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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 5, 2010

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

Re: **BRAZOS RIVER AUTHORITY**
TCEQ DOCKET NO. 2005-1490-WR

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY To: PUBLIC INTEREST COUNSEL, MC 103 P.O. Box 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

TCEQ DOCKET NO. 2005-1490-WR

**APPLICATION OF BRAZOS
RIVER AUTHORITY FOR
PERMIT NO. 5851**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTS FOR HEARING**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) and files this Response to Requests for Hearing in the above-referenced matter. OPIC recommends granting the requests for a contested case hearing filed by: Friends of the Brazos River, Inc. (FBR), Gulf Coast Water Authority (GCWA), Texas Westmoreland Coal Company (TWCC), City of Granbury, George Bingham, Donald McArthur, the Coastal Conservation Association (CCA), Jack Weldon Bridges, Rick and Christie Clark, Perry and Margaret Adams, James R. Isham, Dorothy Gibbs, Maurice and Ginger English, Jean F. King, Richard Giesecke, John Graves, Jerry Swink, Scott and Linna Trees, Lawrence Wilson, Raymond and Debra Pitts, Adam Eyres, Bridges Hague, R. Kip Lewis, H. Jane Vaughn, Mary Lee Lilly, Mathews Land and Cattle, Fort Bend County Levee Improvement District No. 11, Fort Bend County Levee Improvement District No. 106, Pecan Grove Municipal Utility District, and Sienna Plantation Municipal Utility District No. 1. In support of its recommendation OPIC respectfully submits the following:

I. INTRODUCTION

The Brazos River Authority (BRA or Applicant) has applied for a permit, designated its

“System Operation Permit,” to authorize:

- 1) Appropriation of state water in the amount of 421,449 acre-feet per year for multiple use purposes including domestic, municipal, agricultural, industrial, mining, and other beneficial uses on a firm basis in the Brazos River Basin;
- 2) appropriation of current and future return flows (treated sewage effluent and brine bypass/return) to the extent that such return flows continue to be discharged or returned into the bed and banks of the Brazos River, its tributaries, and applicant’s reservoirs;
- 3) an exempt interbasin transfer of the water requested;
- 4) operational flexibility to use any source of water available to applicant to satisfy the diversion requirements of senior water rights to the same extent that those water rights would have been satisfied by passing inflows through the applicant’s reservoirs on a priority basis and to release, pump and transport water from any of the applicant’s reservoirs for subsequent storage, diversion and use throughout the applicant’s service area;
- 5) recognition that the System Operation Permit will prevail over inconsistent provisions in its existing water rights; and
- 6) the use of the bed and banks of the Brazos River, its tributaries, and BRA’s reservoirs for the storage, conveyance and subsequent diversion of state water appropriated pursuant to this application and from other sources.

The water authorized by this amendment will be diverted from: i) the existing diversion points authorized by BRA’s existing water rights; ii) the Brazos River at the USGS gage No. 08091000 near Glen Rose, Texas; iii) the Brazos River at USGS gage No. 08098290 near Highbank, Texas; iv) the Brazos River at the Gulf of Mexico; and v) at such other diversion points that may be identified and included in BR’s proposed Water Management Plan.

BRA’s application was received June 25, 2004 and declared administratively complete on October 15, 2004. On April 22, 2005, the TCEQ Chief Clerk mailed notice to all navigation districts in the Brazos River Basin as well as all holders of certified filings, permits and claims of water rights in the Colorado River Basin. Applicant published notice of the application in 27 newspapers on May 11-13, 2005. The deadline to request a contested case hearing was June 13,

2005, thirty days after publication of the notice.¹ The TCEQ Executive Director's ("ED") Response to Comments was mailed on May 16, 2006.

II. REQUIREMENTS OF APPLICABLE LAW

A. Requirements to Obtain Affected Person Status

This application was declared administratively complete after September 1, 1999, and is subject to Chapter 55, Subchapter G, sections 55.250 - 55.256. According to these rules, an "affected person" must submit a timely contested case hearing request in writing and in compliance with Commission requirements for making a request.² In addition, the request must identify the person's personal justiciable interest affected by the application, including a brief, specific explanation regarding "the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to the members of the general public."³

An "affected person" is one "who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application" in a manner not common to members of the general public.⁴ Relevant factors considered in determining a person's affected person status include:

¹ 30 TAC Section 295.171: A request for contested case hearing on an application for a water use permit or amendment made by the applicant, the executive director, or an affected person who objects to the application must be made in writing, must comply with the requirements of Chapter 55, Subchapter G, of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment), and specifically §55.251 of this title (relating to Requests for Contested Case Hearing, Public Comment), and must be submitted to the commission within 30 days after the publication of the notice of application. The commission may extend the time allowed for submitting a request for contested case hearing.

² 30 TEX. ADMIN. CODE ("TAC") §§ 55.251 *et seq.* and 30 TAC § 295.171.

³ 30 TAC § 55.251(c)(2).

⁴ 30 TAC § 55.256(a). "This standard does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will potentially suffer harm or have a justiciable interest that will be affected." *United Copper v. TNRCC*, 17 S.W.3d 797, 803 (Tex.App. - Austin 2000).

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) 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) likely impact of the regulated activity on the health, safety, and use of the property of the person;
- (5) likely impact of the regulated activity on 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.⁵

A contested case hearing should be granted if an affected person's hearing request meets all requirements of applicable law. A request for hearing shall be granted if the request is made by the applicant or the executive director.⁶ The Commission may also refer an application to the State Office of Administrative Hearings if the Commission determines that a hearing would be in the public interest.⁷

B. Requirements for Amendment of a Certificate of Adjudication

Section 11.022 of the Texas Water Code (TWC) provides that "the right to the use of state water may be acquired by appropriation in the manner and for the purposes provided in this chapter." Section 11.134(b) provides in pertinent part that the Commission shall grant an application to use state water only if:

- (2) unappropriated water is available in the source of supply;
- (3) the proposed appropriation:
 - (A) is intended for a beneficial use
 - (B) does not impair existing water rights or vested riparian rights;

⁵ 30 TAC § 55.256(c).

⁶ 30 TAC § 55.255(b)1

⁷ 30 TAC § 55.255(c).

- (C) is not detrimental to the public welfare;
- (D) considers the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152;
- (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;

Section 11.147(d) of the Water Code also requires the Commission to consider the effect of a proposed permit on existing instream uses and water quality. Subject to the aforementioned requirements, a proposed amendment to a water right that does not increase the amount of water to be diverted or the authorized rate of diversion “shall be authorized 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, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.”⁸

III. DISCUSSION

A. Determination of Affected Persons

1. Water Rights Holders

a. Friends of the Brazos River, Inc.

Richard Lowerre, substituted counsel for Stuart N. Henry, on behalf of Friends of the Brazos River, Inc. (FBR), submitted a request indicating that the purpose of their group is to protect and restore the segment of the Brazos River downstream of Lake Granbury and upstream of Lake Whitney to a state that supports recreation, swimming, fishing, and canoeing, as well as protection of fish and wildlife along the segment. FBR has named Ed Lowe, Mary Lee Lilly,

⁸ TWC § 11.122 (b).

Jane Vaughn, and Jack and Kathy Cathey as affected members who would have standing to request a hearing in their own right. FBR is concerned about the impact of the permitted activities on the vested riparian water rights of some members, water levels, water quality, recreational interests, negative impacts on aquatic life and wildlife, and economic interests.

OPIC finds that the interests FBR seeks to protect are germane to the organization's purpose in accordance with the requirements of §55.252(a). Additionally, the request submitted by FBR adequately identifies one or more members of the group or association who would otherwise have standing to request a hearing in their own right. As existing water rights holders, the named members of FBR have personal justiciable interests under Texas Water Code §11.134(b)(3)(B). OPIC therefore recommends that the request of FBR be granted and the matter referred to SOAH for a contested case hearing.

b. Individual Water Rights Holders

Five additional hearing requests were filed and not withdrawn by individuals who have existing water rights potentially impacted by the Applicant's System Operation Permit.

Martin Rochelle, on behalf of Gulf Coast Water Authority (GCWA) adopts the hearing request originally filed by Lawrence L. Bellatti, on behalf of Chocolate Bayou, after purchasing the Certificates of Adjudication at issue. GCWA is concerned that the Applicant's use will impact their vested riparian water rights.⁹ Martin Rochelle also filed a request on behalf of the Texas Westmoreland Coal Company (TWCC). TWCC is concerned that their water rights under Water Use Permit No. 5319 will be negatively impacted.

Alva Cox, on behalf of the City of Granbury, is concerned that the permitted activities will impact their vested water rights. George Bingham, on behalf of himself, Juanita Sue

⁹ TWC 11.134(b)(3)(B)

Bingham, Brian Bingham, Kellie Bingham, and Carey Bingham, is concerned that the Applicant's use will impact their vested riparian water rights and economic interests.¹⁰ Donald M. McArthur, on behalf of NRG Texas Power LLC (previously Texas Genco), raises the same concerns.¹¹ As existing water rights holders, these five additional requestors have personal justiciable interests under Texas Water Code §11.134(b)(3)(B). OPIC therefore recommends that the requests of GCWA, TWCC, City of Granbury, George Binham, and Donald McArthur be granted and referred to SOAH for a contested case hearing.

2. Non-Water Rights Holders

a. Groups or Associations

Robin Melvin submitted a hearing request on behalf of the Texas Chapter of the Coastal Conservation Association (CCA). Ms. Melvin states that the purpose of the CCA is to save the natural resources of Texas' coastal waters and maintain the freshwater flows that are necessary to support natural marine breeding habitats. CCA names Allen Williams as a specific member of CCA with standing to request a hearing in his own right. Mr. Williams lives in the Freeport, Texas area and regularly fishes in and around the mouth of the Brazos River. CCA is concerned about protection of existing in-stream uses, including fish and wildlife ecosystems and habitats, and whether the permit would be beneficial to the public welfare.

OPIC finds that the interests CCA seeks to protect are germane to the organization's purpose in accordance with the requirements of §55.252(a). Additionally, the request submitted by CCA adequately identifies one or more members of the group or association who would otherwise have standing to request a hearing in their own right. Mr. Williams has a right to use

¹⁰ 30 TAC § 55.256(a). "This standard does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will potentially suffer harm or have a justiciable interest that will be affected." *United Copper v. TNRCC*, 17 S.W.3d 797, 803 (Tex.App. - Austin 2000).

¹¹ *Id.*

the River for recreational purposes.¹² The Commission must consider issues regarding water availability,¹³ the protection of in stream uses,¹⁴ and the protection of public welfare¹⁵ in its determination of whether to grant or amend the Certificate. The proposed permit may threaten flow availability downstream and negatively affect Mr. Williams' use of the water in the river.¹⁶ OPIC therefore recommends that the request of CCA be granted and the matter referred to SOAH for a contested case hearing.

Christopher Brown submitted a hearing request on behalf of the National Wildlife Federation (NWF). Mr. Brown states that the goals of the group are protecting fish and wildlife resources and the right of people to enjoy those resources. Mr. Brown and the NWF are concerned that the permitted diversion would negatively impact water quality and fish and wildlife along the Brazos River and the ability of its members to enjoy these resources. OPIC finds that the interests NWF seeks to protect are germane to the organization's purpose in accordance with the requirements of §55.252(a). However, the request does not name a person who would otherwise have standing to request a hearing in their own right. Pursuant to §55.252(b), OPIC requests that the name and contact information of such a member be disclosed by the reply deadline of April 19, 2010. If this information is timely filed, OPIC recommends that the hearing request of NWF be granted and the matter referred to SOAH for a contested case hearing.

¹² 30 TAC § 55.256(c)(3).

¹³ See TWC § 11.134(b); 30 TAC §297.42.

¹⁴ TWC § 11.147(d).

¹⁵ TWC 11.134(b)(3)(C)

¹⁶ 30 TAC § 55.256(c)(4), (5).

b. Individual Requests

Nineteen individual requests were submitted by individuals who do not have vested riparian water rights.

Jack Weldon Bridges and Rick and Christie Clark submitted a request citing concerns about water availability, recreational interests, and issues concerning human health and safety.

Perry and Margaret Adams, James R. Isham, Dorothy Gibbs and Maurice and Ginger English share these concerns and additionally raise the issues of protection of existing in-stream uses, including protection of fish and wildlife ecosystems and habitats, as well as vegetation dependent on availability of water from the River.

Jean F. King, Richard Giesecke, John Graves, Jerry Swink, Scott and Linna Trees, Lawrence Wilson, and Raymond and Debra Pitts share these concerns and additionally raise the issue of human health and safety.

Several requestors own businesses they fear will be affected by the Applicant's permitted activities. Adam Eyres is concerned about water availability, water quality, recreational use of the Brazos River, protection of existing in-stream uses, including fish and wildlife ecosystems and habitats, and vegetation dependent on availability of water from the River, and protection of human health and safety. Mr. Eyres is also concerned about negative economic impacts on his kayak touring company.

Bridges Hague is concerned about water availability, water quality, recreational use of the Brazos River, protection of human health and safety, protection of existing in-stream uses, including fish and wildlife ecosystems and habitats, and vegetation dependent on availability of water from the River. Mr. Hague is also concerned about negative economic impacts on his commercial grass and nursery products.

R. Kip Lewis, on behalf of Tres Rios Campground, is concerned about water levels, recreational uses of the River, and economic impact on his campground business.

Several requestors own farms and ranches they fear will be affected by the Applicant's permitted activities. H. Jane Vaughn is concerned about water levels, recreational interests and protection of existing in-stream uses, including fish and wildlife ecosystems and habitats, water quality, and human health and safety. Also of concern is potential negative economic impacts on crop irrigation and farming activities.

Mary Lee Lilly, on behalf of the MW Farm and Ranch, is concerned about water levels, recreational interests, human health and safety, protection of existing in-stream uses, including fish and wildlife ecosystems and habitats, and vegetation dependent on availability of water from the River, and her commercial farming and ranching interests.

Leonard H. Dougal, substituted counsel for Molly Cagle, on behalf of Matthews Land and Cattle Company, is concerned about water availability, economic impact and impact on livestock and agricultural uses.

Several water districts have also requested a hearing. Mr. Andrew Strong, of Pillsbury Winthrop Shaw Pittman LLP, supplementing the objection and request for contested case hearing submitted by Mr. Richard L. Muller of Allen Boone Humphries Robinson LLP on behalf of Fort Bend County Levee Improvement District No. 11, Fort Bend County Levee Improvement District No. 106, Pecan Grove Municipal Utility District, and Sienna Plantation Municipal Utility District No. 1, raises the concerns that notice was not properly given because entities holding a wastewater permit on the Brazos River should have been notified as "persons who, in

the judgment of the commission, might be affected,"¹⁷ the application will be detrimental to the public welfare,¹⁸ protection of instream uses, and appropriation of the Districts' effluent.

Each of these requestors raise issues that are not common to members of the general public and are protected by the law under which the application will be considered. The massive appropriation requested by BRA, some 421,449 acre-feet per year, may affect the use of the Brazos River water for livestock, recreational and agricultural purposes.¹⁹ The Commission must additionally consider issues regarding water availability,²⁰ the protection of in stream uses,²¹ and the protection of public welfare²² in its determination of whether to grant or amend the Certificate. The proposed amendment may threaten the flow availability downstream, and, thereby, the regulated activity may impact the requestors' use of the water in the Creek.²³ Moreover, section 11.147(d) of the Water Code requires the Commission to consider the effect of a proposed permit on existing instream uses and water quality.

Therefore, the requestors have personal justiciable interests in their access to the surface water flowing over their property that is not common to members of the general public and is protected by the law under which the application will be considered. In light of the facts and issues raised by the requestors, OPIC finds that they are affected persons entitled to a hearing.

¹⁷ See 30 TAC §295.153(b)(1)-(3)

¹⁸ 30 TWC §11.134(b)(3)(C).

¹⁹ 30 TAC § 55.256(c)(3).

²⁰ See TWC § 11.134(b); 30 TAC §297.42.

²¹ TWC § 11.147(d).

²² TWC 11.134(b)(3)(C)

²³ 30 TAC § 55.256(c)(4), (5).

IV. CONCLUSION

OPIC respectfully recommends that the Commission grant the hearing requests of the following requesters: Friends of the Brazos River, Inc. (FBR), Gulf Coast Water Authority (GCWA), Texas Westmoreland Coal Company (TWCC), City of Granbury, George Bingham, Donald McArthur, the Coastal Conservation Association (CCA), Jack Weldon Bridges, Rick and Christie Clark, Perry and Margaret Adams, James R. Isham, Dorothy Gibbs, Maurice and Ginger English, Jean F. King, Richard Giesecke, John Graves, Jerry Swink, Scott and Linna Trees, Lawrence Wilson, Raymond and Debra Pitts, Adam Eyres, Bridges Hague, R. Kip Lewis, H. Jane Vaughn, Mary Lee Lilly, Mathews Land and Cattle Company, Fort Bend County Levee Improvement District No. 11, Fort Bend County Levee Improvement District No. 106, Pecan Grove Municipal Utility District, and Sienna Plantation Municipal Utility District No. 1. If the information requested of the National Wildlife Federation (NWF) is submitted by April 19, 2010, OPIC will also recommend granting their hearing request. Based on the foregoing, OPIC respectfully requests that the Commission refer this matter to SOAH for a contested case hearing.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel


Eli Martínez

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2010, the original and seven true and correct copies of the Office of the Public Counsel's Response to Requests for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Eli Martinez

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