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April 5, 2010

Via e-file

La Donna Castañuela
Office of the Chief Clerk - MC 105
Texas Commission on Environmental Quality
P.O. Box 13087
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Re: TCEQ Docket No. 2005-1490-WR; *Application by Brazos River Authority for Water Rights Permit No. WRPERM 5851*

Dear Ms. Castañuela:

Enclosed for filing is the Applicant's Response to Hearing Requests in connection with the above-referenced matter. A copy is being served on each party of record.

Please do not hesitate to contact me should you have any questions.

Sincerely,



Denise Fregeolle-Burk
Assistant to Douglas G. Caroom

/dfb
Enclosure

cc: Mailing List

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DOCKET NO. 2005-1490-WR; WRPERM 5851**

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TCEQ DOCKET NO. 2005-1490-WR

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| APPLICATION BY BRAZOS | § | BEFORE THE |
| | § | |
| RIVER AUTHORITY FOR WATER | § | TEXAS COMMISSION ON |
| | § | |
| RIGHTS PERMIT NO. WRPERM 5851 | § | ENVIRONMENTAL QUALITY |

APPLICANT’S RESPONSE TO HEARING REQUESTS

TO THE HONORABLE COMMISSIONERS:

Brazos River Authority (“Applicant” or “BRA”), pursuant to 30 Texas Administrative Code (TAC) § 55.254, files this Response to Hearing Requests made to the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) for a contested case hearing on the above-referenced application, and would respectfully show the Commissioners the following:

I. Introduction

Application No. 5851 is BRA’s System Operation Permit application. BRA owns water rights to twelve reservoirs on the Brazos River and its tributaries. Although the reservoirs are individually permitted, since 1964 BRA has been authorized by Commission Order to operate its reservoirs as a system; however, the additional water supply known to result from operating the reservoirs as a system has never been appropriated to BRA.

Through the System Operation Permit application, BRA seeks to appropriate up to 421,000 acre-feet of water annually, resulting from system operation, as well as available return flows and other available unappropriated water. This represents a badly needed major new water supply, made available without construction of a reservoir, while providing water for

environmental needs using state of the art S.B.3-type flow constraints, developed in cooperation with TCEQ and the Texas Parks and Wildlife Department staff.

Notice of this application was published in April 2005. After receiving over 40 requests for hearing and comments on the application, BRA undertook efforts to address many of the concerns of the hearing requestors. As a result of these efforts, BRA has reached settlement agreements, or is close to reaching settlement, with many of the hearing requestors identified in the Chief Clerk's March 24, 2010 correspondence. Despite these efforts, several individuals and entities continue to oppose BRA's application.

Of those that remain, BRA does not oppose the hearing requests made by Chocolate Bayou Water Company/Gulf Coast Water Authority, NRG (formerly Texas Genco), Dow Chemical, John Graves, Richard Giesecke, and Jack Weldon Bridges III. BRA opposes granting of the hearing requests of Perry and Margaret Adams, Rich and Christie Clark, Maurice and Ginger English, Adams Eyres, Dorothy Gibbs, Bridges Hague, James and Melodie Isham, Kip Lewis, Mary Lee Lilly, Raymond and Debra Pitts, Jerry Swink, Scott and Linna Trees, H. Jane Vaughn, Lawrence Wilson, George E. Bingham, the cities of Granbury and Round Rock, Matthews Land and Cattle Company, Jean King, the Friends of the Brazos River, Coastal Conservation Association, and the National Wildlife Federation. None of these individuals or entities has standing to contest BRA's application.

II. Legal Authority

To be granted a contested case hearing, a person or entity must be an "affected person," meaning it has "a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application" that is not "common to members of the general

public.”¹ The person must describe, briefly but specifically, how and why he or she will be affected by the change proposed in the application.² An interest common to members of the general public does not qualify as a personal justiciable interest.³ The Commission is instructed to consider a list of non-exclusive factors in determining whether a person is an affected person, including:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) the distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) the likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on the use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.⁴

When a hearing request is made by a group or association, the group or association must show the following:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization’s purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.⁵

Whether the hearing request is asserted by an individual or a group or association, a requestor must show a concrete and particularized, legally protected interest that is actual or

¹ 30 TEX. ADMIN. CODE § 55.256(a).

² *Id.*

³ 30 TEX. ADMIN. CODE § 55.256(a).

⁴ *Id.* § 55.256(c).

⁵ *Id.* § 55.252(a); see also *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, No. 03-04-00683-CV, 2010 WL 521027, at * 3 (Tex. App.- Austin, Feb. 11, 2010, no pet. h.) (citing *Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993)).

imminent rather than conjectural or hypothetical, or an “injury in fact.”⁶ Only legally protected interests that are sufficiently particularized and that will be actually or imminently affected by the application are sufficient to confer standing.⁷ A general concern or allegation about the negative effects on a requestor’s environmental, scientific, or recreational interests alone is not sufficient to confer standing in the absence of allegations that the individual or group has an interest in property affected by the application.⁸

III. Evaluation of Protestants’ Hearing Requests

1. Various Individual Hearing Requestors

The following hearing requestors have failed to satisfy 30 Texas Administrative Code § 55.251 and should be denied:

Perry and Margaret Adams;
Rich and Christie Clark;
Maurice and Ginger English;
Adams Eyres;
Dorothy Gibbs;
Bridges Hague;
James and Melodie Isham;
Kip Lewis;
Mary Lee Lilly;
Raymond and Debra Pitts;
Jerry Swink;
Scott and Linna Trees;
H. Jane Vaughn; and
Lawrence Wilson.

These requestors raise concerns about BRA’s current operations of Lake Granbury and allege the water in the Brazos River is low or stagnant, that there is no recreational swimming or canoeing, and that the fish and wildlife have been harmed. These general environmental and

⁶ *Save Our Springs*, 2010 WL 521027, at *3, 6 (citing *Lujan v. Defenders of Wildlife*, U.S. 555, 560-61 (1992)).

⁷ *Id.* at * 5.

⁸ *See Save Our Springs*, 2010 WL 521027, at * 4-5.

recreational concerns are interests that are common to the general public and are insufficient to confer standing.⁹ Moreover, none of the requestors identify or allege how they, or any legal right they may have, will be affected by BRA's application.¹⁰ The requestors' concerns are about the state of the river today and do not allege that the granting of the application will diminish recreational opportunities, or otherwise adversely affect the Brazos River's ecosystem. For a person to have standing in this case, the requestor must show a particular, legally protected interest that is actually or imminently affected by the Application.¹¹

2. George E. Bingham

George E. Bingham's request for a contested case hearing fails to satisfy 30 Texas Administrative Code § 55.251 and should be denied. Mr. Bingham has no justiciable interest affected by the application based on Certificate of Adjudication No. 12-3580D and Permit No. 4264, both of which are term permits and expired December 31, 2009. Even if those term permits were to be "reissued" in the future, which is far from certain, those permits, by their terms, are inferior to all other permanent water rights in the basin. Mr. Bingham has no legal rights to the future availability of the water permitted under those term water rights. Because Mr. Bingham has no legally protected interest that will be adversely affected by this application, he lacks standing.¹²

3. City of Granbury

The City of Granbury's request for a contested case hearing fails to satisfy 30 Texas Administrative Code § 55.251 and should be denied. Specifically, the request is untimely as it was received by the TCEQ on February 10, 2009 – four years after notice was published.

⁹ See *id.* at * 6.

¹⁰ See 30 TEX. ADMIN. CODE § 55.256(a).

¹¹ See *Save Our Springs*, 2010 WL 521027, at * 6.

¹² See *id.*

Furthermore, the City of Granbury does not have a water right or any legal rights to any return flows discharge from the City of Granbury's wastewater treatment plant, as those flows become state water once in the state water course. The application would do nothing to prevent direct reuse of effluent from the City of Granbury's wastewater treatment plant. Therefore, the City of Granbury has no justiciable interest affected by the application. Without a legally protected interest that will be adversely affected by this application, the City of Granbury lacks standing to challenge BRA's application.¹³

4. Matthews Land and Cattle Company

Matthews Land and Cattle Company's request for a contested case hearing fails to satisfy 30 Texas Administrative Code § 55.251 and should be denied. The Company's Lamshead Ranch is located far upstream of BRA's reservoirs. The water rights requested by the application are a result of the operation of BRA's reservoirs as a system. The application will not affect the water that flows past the Lamshead Ranch. Moreover, the Company has no water right; it simply plans to seek one in the future. Because the Company's property is upstream of BRA's reservoirs, and because the Company has no water right, the Company has no legally protected justiciable interest that will be affected by the application.

5. Jean F. King

Jean F. King's request for a contested case hearing fails to satisfy 30 Texas Administrative Code § 55.251 and should be denied. Specifically, Ms. King has failed to identify any legally protected interest or right that will be adversely affected by this application. Ms. King does not own any property along the Brazos River, and any alleged injury to environmental or recreational interests generally, without any interest in or connection to real

¹³ See *Save Our Springs*, 2010 WL 521027, at * 6.

property, is insufficient to confer standing.¹⁴ Moreover, she does not identify or allege how she, or any legal right she has, will be affected by BRA's application.¹⁵ Her concerns are about the state of the river today. She does not allege that the granting of the application itself will diminish recreational opportunities, or otherwise adversely affect the Brazos River's ecosystem. For a person to have standing in this case, the requestor must show a particular, legally protected interest that is actually or imminently affected by the Application.¹⁶

6. The City of Round Rock

The City of Round Rock's request for a contested case hearing fails to satisfy 30 Texas Administrative Code § 55.251 and should be denied. Specifically, the request is untimely as it was submitted on April 1, 2010 – five years after notice was published. Furthermore, the City of Round Rock indicates that it has several contracts with BRA to purchase water from Lake Georgetown, Stillhouse Hollow Lake, and the Colorado River Basin, and states its concern with ownership of wastewater derived from water supplied under those contracts. The City of Round Rock's concerns cannot be resolved through any changes to the application or this contested case hearing. Such concerns are contract disputes outside the jurisdiction of the Commission. Moreover, the City of Round Rock has no water rights. The City of Round Rock failed to identify any legally protected justiciable interest that will be affected by the application.

7. The Friends of the Brazos River

The Friends of the Brazos River's ("FBR") request for a contested case hearing fails to satisfy 30 Texas Administrative Code § 55.252 and should be denied. Only four of the members

¹⁴ *See id.*

¹⁵ *See* 30 TEX. ADMIN. CODE § 55.256(a).

¹⁶ *See Save Our Springs*, 2010 WL 521027, at * 6.

of FBR are listed in the request, and none of them have standing to request a hearing in their own right.

Mary Lee Lilly and Jane Vaughn filed individual requests and, as previously explained, neither of these protestors has satisfied the requirements of 30 Texas Administrative Code § 55.251 and, therefore, do not have standing to protest this case individually. Neither member identifies or alleges how they, or any legal right they may have, will be affected by BRA's application.¹⁷ The members' concerns are about the state of the river today and do not allege that the granting of the application will diminish recreational opportunities or otherwise adversely affect the Brazos River's ecosystem. The member must show a particular, legally protected interest that is actually or imminently affected by the Application.¹⁸ The FBR request states that Ms. Vaughn owns a water right; however, there is no water rights number to identify and verify the claim, or any information about how or why the alleged water right will be affected by the application. It should also be noted that Ms. Vaughn mentioned no such right in her individual request.

Ed Lowe, FBR's President, and Jack and Kathy Cathey have not filed individual requests, nor do they have standing to request a hearing in their own right pursuant to 30 Texas Administrative Code § 55.251. Neither Mr. Lowe nor the Catheys have shown that they have suffered injuries "in fact." Mr. Lowe is concerned that granting BRA the authority to manage the river will result in reduced canoeing opportunities. The Catheys are concerned that granting BRA more control of the water in the river will adversely affect their canoeing business. However, general concerns about the negative effects on a requestor's environmental, scientific,

¹⁷ See 30 TEX. ADMIN. CODE § 55.256(a).

¹⁸ See *Save Our Springs*, 2010 WL 521027, at * 6.

or recreational interests are not sufficient to confer standing in the absence of allegations of interests in property that will actually be impacted by the application. The injuries alleged are not immediate or direct. There are no allegations of personal justiciable interests that will be affected by the application.

FBR asserts that its other members are concerned that their rights as riparian owners will be adversely affected by the application and that the fish and wildlife will be severely harmed. FBR has not identified the “other members.” These “other members” have not alleged injuries “in fact.” They have not identified a riparian right, thus there are no allegations of personal justiciable interests that will be affected by the application. General concerns about the negative effects on a requestor’s environmental, scientific, or recreational interests are not sufficient to confer standing in the absence of allegations of interests in property that will actually be impacted by the application.

Because FBR has failed to identify one or more members of the group or association that would otherwise have standing to request a hearing in their own right, FBR has failed to satisfy the group or associational standing requirements and, therefore, its hearing request should be denied.

8. The Coastal Conservation Association

The Coastal Conservation Association’s (“CCA”) request for a contested case hearing fails to satisfy 30 Texas Administrative Code § 55.252 and should be denied. Only one member is identified in the request and this member does not have standing to request a hearing in his own right.

CCA describes Allen Williams, the only member identified in the request, as someone who regularly fishes in the Brazos River, but failed to show that Mr. Williams owns property

along the Brazos River. Mr. Williams has not shown an injury “in fact” to any legally protected interest. Moreover, the injuries alleged are not immediate or direct. General concerns about the negative effects on a requestor’s environmental, scientific, or recreational interests are not sufficient to confer standing in the absence of allegations of interests in property that will actually be impacted by the application.¹⁹ Because CCA has failed to identify one or more members of the group or association that would otherwise have standing to request a hearing in his or her own right, CCA has failed to satisfy the group or associational standing requirements and, therefore, its hearing request should be denied.

9. The National Wildlife Federation

The National Wildlife Federation’s (“NWF”) request for a contested case hearing fails to satisfy 30 Texas Administrative Code § 55.252 and should be denied. NWF has failed to show that any of its members have standing to request a hearing in their own right.

NWF alleges that it has approximately 38,000 members that share the goal of protecting fish and wildlife resources and the application will affect the ability of its members to use and enjoy these resources. NWF has not identified any member specifically that would have standing in his or her own right to request a contested case hearing. Because NWF has failed to identify one or more members of the group or association that would otherwise have standing to request a hearing in his or her own right, NWF has failed to satisfy the group or associational standing requirements and, therefore, its hearing request should be denied.

¹⁹ See *Save Our Springs*, 2010 WL 521027, at * 6.

IV. Settled and Withdrawn Protests

The following entities have entered into settlement agreements with BRA and/or withdrawn their protests to the application:

1. City of Lubbock;
2. City of Bryan;
3. City of College Station;
4. Ft. Bend County Municipal Utility District No.106;
5. Pecan Grove Municipal Utility District;
6. Luminant Generation Co., LLC, et al. (formerly TXU);
7. AEP;
8. Assoc. of Electric Companies of Texas;
9. Texas Municipal Power Agency;
10. Walnut Creek Mining Co.; and
11. Palo Pinto County Municipal Water District No. 1.

The cities of Lubbock, Bryan, and College Station have conditionally withdrawn their protests by reserving their rights to participate in the contested case hearing. BRA does not oppose the granting of the hearing requests of these entities.

V. Protestants BRA Anticipates Entering Into Settlement With

BRA is negotiating settlement agreements with the following entities:

1. Ft. Bend County Levee Improvement District No. 11;
2. Fort Bend County Levee Improvement District No. 15;
3. Sienna Plantation Municipal Utility District No. 1; and
4. Texas Westmoreland Coal Company.

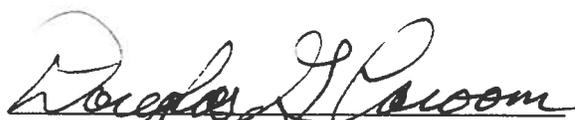
BRA anticipates withdrawal of these protests in the near future and does not oppose the granting of the hearing requests of these entities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify by my signature below that a true and correct copy of the above and foregoing document was forwarded via First Class Mail, hand delivery, or facsimile on April 5, 2010 to the parties on the attached Mailing List.


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