendment, the time priority for the right to divert and use the remaining 124 acre-feet of the 252.1 acre-feet of water from DP 4 is October 8, 1931, except that it is junior in priority to the interjacent water right holders of record between DP 2 and DP 4, as they existed on June 7, 2006.

88. The 1298B Draft Amendment proposed by TCEQ staff contains multiple layers of protection designed to ensure that the City's exercise of the amended water right would not adversely impact water rights or the environment within the Colorado River Basin.

89. The 1298B Draft Amendment additionally prohibits the City from making any diversions of COA 14-1298B-appropriated water from DP 4 unless there are inflows into Lone Wolf Reservoir.

90. The City would also be prohibited from diverting any portion of the 252.1 acre-feet from DP 4 under the 1298B Draft Amendment unless the same portion of the appropriated water would have also been available at the corresponding upstream diversion points—DP 1, DP 2 or DP 3.

91. The City would not be authorized to divert from DP 4 under the 1298B Draft Amendment unless specified minimum instream flow requirements were first satisfied upstream at the Lake Nasworthy Dam outlet.

92. The 1298B Draft Amendment would also incorporate into the certificate the multiple additional protective features of the Accounting Plan.

93. The Accounting Plan will serve to inform the City and the Watermaster how much water is available through each of the City's various water rights addressed in the plan at a given time, including the 1298B Draft Amendment, and it will thereby ensure that the City diverts and uses no more water than the amount it has available to it under the conditions specified therein.

94. The 1298B Draft Amendment requires the City to coordinate with, and obtain approval from, the Watermaster before the City could make any diversions under the amended certificate at DP 4.

95. The Watermaster cannot authorize any diversions under the 1298B Draft Amendment if doing so would result in the impairment of other water rights or be in contravention to the terms and conditions of the amended certificate.

96. The City has an interest and an obligation to ensure that its water supplies are in place and readily accessible so that it can deliver treated water in the most efficient, cost-effective manner reasonably possible.

97. The changes proposed in the 1298B Draft Amendment would allow the City to make better, more efficient use of its overall existing water supply system, benefiting the citizens of San Angelo and those additional customers served by the City.

98. The 1298B Draft Amendment is expressly junior in time priority to "the interjacent water right holders of record between the two existing diversion points and downstream diversion point."

99. The final issued version of COA 14-1298B should specifically delineate all water rights sharing DP 1 as "interjacent" for purposes of the time priority clause at Section 3.A. on page 2 of the 1298B Draft Amendment.

100. The following language should be added to the 1298B Draft Amendment at Section 2 on page 2 to clarify the diversion rate at DP 4, thus aiding the Watermaster in authorizing diversions under the amendment:

2. DIVERSION

A. Additional Diversion Point

[retain the existing 1298B Draft Amendment provision that adds DP 4]

B. Location

In addition to Diversion Points 1, 2, and 3 as defined in Certificate of Adjudication 14-1298, Owner is authorized to divert from a downstream diversion point (Diversion Point 4) located on the west bank of the South Concho River bearing S85°E, 1,700 feet from the northwest corner of the Emil Hermes Survey No. 174, Abstract No. 349 in Tom Green County, also being at Latitude 31.447°N, Longitude 100.426°W.

C. Rate

For the 128.1 acre-feet of water per year authorized at a priority date of July 29, 1914, the maximum diversion rate at Diversion Point 4 is 15.11 cfs in combination with other owners of Diversion Point 1 (Owners of Certificates of Adjudication Nos. 14-1280 through 14-1297, 14-1299 through 14-1303, 14-1314, 14-1403, and 14-1404). For the 124 acre-feet of water per year authorized at a priority date of October 8, 1931, the maximum diversion rate at Diversion Point 4 is 3.67 cfs.

101. The following language should be substituted for the language proposed in the 1298B Draft Amendment at Section 3.A. on page 2:

3. TIME PRIORITY

A. The time priority for the right to divert and use the first 128.1 acre-feet of water per year from the diversion point authorized by this amendment is July 29, 1914 except that it is junior in priority to the interjacent water right holders of record between the two existing diversion points and downstream diversion point authorized by this amendment as they existed on the filing date of this amendment, July 7, 2006. Such interjacent owners include all water rights that share diversion point 1.

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 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 in the South Concho River, tributary to the Colorado River, Colorado River Basin. TEX. WATER CODE ANN. § 11.0235(a).

4. 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).

5. The City must obtain authority from TCEQ to amend COA 14-1298 in the manner provided for in the Application and in the 1298B Draft Amendment. TEX. WATER CODE ANN. § 11.122.

6. 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).

7. 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).

8. The City will beneficially use water diverted pursuant to the terms and conditions of the 1298B 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 1298B Draft Amendment will not deprive appropriators of the equivalent quantity or quality of water that was available with the full, legal exercise of COA 14-1298 before the change requested in the Application. TEX. WATER CODE ANN. § 11.122(b) and 30 TAC § 297.45(b).

10. The terms and conditions of the 1298B 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 14-1298 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).

11. 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).

12. The amendments requested in the Application, and proposed in the 1298B 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).

13. The 1298B 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).

14. 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).

15. The City to 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).

16. As of the date that Application was deemed administratively complete, and since that time, the points of diversion and place of use proposed in the 1298B Draft Amendment are wholly within a region subject to a regional water plan that has been approved in accordance with TEX. WATER CODE ANN. § 16.053(i).

17. Pursuant to the terms and conditions of the 1298B 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).

18. The City has demonstrated that the Application satisfies each applicable statutory and regulatory requirement.

19. The evidence admitted in this case supports granting the Application and issuing the 1298B Draft Amendment.

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

1. The Application is approved in accordance with the Draft Amendment, with the changes set out in this Order.

2. The Chief Clerk of the Commission will forward a copy of this Order and attached Draft Amendment with the changes to all parties and, subject to the filing of motions for rehearing, issue the attached Draft Amendment with the changes set out in this Order.

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