

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
INTEROFFICE MEMORANDUM

TO: Commissioners DATE: June 20, 2008

THRU: Todd Chenoweth, Director
Water Supply Division *TC*

Robin Smith, Attorney
Environmental Law Division

FROM: Kellye Rila, Section Manager *KJR*
Water Rights Permitting & Availability Section

SUBJECT: City of Abilene
Docket # 2008-0650-WR
Application No. 12-4150B to Amend COA No. 12-4150
Cedar Creek, Brazos River Basin
Taylor County

On June 19, 2006 the Texas Supreme Court issued an opinion in the case of *Marshall v Uncertain*.¹ The Supreme Court in that opinion considered the Commission's practices regarding notice and hearing for applications to amend a water right under Texas Water Code §11.122(b). The Court held that it could not determine under the record in that case whether notice and a hearing would be required. The Court remanded the case to the Commission.

The court in *Marshall* held that when reviewing an amendment to a water right, the Commission must determine whether there could be an adverse impact from the application on other water rights and the environment beyond or irrespective of the full use assumption, explained below. The court also held that the Commission must determine if the application could have an adverse impact on the public interest criteria: beneficial use, public welfare, groundwater effects, consistency with the state and regional water plan, compliance with administrative requirements, and conservation.

The purpose of this memo is to discuss the public notice that should be given in the above referenced application by the City of Abilene in light of agency rules and the *Marshall* decision.

¹ City of Marshall et. al. v. City of Uncertain et. al., No. 03-1111 (Tx. June 9, 2006).

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Current Permit and Application for Amendment

The applicant currently owns Certificate of Adjudication (COA) 12-4150. That water right authorizes the Owner to maintain an existing dam and reservoir, known as Lake Kirby, on Cedar Creek, tributary of Elm Creek, tributary of the Clear Fork Brazos River, tributary of the Brazos River, Brazos River Basin and to impound therein not to exceed 8,500 acre-feet of water. Owner is authorized to divert and use not to exceed 115 acre-feet of water per year at a maximum diversion rate of 2.2 cfs (1000 gpm) from the dam outlet structure and from any point on the perimeter of the reservoir for agricultural purposes to irrigate land within the environs of the City of Abilene. Owner is also authorized to divert and use 3,765 acre-feet of water per year at a maximum diversion rate of 10 cfs (4,500 gpm) from the dam outlet structure for municipal purposes in Taylor County. The priority date is October 10, 1927.

The City of Abilene has applied for an amendment to Certificate of Adjudication No. 12-4150 to use the entire authorized 3,880 acre-feet of water per year for municipal, industrial, and agricultural purposes, authorize the diversion from any point on the perimeter of Lake Kirby, and increase the diversion rate from Lake Kirby to a combined maximum rate of 12.2 cfs.

Rules Related to Notice

The Commission has specified what notice is required for applications to amend a water right in 30 TAC §295.158. Under subsection (c)(1) of that rule, no notice is required for applicants who do not contemplate an additional consumptive use of state water if the commission does not believe that other water rights can be impaired. Abilene's application is to add industrial use to the existing uses and convert to a multi-use permit, whereby any part of the total 3,880 acre-feet could be used for municipal, industrial, or agricultural uses. Since the present permit allows for municipal and agricultural uses, and those uses are consumptive, the application does not contemplate additional consumptive use.

The application also requests that the diversion point for the 3,765 acre-feet of water for municipal use be changed from the dam outlet structure to diversion from any point on the perimeter of Lake Kirby. Additional points of diversion may be allowed where there are no water users of record between the original authorized point of diversion and the new one to be added. There are no other authorized diverters from Lake Kirby other than Abilene. Diverting water from any point on the perimeter of a reservoir is hydrologically equivalent to diverting at any other point. No water rights or the environment can be impaired.

The application also requests that all the water in the permit be allowed to be diverted at a combined maximum rate of 12.2 cfs (5,500 gpm). The Executive Director notes that under the same patterns of use, the existing certificate would allow water to be diverted at 12.2 cfs (5,500

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gpm). Section 295.158(c)(2)(F) allows amendments that increase the diversion rate from a storage reservoir to be issued without notice.

Water Code

This application for an amendment to an existing water right is governed by Texas Water Code §11.122. Subsection (a) requires a water right holder, except as discussed above, to obtain a water right amendment if the holder is going to change the purpose of use or "otherwise alter a water right."

Subsection (b) of §11.122 sets out the scope of the Commission's authority in reviewing applications to amend a water right. Staff notes that in their application the City Abilene is not asking for an increase in the amount of water authorized for diversion. The City is requesting a small increase in the rate of diversion from Lake Kirby for the total authorized amount of water and the addition of points on the perimeter of that reservoir. For all three requested changes, the commission must review the application to determine if "*the requested change will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit . . . that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment,*" and if the application meets, "*all other applicable requirements,*" of Chapter 11 of the Water Code. The clause that requires the Commission to compare the requested amendment to the existing permit as if the existing permit was fully exercised is often referred to as the "full use assumption."

As part of the other applicable requirements, the Commission must also review the application for all three changes under the "public interest criteria."

Adverse Impact on Water Right Holders and the Environment

Under the City of Marshall opinion, the Commission must evaluate whether an amendment can adversely impair other water rights or the environment. Under the full use assumption, the addition of municipal, industrial, and agricultural use can have no greater impact on other water right holders and the environment than the impacts to those interests under the existing certificate. Both before and after the amendment, the water right holder will only be able to take 3,880 acre-feet of water per year from water stored in Lake Kirby. The water right holder, under the existing certificate and the proposed amended certificate, could take all of that water in the first part of the year, or take all of that water in later parts of the year. In other words, there are no special conditions in the certificate that restrict the water right holder to a particular pattern of use, or that spreads out the diversion of 3,880 acre-feet to specific amounts over the course of the year. Because there is no specific pattern of use in the certificate, the full use assumption requires

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the Commission to consider the existing certificate and the proposed amended certificate as potentially exercised under all lawful patterns of use.

It makes no difference to other water right holders or the environment, whether the water right holder is taking its 3,880 acre-feet for the current uses or for the proposed uses. The effect on water in the reservoir, and therefore water available for downstream water right holders or the downstream aquatic environment will be the same: there will be 3,880 acre-feet per year less after the diversion. Therefore with the full use assumption, the request to add additional purposes of use to the certificate will not cause adverse impact on other water right holders or the environment.

The increase in diversion rate from 2.2 cfs for agricultural purposes and 10 cfs for municipal purposes to a combined maximum of 12.2 cfs should have no greater impact on other water right holders or the environment than the impacts to those interests under the existing permit. This is because 97% of the water is already authorized to be diverted at a rate of 10.0 cfs; therefore the increase in diversion rate is relatively small compared to the diversion rate of the existing water right. The effect of increasing the diversion rate for the remaining 3.0% of the water should be de minimus. Also, these diversions are from a reservoir, and an increased diversion rate, which is small, should not impact downstream water rights or environmental uses.

With respect to the request to add points on the perimeter of the reservoir, the water right holder, under the existing certificate and the proposed amended certificate, can divert stored water from Lake Kirby. Adding additional point(s) on the perimeter of the reservoir would have no effect on the amount of stored water diverted under the certificate, and therefore water available for downstream water right holders or the aquatic environment will be the same; there will be 3,800 acre-feet per year less after the diversion. Thus the request to add additional points on the perimeter of the reservoir will not cause adverse impact on other water right holders or the environment.

Other Applicable Requirements

Under Section 11.122(b) the proposed amendment must also satisfy all other applicable requirements of Water Code Chapter 11. The Supreme Court in the *Marshall* case itemized those other requirements. We turn now to a consideration of the requested amendments and those other requirements that the Supreme Court has told us are applicable.

Administrative Requirements

Staff has reviewed the application and has found that it meets all administrative requirements of the Water Code. Staff therefore declared the application administratively complete and accepted it for filing with the Chief Clerk on November 16, 2007.

Beneficial Use

Proposed appropriations of state water must be for a beneficial use. Beneficial use is the non-wasteful use of water for a purpose recognized under the Water Code. The applicant seeks to use the entire authorized 3,880 acre-feet of water per year for municipal, industrial, and agricultural purposes. Municipal, industrial, and agricultural use are recognized as beneficial uses by Water Code §11.023(a). These uses are considered beneficial uses regardless of the rate of diversion or the location of the diversion point. We will consider whether the use is non-wasteful below.

Protection of Public Welfare

A proposed appropriation of state water must not be detrimental to the public welfare. No definition of "detriment to public welfare" is provided in the law. Therefore, the Commission has wide discretion in determining benefits or detriments to the public welfare. The applicant seeks to use the entire authorized 3,880 acre feet of water per year for municipal, industrial, and agricultural purposes. This type of multi-use permit is authorized by Water Code §11.023(e). A multi-use permit in this situation would allow the water right owner to provide raw water, instead of treated water, for industrial and agricultural purposes. At the same time, all of the authorized water will be available to be treated for municipal use. Water suppliers' use of their authorized water for more than one purpose is efficient water management. In addition, allowing the City to divert from anywhere on the perimeter of the reservoir at a combined maximum rate of diversion provides the City with the flexibility to meet future changes in municipal and industrial demands while continuing to allow use of this water supply for agricultural purposes. The Executive Director's opinion is that there is no detriment to the public welfare by granting this application.

Groundwater Effects

A proposed appropriation of state water must consider effects of the proposed permit on groundwater or groundwater recharge. The Commission's Water Availability Model (WAM) is used to evaluate the availability of unappropriated water for new appropriations and takes into account both contribution to river flow caused by groundwater coming to the surface in the river (springs) and decreases in river flow caused by the river flowing over recharge features and losing surface water to groundwater recharge. The WAM contains channel loss factors that

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account for the gain or loss of river flow. These channel loss factors were developed by the expert engineering contractors hired by the Commission to develop the WAMs.

The Brazos WAM includes the segment of Cedar Creek at which the diversion under this permit occurs. The Brazos WAM does not have channel loss factors associated with Cedar Creek (Lake Kirby) at the permitted diversion point. The Water Availability report for the Brazos Basin indicates that groundwater development in this portion of the Brazos River watershed has not been widespread and the effects of groundwater development on surface water flows has not been well documented². The Brazos G Regional Water Plan³ indicates that there is limited groundwater in the area of the application.

The amount of water diverted by the owner will be the same (3,880 acre-feet per year) whether that water is drawn out of Lake Kirby for the existing or proposed uses and irrespective of the diversion rate and location of the diversion point. Thus, the diversion of the full authorized volume of water for municipal, industrial and agriculture use will have no greater effect on groundwater resources or groundwater recharge than the diversion of water for the existing agriculture and municipal use. Therefore, the Executive Director concludes that there is no potential groundwater issue involved with this application.

Consistency with Regional and State Plan

Water right applications are only granted if the application addresses a water supply need in a manner that is consistent with the state water plan and the relevant regional water plan, unless the Commission determines that conditions warrant a waiver of this requirement. The purpose of the state and regional water plans is to assess the likely future use of water and to develop strategies for meeting water supply shortfalls. The state and regional water plans simply do not address every possible change in individual water rights. Staff notes that the 2006 Brazos G Regional Water Plan does identify a shortage for the Abilene area in the future⁴. The applicant asserts that given the projected shortages, the City has an interest in ensuring the most efficient use of its existing rights and that the project is therefore consistent with the state and regional water plans. Diversion from any point on the perimeter of Lake Kirby at a combined maximum diversion rate allows the City to meet the water needs of other communities within the Regional Planning Area and accommodate future changes in demand. Therefore, the Executive Director

² Water Availability in the Brazos River Basin and the San Jacinto-Brazos Coastal Basin. Appendix VIII. Memorandum Documenting Assessment of Channel Losses and Groundwater/Surface Water Interactions. Prepared by HDR Engineering for the Texas Natural Resource Conservation Commission. December 2001.

³ Brazos G Regional Water Planning Area. Regional Water Plan. Appendix B. Prepared by Brazos G Regional Water Planning Group and others for the Texas Water Development Board. January 2006.

⁴ Brazos G Regional Water Planning Area. Regional Water Plan. Prepared by Brazos G Regional Water Planning Group and others for the Texas Water Development Board. January 2006.

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concludes that either conditions warrant a waiver of the consistency determination, or the requested amendment is consistent with the relevant regional water plan and the state water plan.

Avoidance of Waste and Achievement of Water Conservation

The Commission has adopted rules to specify the type of water conservation plans that will be required for amendments to existing water rights in 30 TAC §295.9(a)(4). The applicant is not increasing the amount of its appropriation. The applicant is requesting to use the entire 3,880 acre-feet of water for municipal, industrial, and agricultural uses to accommodate the use of raw water for industrial and agricultural purposes. The applicant has submitted water conservation plans. Staff has reviewed the plans and finds that the applicant will achieve water conservation and avoid waste. Allowing the City to divert from any point on the perimeter of Lake Kirby at a combined maximum rate of diversion allows the City the flexibility to more timely and efficiently use its water resources. A memo addressing the water conservation plans is included with the other agenda materials.

Conclusion

This application seeks an amendment to an existing authorization to add multiple purposes of use (municipal, industrial, and agricultural) to the currently authorized 3,880 acre-feet of water per year, authorize the diversion from any point on the perimeter of Lake Kirby, and increase the diversion rate from Lake Kirby to a combined maximum rate of 12.2 cfs. The application does not seek an increase in either the amount of water diverted, and only seeks to increase the rate of diversion from a storage reservoir. Under the full use assumption, the amendment will not have an adverse impact on other water right holders or the environment. The application does not raise any issues of beneficial use, detriment to the public welfare, groundwater effects, consistency with the state and regional water plans, compliance with administrative requirements, or avoidance of waste and achievement of water conservation. Commission rules allow this application to be processed without notice. Therefore, the Executive Director recommends that no notice be issued for this application.

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 16, 2005

Scott F. Hibbs
Hibbs & Todd, Inc.
P.O. Box 3097
Abilene, Texas 79604

**Re: Administrative Review
City of Abilene's April 2005 Water Conservation and Drought Contingency Plan**

Dear Mr. Hibbs:

The Texas Commission on Environmental Quality (TCEQ) has reviewed the above referenced water conservation and drought contingency plan, received on April 29, 2005, to determine if it meets all of the minimum requirements as set forth in the TCEQ Rules, Title 30 Texas Administrative Code (TAC) Chapter 288.

Title 30 TAC Chapter 288.30(1) states:

The holder of an existing permit, certified filing, or certificate of adjudication for the appropriation of surface water in the amount of 1,000 acre-feet a year or more for municipal, industrial and other non-irrigation uses shall develop, submit and implement a water conservation plan meeting the requirements of Subchapter A of this Chapter.

The TCEQ records indicate that the City of Abilene holds a water right in the amount of 1,000 acre-feet or more for municipal use.

Title 30 TAC Chapter 288.30(5)(A) states:

For retail public water systems providing water service to 3,300 or more connections shall submit a drought contingency plan meeting the requirements of Subchapter B of the executive director.

The TCEQ records indicate that the City of Abilene provides service to 3,300 or more connections.

Title 30 TAC Chapter 288.30(6) states:

Wholesale public water suppliers shall submit a drought contingency plan meeting the requirements of Subchapter B of this Chapter to the executive director.

The TCEQ records indicate that the City of Abilene is a wholesale public water supplier.

Scott Hibbs
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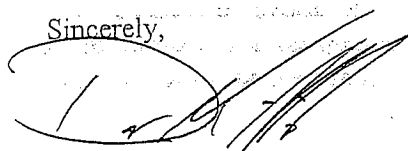
Re: Administrative Review
City of Abilene's April 2005 Water Conservation and Drought Contingency Plan

The submitted plan meets the minimum requirements for municipal and wholesale water use as defined in the TCEQ Rules, Title 30 TAC Chapter 288.2, 288.5, 288.20, and 288.22, and the plan is declared administratively complete.

Please be advised that in accordance with Title 30 TAC Chapter 288, the next revision of water conservation and drought contingency plans shall be updated, adopted, and submitted to TCEQ no later than May 1, 2009. Additionally, any future revised water conservation and drought contingency plans shall be submitted to TCEQ within 90 days of adoption.


Should you have any questions, the Resource Protection Team can be reached at (512) 239-4691.

Sincerely,



Dean Minchillo, Water Conservation Specialist
Resource Protection Team
Water Supply Division

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
INTEROFFICE MEMORANDUM

TO:  Chief Clerk

THRU: Iliana Delgado, Team Leader
Water Rights Permitting Team

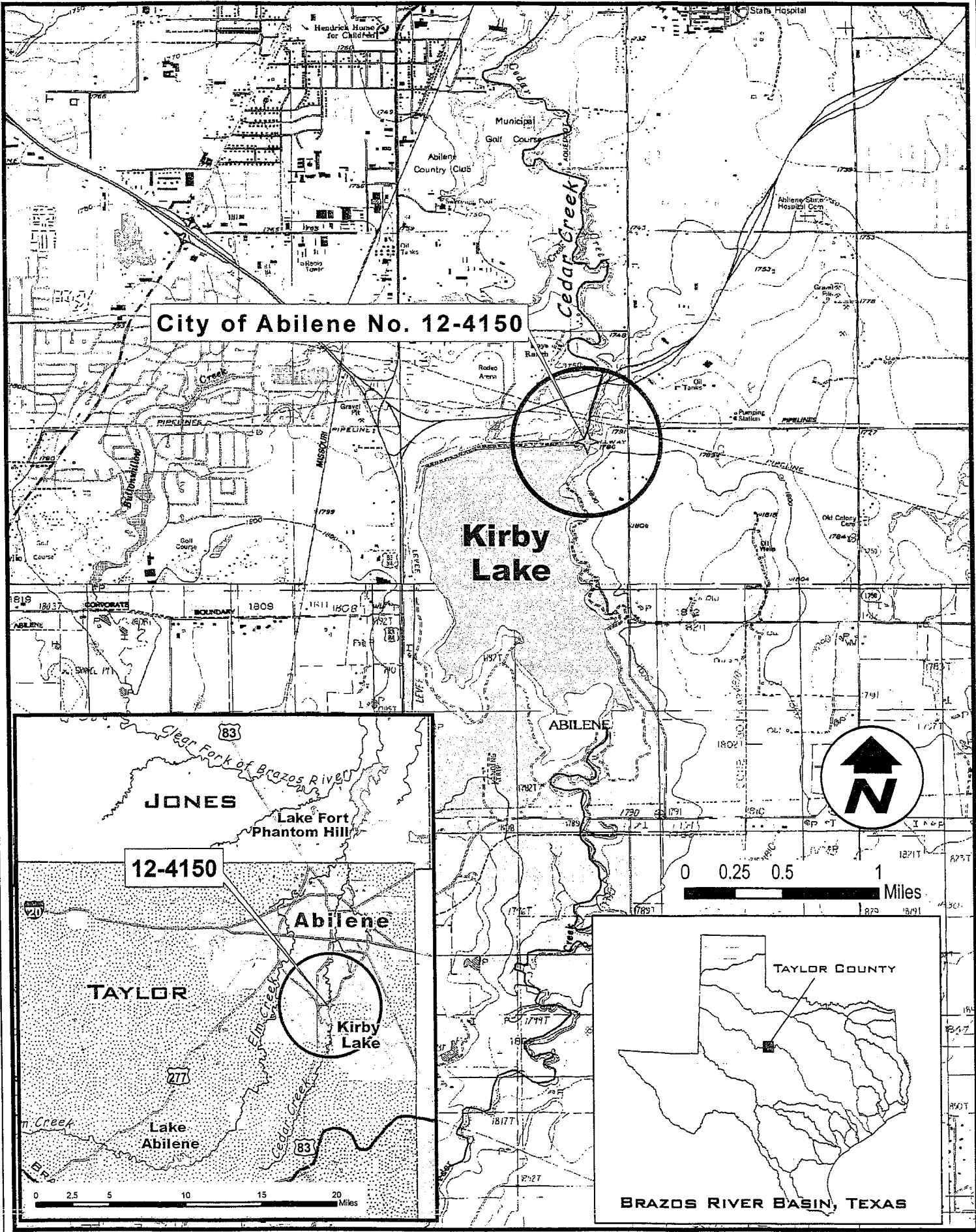
FROM: Ron Ellis, Project Manager
Water Rights Permitting Team

SUBJECT: City of Abilene
Docket # 2008-0650-WR
ADJ 4150
CN600242671
RN105372031
Application No. 12-4150B to Amend Certificate of Adjudication No. 12-4150
TWC §11.122
Cedar Creek, Brazos River Basin
Taylor County

DATE: June 20, 2008

Below is the caption for this application:

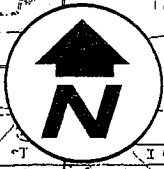
Consideration of the public notice required for the City of Abilene's application for an amendment to Certificate of Adjudication No. 12-4150 to use the entire authorized 3,880 acre-feet of water per year for municipal, industrial, and agricultural purposes, authorize the diversion from any point on the perimeter of Lake Kirby, and increase the diversion amount from Lake Kirby to a combined maximum rate of 12.2 cubic feet per second (5,500 gallons per minute). The City of Abilene's certificate of Adjudication (COA) 12-4150 authorizes the Owner to maintain an existing dam and reservoir, known as Lake Kirby, on Cedar Creek, tributary of Elm Creek, tributary of the Clear Fork Brazos River, tributary of the Brazos River, Brazos River Basin and to impound therein not to exceed 8,500 acre-feet of water. Owner is authorized to divert and use not to exceed 115 acre-feet of water per year at a maximum diversion rate of 2.2 cfs (1000 gpm) from the dam outlet structure and from any point on the perimeter of the reservoir for agricultural purposes to irrigate land within the environs of the City of Abilene. Owner is also authorized to divert and used 3,765 acre-feet of water per year at a maximum diversion rate of 10 cfs (4500 gpm) from the dam outlet structure for municipal purposes in Taylor County. [The priority date is October 10, 1927.] The executive director recommends that no public notice be required for this amendment. (Kellye Rila, Todd Chenoweth, Robin Smith)



City of Abilene No. 12-4150

Kirby Lake

Cedar Creek



0 0.25 0.5 1 Miles

12-4150

TAYLOR

Abilene

Kirby Lake

Lake Abilene

TAYLOR COUNTY

BRAZOS RIVER BASIN, TEXAS

0 2.5 5 10 15 20 Miles



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

P.O. Box 13088, MC-160

Austin, Texas 78711-3088

Telephone No. (512) 239-4691 FAX (512) 239-4770

APPLICATION FOR AMENDMENT TO A WATER RIGHT

REQUIRING MAILED AND PUBLISHED NOTICE

NOT REQUIRING MAILED AND PUBLISHED NOTICE

Reference Texas Administrative Code § 295.158(b) or (c)

Notice: This form will not be processed until all delinquent fees and/or penalties owed to the TCEQ or the Office of the Attorney General on behalf of the TCEQ are paid in accordance with the Delinquent Fee and Penalty Protocol.

Customer Reference Number (if issued): CN 600242671

Note: If you do not have a Customer Reference Number, complete Section II of the Core Data Form (TCEQ-10400) and submit it with this application.

1. Name: The City of Abilene
Address: P.O. Box 60
Abilene, Texas 79604
Email Address: mrochelle@lglawfirm.com
Fax: 512/472-0532

2. Applicant owes fees or penalties?
 Yes No
If yes, provide the amount and the nature of the fee or penalty as well as any identifying number:

3. Permit No. _____ Certificate of Adjudication No. 12-4150, as amended

Stream: Cedar Creek, tributary of the Clear Fork Brazos River, tributary of the Brazos River
Watershed: Brazos River Basin
Reservoir (present condition, if one exists): Lake Kirby is in good condition
County: Taylor

4. Proposed Changes To Water Right Authorizations:
Pursuant to provisions of 30 TAC §§ 295.158(c)(1), 295.158(c)(2)(E) and 295.158(c)(2)(F), the City proposes to 1) add multiple purposes of use (municipal, industrial and agricultural) for the 115 acre-feet of water currently authorized for irrigation and the 3.765 acre-feet of water currently authorized for municipal purposes of use; 2) authorize the diversion of such water from anywhere on the perimeter of Lake Kirby, including through the dam outlet structure; and 3) increase the rate of diversion from a storage reservoir to a maximum combined rate of 12.2 cfs. Please see Attachment A.

(ATTACH ADDITIONAL PAGE AS NECESSARY, ATTACH MAP/PLAT DEPICTING PROJECT LOCATION, DIVERSION POINT, PLACE OF USE AND OTHER PERTINENT DATA)

5. I understand the Agency may require additional information in regard to the requested amendment before considering this application.

6. I have submitted the required fees herewith. (Sections 295.131-295.139)

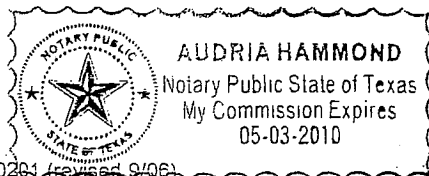
Name (sign) _____
Larry D. Gilley

Larry D. Gilley
Name (print) _____

Name (sign) _____

Name (print) _____

Subscribed and sworn to me as being true and correct before me this: 1st day of June, 2007



Audria Hammond
Notary Public, State of Texas

ATTACHMENT A

SUPPLEMENT TO APPLICATION TO AMEND CERTIFICATE OF ADJUDICATION NO. 12-4150, AS AMENDED CITY OF ABILENE, TEXAS

In addition to the TCEQ Application Form (Form 10201), a narrative description of the amendments sought with this application is found below. The following documents are also attached to this application:

A1 – Copy of Certificate of Adjudication No. 12-4150, as amended

A2 – Lake Kirby Location Map

I. Background Information

The City of Abilene (the "City") is a municipality of the State of Texas, organized and operating pursuant to its home rule charter and the Constitution and laws of the State of Texas. The City holds various water rights for the impoundment, diversion and use of state water, as authorized by the Texas Commission on Environmental Quality ("TCEQ") or its predecessor agencies.

The City has the right to appropriate a total of 3,880 acre-feet of water per year from a tributary of the Brazos River under Certificate of Adjudication ("CA") No. 12-4150, as amended. Currently, this water right authorizes the diversion of up to 115 acre-feet of water for irrigation use and 3,765 acre-feet of water for municipal use. The 115 acre-feet of water for irrigation use is authorized to be diverted "from the perimeter of Lake Kirby" at a rate of 2.2 cfs. The 3,765 acre-feet of water for municipal use is authorized to be diverted "at the dam outlet structure by gravity" at a rate of 10 cfs.

In order to make the most efficient use of this water supply, the City hereby requests that 1) all 3,880 acre-feet of water authorized under CA No. 12-4150, as amended, be authorized for diversion for multiple purposes of use (i.e., municipal, industrial and agricultural uses); 2) that all 3,880 acre-feet of water authorized under CA No. 12-4150, as amended, be authorized for diversion from anywhere on the perimeter of Lake Kirby, including the dam outlet structure; and 3) that all 3,880 acre-feet of water authorized under CA No. 12-4150, as amended, be authorized for diversion at a maximum combined rate of 12.2 cfs. Such amendments can be made to CA No. 12-4150, as amended, without notice pursuant to 30 TAC §§ 295.158(c)(1), 295.158(c)(2)(E), and 295.158(c)(2)(F). Adding multiple purposes of use to the 3,880 acre-feet of water rights and allowing such water to be diverted from any point along the lake's perimeter at a maximum combined rate of diversion provides the City with the flexibility to meet changes in future municipal and industrial demands, while protecting the opportunity for beneficial use of this water supply for agricultural purposes.

II. Applicant Information

Name of Applicant: The City of Abilene
Address: P.O. Box 60, Abilene, Texas 79604
Principal Contact: Mr. Tommy O'Brien (Director of Water Utilities)
Telephone: (325) 676-6416
Fax: (325) 676-6458

III. Source of Supply

The source of water associated with this amendment is Cedar Creek (a tributary of the Clear Fork Brazos River and the Brazos River) and Lake Kirby, an impoundment on Cedar Creek.

IV. Amount and Purpose of Diversion and Use

This application proposes to add multiple purposes of use to the 3,880 acre-feet of water authorized for diversion under CA No. 12-4150, as amended, (priority date of October 10, 1927) from Lake Kirby. This application seeks to amend the presently authorized irrigation use authorization (115 acre-feet) to include agricultural, industrial, and municipal purposes of use, in any combination, with the currently authorized priority date. Likewise, this application seeks to amend the presently authorized municipal use authorization (3,765 acre-feet) to include agricultural, industrial, and municipal purposes of use, in any combination, with the currently authorized priority date.

V. Diversion Information

Currently, as specified in CA No. 12-4150, as amended, the diversion of water from Lake Kirby is permitted at 1) the dam outlet structure by gravity, at a maximum diversion rate of 10 cfs (4,500 gpm) for municipal purposes; and 2) from the perimeter of Lake Kirby, at a maximum diversion rate of 2.2 cfs (1,000 gpm) for irrigation purposes. For this amendment, the City also proposes the right to divert all 3,880 acre-feet of water authorized for diversion from anywhere along the perimeter of Lake Kirby, including through the dam outlet structure. Additionally, the City proposes a maximum combined 12.2 cfs rate of diversion for all 3,880 acre-feet of water authorized in CA No. 12-4150, as amended.

Thus, the City seeks authorization to cumulatively divert up to 3,880 acre-feet of water per year under CA No. 12-4150, as amended, from any one or from any combination of possible diversion locations along the perimeter of Lake Kirby, including through the dam outlet structure, at a maximum combined rate of 12.2 cfs. No additional dams are proposed, no increase in the amount of water diverted is requested, and no additional storage is sought with this proposed amendment.

VI. Surplus or Re-Use

Any unused water or return flows will be returned to streams in the Brazos River Basin, but may be subject to prior appropriation by the City pursuant to its pending indirect reuse application (Application No. 12-4161C).

VII. Beneficial Use

The City will continue to utilize the water authorized for diversion under CA No. 12-4150, as amended, for a beneficial use, as defined in Texas Water Code § 11.002(4) as the use of water "which is economically necessary for a purpose authorized by [chapter 11 of the Texas Water Code]." Municipal, industrial and agricultural purposes of use are identified in § 11.023 of the Texas Water Code as purposes for which water may be diverted and beneficially used. The City's continued need to provide water for municipal, industrial and agricultural purposes of use is inevitable. An industrial purpose of use authorization allows the City to provide non-potable water to customers for use in industrial processes, rather than providing such customers with treated water, resulting in unnecessary treatment costs for the City and its customers and unnecessary water loss from the treatment process. Providing water for municipal purposes of use allows the City to continue to provide its residential customers with an adequate supply of water for household purposes. And, because the Abilene area supports a significant number of farming and irrigation operations, water for agricultural purposes of use will be put to a beneficial use in operations at locations such as Dyess Air Force Base, Abilene Christian University, Hardin-Simmons University, and McMurry University. The provisions of such water for farming and irrigation operations is important to the local and regional economy in Abilene. Thus, for both economic and conservation purposes it is beneficial and necessary for the City to secure a multiple purpose of use authorization.

Additionally, the City's ability to divert all of the water authorized for diversion from any point on the perimeter of Lake Kirby, including through the dam outlet structure, at a maximum combined rate of 12.2 cfs will allow the City flexibility in its diversion of water from this supply and will aid the City's ability to put such water to a beneficial use in a timely manner. Under such an authorization, the City will continue to utilize and provide the water appropriated to it under CA 12-4150, as amended, for beneficial and economically necessary purposes. The City's proposed amendment will simply allow the City to make more efficient use of the water authorized for diversion under CA 12-4150, as amended.

VIII. Public Welfare

As discussed above, the proposed amendment will allow the City to continue to provide water for beneficial use purposes, as defined under the Texas Water Code. Such action is consistent with the City's intent to protect the public welfare, and will certainly not be detrimental to the public welfare. Indeed, the

City's proposed amendment will benefit the public welfare as it will improve the City's ability to more timely and efficiently divert and utilize its existing water supplies to address multiple demands for water. For example, under CA 12-4150, as amended, the City may only provide potable water supplies for industrial activities under the authorized "municipal" purpose of use designation (which is defined at 30 TAC § 297.1(32) as "the use of potable water...for domestic, recreational, commercial, or industrial purposes"). This requires the City to treat such water to a level of drinking water quality. However, the City's proposed amendment to add an "industrial" purpose of use will allow the City to utilize raw or non-portable water for certain industrial activities (as an "industrial" purpose of use is defined in 30 TAC § 297.1(24) as "the use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value"). The use of non-potable water for certain industrial activities, when feasible and appropriate, protects the City's ratepayers from having to pay for unnecessary water treatment plant costs in situations where an industrial customer does not require water of potable quality. Additionally, the ability of the City to have flexibility in its provision of water for municipal, agricultural and industrial purposes of use and flexibility in the location surrounding Lake Kirby from which water will be diverted will allow the City the opportunity to attract new businesses, increase the availability of jobs, and increase the City's tax base. Thus, for these reasons, the proposed amendment is not detrimental to the public welfare.

IX. Effects on Groundwater or Groundwater Recharge

There is no significant connection, if any, between groundwater resources or groundwater recharge and the City's diversion of water for municipal, industrial and agricultural purposes of use. The small and limited amount of groundwater near the City is not a potable water supply. Even if there were usable quantities of good quality groundwater available in the area, allowing the City multiple purposes of use for its existing supplies in Lake Kirby and the ability to divert such supplies from anywhere along the perimeter of Lake Kirby, including the dam outlet structure, at a maximum combined rate of 12.2 cfs would serve to diminish the use of such groundwater by making surface water supplies available for a variety of uses.

VII. Water Conservation and Drought Contingency

The City's current water conservation and drought contingency plan was recently revised and submitted to TCEQ on April 28, 2005. This plan includes provisions that allow the City to enforce conservation of supplies on customers, thereby reducing the consumption of water, and the loss or waste of water, so that a water supply is made available for future or alternative uses. As defined in both 30 TAC § 295.9 and Texas Water Code § 11.002(8), "conservation" means those practices that will "reduce the consumption of water, reduce the loss or waste of water, *improve the efficiency in the use of water*, or increase the recycling and

reuse of water so that a water supply is made available for future or alternative uses." Being located in West Texas, the City has an acute awareness of the need to conserve water supplies. By amending CA No. 12-4150, as amended, so as to allow for multiple purposes of use for that water by diversion from anywhere along the perimeter of Lake Kirby, including through the dam outlet structure, at a maximum combined rate of 12.2 cfs, the City will have the flexibility to more timely and efficiently utilize its water supplies. Such efficiency, along with the City's water conservation and drought contingency plans, will allow the City to address its water supply needs in a manner that will allow it to avoid waste and achieve water conservation.

VIII. Consistency with State and Regional Water Plans

The City is located within the adopted 2006 Region G Water Plan. According to the data provided in the 2006 Brazos G Regional Water Plan, as adopted by the Texas Water Development Board, water demands for the Abilene area are projected to increase, specifically for municipal, manufacturing, and steam-electric purposes of use. It is estimated that the City will have a water shortage of 14,071 acre-feet in 2030. Likewise, the current 2007 Texas Water Plan highlights an expected increased demand for municipal, steam-electric, mining and manufacturing purposes of use.

Thus, based on the identified need in both the Region G and the State Water Plans for additional future water supplies (particularly for municipal and industrial purposes of use), the City has a significant interest in securing multiple purposes of use for its current water rights, as well as the efficient diversion of such rights, so as to ensure that this water supply can be put to the most efficient use. With the capability to provide water for agricultural, municipal and industrial purposes by diverting water anywhere from the perimeter of Lake Kirby, including through the dam outlet structure, at a maximum combined rate of 12.2 cfs, the City has the ability to help meet the water needs of the communities within this portion of the regional planning area. Therefore, the City's application is consistent with the Region G Water Plan and the State Water Plan.

IX. Fees

In accordance with § 295.131 and subsequent rules relating to fees, the City is providing payment of \$100 toward the application fees, and formally requests a determination of any additional fees that may be needed. Upon receipt of such determination, the City will forward additional fees to the Commission.



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March 27, 2008

Mr. Ron Ellis (MC 160)
Water Supply Division
Texas Commission on Environmental Quality
Bldg. F, Room 3101
Austin, Texas 78711-3087

VIA FACSIMILE TRANSMISSION
AND FIRST CLASS MAIL

Re: City of Abilene Application No. 12-4150B for Amendment to Certificate of Adjudication No. 12-4150, as amended (450-03)

Dear Mr. Ellis:

On behalf of my client, the City of Abilene, Texas (the "City"), this letter is in response to your February 28, 2008 request for additional information and fees regarding the above-referenced application (the "Application"). The City appreciates your attention to this important matter and offers the following responses to your inquiries. These responses are numbered in accordance with the inquiries included in your February 28, 2008 letter.

Response to Question No. 1: *Confirm whether this application meets the administrative requirements for an amendment to a water use permit pursuant to TWC Chapter 11 and Title 30 Texas Administrative Code (TAC) §§ 281, 295 and 297. An amendment application should include, but is not limited to, a sworn application, maps, completed conservation plan, fees, etc.*

The City's application meets the administrative requirements for an amendment to a water use permit, in light of the information included in its application, submitted on June 12, 2007, and the additional information submitted on August 20, 2007, and October 1, 2007. If, however, you believe additional information is necessary to meet the administrative requirements for an amendment to a water use permit pursuant to Texas Water Code Chapter 11 and Title 30 Texas Administrative Code §§ 281, 295 and 297, please so advise as soon as possible and the City will supplement the application.

Response to Question No. 2: *Discuss how the proposed amendment is a beneficial use of the water right as defined in TWC § 11.002 and listed in TWC § 11.023. Identify the specific proposed use of the water (e.g. road construction, hydrostatic testing, etc.) for which the amendment is requested.*

The City's Application proposes a beneficial use of the water to be utilized under Certificate of Adjudication 12-4150B, if issued. The City has addressed this issue in the

Application and respectfully refers you to the "Beneficial Use" section of Attachment A to the Application (the "Attachment") on page 3.

Response to Question No. 3: *Explain how the proposed amendment is not detrimental to the public welfare. Consider any public welfare matters you think might be relevant to a decision on the application. Examples could include concerns related to the well-being of humans and the environment.*

Granting the City's Application will not be detrimental to the public welfare. The City has addressed this issue in the Application and respectfully refers you to the "Public Welfare" section on pages 3 and 4 of the Attachment.

Response to Question No. 4: *Discuss the effects, if any, of the proposed amendment on groundwater or groundwater recharge.*

Granting the City's Application will not have any effects on groundwater or groundwater recharge. The City has addressed this issue in the Application and respectfully refers you to the "Effects on Groundwater or Groundwater Recharge" section on page 4 of the Attachment.

Response to Question No. 5: *Describe how the proposed amendment addresses a water supply need in a manner that is consistent with the state water plan or the applicable regional water plan for any area in which the proposed appropriation is located or, in the alternative, describe conditions that warrant a waiver of this requirement.*

The City's Application is consistent with the State and Regional Water Plans. The City has addressed this issue in the Application and respectfully refers you to the "Consistency with State and Regional Water Plans" section on page 5 of the Attachment.

Response to Question No. 6: *Provide evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined in TWC § 11.002. Examples of evidence could include, but are not limited to, a water conservation plan or, if required, a drought contingency plan, meeting the requirements of 30 TAC § 288.*

The City has a current water conservation and drought contingency plan, as discussed in the "Water Conservation and Drought Contingency" section of the Attachment on pages 4 and 5. Additionally, the City submitted to TCEQ on October 1, 2007 the City's *Industrial/Mining Water Conservation Plan* and the *System Inventory and Water Conservation Plan for Agricultural Water Suppliers Providing Water to More than One User*. These plans were accepted by the agency on October 10, 2007.

Response to Question No. 7: *Explain how the proposed amendment will or will not impact water right holders or the environment beyond and irrespective of the fact that the water right can be used to its full authorized amount.*

The Full-Use Assumption

The City's proposed amendment to 1) add multiple purposes of use, 2) authorize the diversion of water from anywhere on the perimeter of Lake Kirby, and 3) increase the rate of diversion from a storage reservoir will not have an impact on other water right holders or the on-stream environment of Cedar Creek or other downstream waters. The City is currently authorized to divert and fully consume up to 3,880 acre-feet of water per annum as authorized under COA 12-4150, as amended, and pursuant to Texas Water Code § 11.046(c), which provides that water authorized for diversion can be "beneficially used and reused" without limit. Unless provided otherwise through a term or condition in a water right, there is no restriction against full consumption of water properly authorized for diversion by the state. While TCEQ has issued some water rights that require a certain percentage of return flows to the basin of origin, or an express limitation on consumption, the City's COA 12-4150, as amended, contains no such restriction. Pursuant to the "full use assumption" of Texas Water Code § 11.122(b), the City's use of its 3,880 acre-feet of water rights for municipal, industrial or agricultural purposes (rather than only utilizing 3,765 acre-feet for municipal purposes and 115 acre-feet for agricultural purposes) will not cause an adverse impact on other water rights holders or the on-stream environment of greater magnitude than if the City fully exercised its rights as currently authorized in COA 12-4150, as amended. Furthermore, under its municipal use authorization (associated with 3,765 acre-feet), the City is fully authorized to and is capable of serving both municipal and industrial customers with potable water. However, as discussed in the Attachment to the Application, the City's proposed amendment will allow the City to make more efficient use of its water supplies and will prevent unnecessary water treatment plant costs and water losses associated with providing potable "municipal use" water to certain industrial customers, rather than non-potable "industrial use" water. Likewise, the City can utilize its "municipal use" water for some irrigation purposes, but recognizes that it is more efficient to utilize non-potable "agricultural use" water for such purposes.

The City's existing authorization allows the diversion of 3,765 acre-feet of water for municipal purposes from the dam outlet on Lake Kirby and the diversion of 115 acre-feet of water for agricultural purposes from the perimeter of Lake Kirby. The City does not seek to add or move its diversion point downstream or upstream of Lake Kirby, but merely seeks authorization to divert all water authorized under COA 12-4150, as amended, from the perimeter of Lake Kirby. No other water right holders are authorized to divert from Lake Kirby, and therefore no interjacent diverters are impacted by this change. The lake's environment will not be impacted by this change, as the total 3,880 acre-feet are already authorized for diversion from Lake Kirby. Finally, the City seeks a maximum combined 12.2 cfs rate of diversion from Lake Kirby, a storage reservoir. This change does not impact other water right holders or the environment because there are no interjacent diverters impacted by this change and the amount of water withdrawn from Lake Kirby is not being altered (TCEQ's regulations expressly acknowledge that such an amendment may be authorized without notice in 30 TAC § 295.158(c)(2)(F)). By employing the Water Code's "full use assumption," there is no

circumstance under which downstream water rights or the environment will be harmed by the City's proposed amendment.

Impacts "Beyond or Irrespective" of the Full-Use Assumption

In its *Marshall* decision, the Texas Supreme Court suggests that the agency must evaluate whether a proposed amendment will affect other water-rights holders or the on-stream environment "beyond or irrespective" of the full-use assumption. The Court provides that such an affect may occur with applications seeking to move the point of diversion "upstream above a senior right holder," or seeking to change the purpose of use from a "nonconsumptive use to a consumptive one." The City's Application seeks neither of these types of amendments and will not harm other water right holders or the environment beyond the legislatively mandated full-use assumption. The City's water right currently includes an authorization to divert, without any limitation or condition on consumption, up to 3,880 acre-feet of water per annum under a municipal (3,765 acre-feet) and agricultural (115 acre-feet) purposes of use authorization. The City's proposed amendment seeks to add (not to change) multiple purposes of use (municipal, industrial and agricultural) for the 3,880 acre-feet authorized for diversion. The addition of a multiple purpose of use authorization does not in any way alter the amount of water the City may ultimately consume under its water right, as the City can currently provide potable water service to industrial customers and irrigation customers under its existing municipal purpose of use authorization (for 3,765 acre-feet) and in light of the City's ability to fully consume this water right. Again, with its Application, the City merely seeks the ability to more efficiently utilize its water supply within the current parameters of COA 12-4150, as amended. Following issuance of the amendment requested by the City, any industrial or irrigation customer that chooses to use industrial use water or agricultural use water for its future supply in lieu of municipal use water will consume the same volume of the water that may have been historically provided, and without regard to the water's historical or future potability.

Some may argue that the addition of a purpose of use to a water right impacts other water rights holders or the environment beyond or irrespective of the full use assumption, because of alleged different rates of consumption that are attendant to different uses of water, which may result in different rates and amounts of return flows. Because the City firmly believes the full use assumption incorporates the concept of full consumption of water appropriated (see, Water Code 11.046(c), which authorizes the full consumption of water supplies prior to discharge, and the TCEQ's use of WAM Run 3—full use, no return flows—in its determination of water available for appropriation) it disagrees with this argument, for several reasons.

First, it is important to recognize that all purposes of use may come with different levels of actual consumption, and that these different levels of consumption occur even within a common purpose of use. The level of consumption is dependant, in part, upon the actual use made by the customers for such waters and not on the purpose of use category in which such use is categorized. For example, some municipal use customers, such as water, soft drink, or beer bottlers, may consume essentially all of the water made available to them by a water right holder,

while other municipal use customers, such as residential and commercial customers, may only consume around half of the water made available to them. Likewise, industrial use customers may consume various percentages of the raw water made available to them, depending on the particular industry. Thus, it is infeasible and inappropriate for the agency to confine each purpose of use category to a single supposed rate of consumption. The agency should rely instead on the concept of full consumption—which it already does in its use of the WAM Run 3 to determine water available for appropriation.

Second, from a practical perspective it is important to recognize the challenges any water rights applicant would confront if it were explicitly required to identify, in an application adding a purpose of use, each and every end-user for its water, and a specified level of consumption that such users would meet. In most instances, such specifics will not be available to the applicant. Indeed, given the length of time necessary to amend a water right, and in light of the fact that many new water customers will not have the capability of waiting any significant period of time for a water supply to be made available, it is much more likely that applicants will be securing such amendments in anticipation of customers, so as to be ready to serve any and all customers when their demands arrive. Thus, water rights applicants most likely will not know either the identity or the consumptive use patterns of the customers they may serve in the future. Moreover, patterns of water use, water reuse, and consumption will change over time, as the cost of water supplies, the availability of reuse projects, and industrial processes change. Even if an applicant were able to identify a particular user of its proposed industrial use supplies, for example, and a specific consumptive pattern of that user at the time of the application, which as noted is unlikely in many instances, those users and the consumptive rates of those users will certainly change over time.

Finally, pursuant to the provisions of Water Code §11.046(c), and in the absence of some term or condition in the base water right limiting the consumptive use of water, wastewaters resulting from the use by customers—whether industrial or municipal use customers—may be directly reused without further water rights authority. The City would emphasize that the water right it seeks to amend in this Application does not contain any consumptive use limit for the water diverted. Significantly, and appropriately given the uncertainties noted above, neither the Texas Water Code nor TCEQ's regulations require applicants seeking a water right, or TCEQ in granting a water right, to specify the actual end users for a particular use category or the projected degrees of consumption for each possible end user within a particular use category.

For the foregoing reasons, the City's proposed addition of a multiple purpose of use authorization will not result in any greater potential consumption of water than is currently possible under the terms and conditions of COA 12-4150, as amended. Perhaps if terms and conditions in the City's existing water right limited its use to purely nonconsumptive purposes of use (for example, recreational, hydroelectric power, or navigation purposes of use), then the addition of multiple purposes of use might have an impact "beyond or irrespective" of the full-use assumption (as expressly suggested by the Supreme Court in its *Marshall* decision), but that possibility is not relevant to facts of the Application. Thus, the City's proposed amendment does

Mr. Ron Ellis
March 27, 2008
Page 6

not impact the current potential for full consumption of water authorized under COA 12-4150, as amended, and there will be no impacts to other water rights or the environment "beyond or irrespective" of the full use assumption.

Nor will an authorization to divert all 3,880 acre-feet authorized under COA 12-4150, as amended, from the perimeter of Lake Kirby at a 12.2 cfs rate impact other water-rights holders or the on-stream environment "beyond or irrespective" of the full-use assumption. The City is currently authorized to divert from Lake Kirby, and by its Application merely seeks the flexibility to divert water from anywhere along the perimeter of the Lake. No other water right holders divert from Lake Kirby. Lake Kirby is a storage reservoir owned and maintained by the City, so the increase in diversion rate will not impact the maintenance of the Lake.

I trust this letter, together with the Application, the Attachment, and the responses to requests for additional information previously provided, adequately responds to your inquiry. If not, or if you have any questions or concerns regarding the information provided herein, please do not hesitate to contact me at your earliest convenience and the City and I will make every effort to affirmatively respond. Based on this information and pursuant to the agency's regulations in Title 30 Texas Administrative Code §§ 295.158(c)(1), 295.158(c)(2)(E), and 295.158(c)(2)(F), TCEQ should be able to issue the proposed amendment without notice. Thank you for your attention to this important matter.

Sincerely,



Martin C. Rochelle

MCR/jdg

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cc: Mr. Larry Gilley
Mr. David Vela
Mr. Dan Santee
Mr. Tommy O'Brien
Mr. Scott Hibbs
Ms. Michelle Smith