

Apr 19 10 03:40p

P.2

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

TCEQ DOCKET NO. 2005-1490-WR

2010 APR 19 PM 4:58

CHIEF CLERKS OFFICE

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

**NATIONAL WILDLIFE FEDERATION'S REPLY**  
**TO RESPONSES TO HEARING REQUESTS**

The National Wildlife Federation (NWF) files this reply to the responses to hearing requests filed on the above-referenced application and would respectfully show the Commissioners the following.

I. Introduction

In this Reply, the National Wildlife Federation designates a new contact person for future filings; supplements the information provided in the earlier request for contested case hearing; discusses the mischaracterization, in various responses to hearing requests, of a recent opinion by the Texas Court of Appeals relating to standing; and notes certain special circumstances regarding the issues raised by the above-referenced application that suggest the need for a bifurcated hearing process.

II. Designation of New Contact Person

The National Wildlife Federation requests that Myron J. Hess be formally listed as the appropriate contact person for the National Wildlife Federation for purposes of this application. Christopher Brown no longer represents NWF. The contact information for Mr. Hess is as follows:

Myron J. Hess  
National Wildlife Federation  
44 East Avenue Suite 200  
Austin, TX 78701  
Office ph: 512-610-7754  
Fax: 512-476-9810  
Email: [hess@nwf.org](mailto:hess@nwf.org)

### III. Supplemental Information

Consistent with Sections 55.252 (b) and 55.254 of the Commission's rules, the National Wildlife Federation provides this supplemental information in support of its hearing request. As noted in its hearing request in this matter, the National Wildlife Federation is a national, non-profit organization dedicated, among other things, to protecting natural resources and the right of people to use and enjoy those resources. NWF's membership is composed of people who share the goals of protecting fish and wildlife resources and the right of people to enjoy those resources.<sup>1</sup> NWF currently has approximately 34,000 members in Texas, many of whom use and enjoy those resources, including the resources of the Brazos River. One such member is Larry Wilson. Mr. Wilson owns property fronting on the Brazos River below Lake Granbury. Mr. Wilson is greatly concerned about the potential adverse effects of the above-referenced application on the natural resources associated with the flows in the Brazos River and with recreational activities dependent on those natural resources. Because Mr. Wilson meets the test for standing in his own right and because Mr. Wilson is a member of the National Wildlife Federation and is concerned about issues germane to the purposes of the National Wildlife Federation, NWF has met the test for a valid hearing request.

### IV. Discussion of Recent Judicial Opinion Regarding Standing

The Brazos River Authority and the Executive Director, in their respective responses to hearing requests, rely on a recent opinion in *Save Our Springs Alliance v. City of Dripping Springs*, which they assert imposes new limits on standing. Basically, they argue, based on the opinion, that an interest in real property which may be adversely affected is a necessary prerequisite for a valid hearing request by a conservation or environmental organization. That assertion ignores the plain language of the opinion, which recognizes two alternate bases for standing: "SOS Alliance has alleged neither an environmental interest provided for or protected by statute (as is present in the federal cases cited by SOS Alliance) nor a property interest subject

---

<sup>1</sup> The formal mission of the National Wildlife Federation is to inspire Americans to protect wildlife for our children's future.

to the recreational or environmental harm (as is present in state cases cited by SOS Alliance).”<sup>2</sup> Thus, as that opinion makes clear in accordance with previous court opinions, standing for an environmental organization can be supported either based on an environmental interest protected by statute that is at issue or based on a property interest subject to environmental harm.

Initially, it is important to distinguish the posture of the issues addressed in *Save Our Springs Alliance v. City of Dripping Springs* from the issues currently before the Commission. In this proceeding, the issue of current relevance is the adequacy of the assertions of standing in the hearing requests. In *Save Our Springs Alliance*, the court was concerned with the adequacy of the evidence regarding standing that was presented during trial. As a result, more stringent evidentiary tests and standards were applicable there. In addition, in *Save Our Springs Alliance*, the subject matter of the litigation was a challenge, pursuant to the Declaratory Judgments Act, to various development agreements alleging violations of the Texas Constitution and the Texas Open Meetings Act. Thus, unlike the case before the Commission, there was no permitting process at issue and there were no applicable statutory provisions expressly protecting environmental interests. Indeed, the Court of Appeals expressly distinguished the result in that case from the result in *City of San Marcos v. Texas Commission on Environmental Quality*, 128 S.W.3d 264 (Tex. App.—Austin 2004, pet. denied), because of the existence of a statutory provision, Tex. Water Code Ann. § 5.351, authorizing judicial review.<sup>3</sup> Thus, *Save Our Springs Alliance* is not authority for limiting standing in cases before the Commission.

Even if *Save Our Springs Alliance* were applicable, the National Wildlife Federation has sufficiently alleged standing under either prong of the analysis in that case to demonstrate the validity of its hearing request. First, The National Wildlife Federation, like numerous other hearing requestors, has alleged an environmental interest “provided for or protected by statute.” Sections 11.147 and 11.150 of the Texas Water Code, which unquestionably are applicable to this application, expressly provide protections for environmental interests. Section 11.147 (d)

---

<sup>2</sup> *Save Our Springs Alliance v. City of Dripping Springs*, No. 03-04-00683-CV, 2010 Tex. App. LEXIS 1025, at \*22 (Tex. App.—Austin Feb. 11, 2010, no pet. h.)

<sup>3</sup> *Id.* at fn. 7.

directs the commission to include, in any permit granted, appropriate protections "to maintain existing instream uses and water quality of the stream or river to which the application applies."<sup>4</sup>

As the Commission's rules make abundantly clear, instream uses include purposes such as recreation, fisheries, and aquatic and riparian habitat.<sup>5</sup> The types of interests germane to the purposes of the National Wildlife Federation and of concern to its members, including Mr. Wilson, are expressly protected by statutory provisions applicable to this application. Accordingly, the National Wildlife Federation does have standing to request a hearing under the first prong recognized in *Save Our Springs Alliance*.

Second, the National Wildlife Federation also has standing to request a hearing under the second prong recognized in the *Save Our Springs Alliance* opinion. As noted there, an environmental or conservation organization also can base its standing on a property interest of a member subject to recreational or environmental harm. As noted above, Mr. Wilson owns property adjoining the Brazos River. There is no serious question that the reduced flows likely to result from the granting of the application have the potential to cause recreational or environmental harm to those property interests.

#### V. Special Circumstances Raised by This Application

The application at issue in this proceeding is massive in scope and in precedential import. For all practical purposes, the Brazos River Authority has asked the Commission to grant control of the remaining unappropriated water (1,001,449 acre-feet: 331,449 firm and 670,000 interruptible) in the Brazos Basin to BRA. In fact, as discussed further below, BRA actually has requested the appropriation of 1,204,099 acre-feet (335,099 firm and 869,000 interruptible) of water until the Allens Creek Reservoir is completed. If granted, persons seeking future use of surface water in that basin will have to do business with BRA because the Commission will no longer be granting permits.

<sup>4</sup> Tex. Water Code Ann. § 11.147 (d). Similarly, Section 11.150 provides additional emphasis for water quality protection *id.* at § 11.150.

<sup>5</sup> The rules, at 30 TAC § 297.1 (25), define instream use as follows: Instream use--The beneficial use of instream flows for such purposes including, but not limited to, navigation, recreation, hydropower, fisheries, game preserves, stock raising, park purposes, aesthetics, water quality protection, aquatic and riparian wildlife habitat, freshwater inflows for bays and estuaries, and any other instream use recognized by law. An instream use is a beneficial use of water. Water necessary to protect instream uses for water quality, aquatic and riparian wildlife habitat, recreation, navigation, bays and estuaries, and other public purposes may be reserved from appropriation by the commission.

In addition, because of the scope of the application, the unappropriated flows that might otherwise be set aside by the Commission pursuant to the new environmental flows allocation process established by the Texas Legislature in 2007 through Senate Bill 3 will instead be governed by any permit granted pursuant to this application. Accordingly, it is particularly important that all potentially affected interest groups, including conservation and environmental organizations and recreational groups, that are expressly recognized as key players in that Senate Bill 3 process<sup>6</sup> have the opportunity to participate fully in this permitting proceeding.

The application also seeks "operational flexibility" to deviate from strict application of the prior appropriation system and meet senior water rights from any source of water available to BRA. Again, this unprecedented "flexibility" has significant implications for potential reductions in flow in stretches of the river through which water otherwise would have flowed in order to honor senior rights. That issue raises significant legal and policy considerations.

The draft permit contemplates the creation of a Water Management Plan structure to govern future operation under the permit, which would have the effect of deferring key determinations and decisions until some future date after the permit has been granted by the Commission. Broad participation is needed in order to ensure that an effective process is created that would provide for sufficient Commission oversight and for meaningful public participation. Early Commission guidance on the nature and acceptability of the Water Management Plan process also could be extremely helpful in ensuring an efficient hearing process.

The application seeks the appropriation of water previously appropriated for the Allens Creek Reservoir. That request is not limited to a finite term consistent with Section 11.1381. That aspect raises significant legal and policy issues that likely would benefit from early Commission guidance.

For these various reasons, this application is, arguably, the most complex ever considered by the Commission. Indeed, the Executive Director makes the same point about complexity in his Response to Hearing Requests.

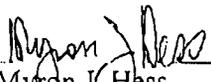
---

<sup>6</sup> Section 11.02362 (f)(2) of the Water Code, as added by Senate Bill 3, lists specific stakeholder interests, including recreational water users and environmental interests, that are to be represented on the stakeholder committees charged with developing recommendations for environmental flow standards and set asides to be considered by the Commission.

Because of the significance of these issues, among others, and because they raise major policy questions of first impression, a bifurcated hearing process appears to be appropriate. An initial briefing process for identifying significant legal and policy issues and obtaining Commission guidance through the submission of certified questions could help to avoid an unduly complex and lengthy evidentiary hearing. With early Commission guidance, the parties will be able to narrow the issues requiring full evidentiary consideration, which would be more efficient for all involved.

ACCORDINGLY, the National Wildlife Federation requests that the Commission grant its request for a contested case hearing and that the Commission provide for a bifurcated hearings process that results in an initial briefing schedule, accompanied by limited evidentiary proceedings if necessary, to develop a set of certified questions for resolution by the Commission on major legal and policy issues of first impression raised by this complex application. That type of bifurcated process would allow the parties to narrow and streamline the contested case hearing in this matter.

Respectfully submitted,

  
 Myron J. Hess  
 SBN 09549415

National Wildlife Federation  
 44 East Avenue, Suite 200  
 Austin, TX 78701  
 Ofc: 512-610-7754  
 Fax: 512-476-9810

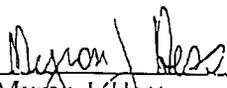
CHIEF CLERKS OFFICE

2010 APR 19 PM 4: 59

TEXAS  
 COMMISSION  
 ON ENVIRONMENTAL  
 QUALITY

**CERTIFICATE OF SERVICE**

I hereby certify by my signature below that a true and correct copy of the above document was sent via First Class Mail, hand delivery, or facsimile transmission on April 19, 2010 to the persons on the attached mailing list.

  
 Myron J. Hess

Apr 19 10 03:41p

P.8

MAILING LIST  
**BRAZOS RIVER AUTHORITY**  
 TCEQ DOCKET NO. 2005-1490-WR

FOR THE APPLICANT:

Douglas G. Caroom  
 Bickerstaff, Heath, Delgado, Acosta LLP  
 3711 S. Mopac Expressway, Building 1  
 Austin, TX 78746-8015  
 Tel: (512) 472-8021 Fax: (512) 320-5638

FOR THE EXECUTIVE DIRECTOR:

Robin Smith, Staff Attorney  
 Texas Commission on Environmental Quality  
 Environmental Law Division, MC-173  
 P.O. Box 13087  
 Austin, Texas 78711-3087  
 Tel: (512) 239-0600  
 Fax: (512) 239-0606

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director  
 Texas Commission on Environmental Quality  
 Office of Public Assistance, MC-108  
 P.O. Box 13087  
 Austin, Texas 78711-3087  
 Tel: (512) 239-4000  
 Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE  
 RESOLUTION:

Kyle Lucas  
 Texas Commission on Environmental Quality  
 Alternative Dispute Resolution, MC-222  
 P.O. Box 13087  
 Austin, Texas 78711-3087  
 Tel: (512) 239-4010  
 Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castanucla  
 Texas Commission on Environmental Quality  
 Office of Chief Clerk, MC-105  
 P.O. Box 13087  
 Austin, Texas 78711-3087  
 Tel: (512) 239-3300  
 Fax: (512) 239-3311

FOR THE PUBLIC INTEREST COUNSEL

Eli Martinez, Attorney  
 Texas Commission on Environmental Quality  
 Public Interest Council, MC 103  
 P.O. Box 13087  
 Austin, Texas 78711-3087

REQUESTERS:

Perry & Margie Adams  
 P.O. Box 400  
 Nemo, Texas 76070-0400  
  
 George E. Bingham  
 2191 Highway 2247  
 Comanche, Texas 76442-4316

Jack Weldon Bridges  
 P.O. Box 7233  
 Glen Rose, Texas 76043-7233

Rick & Christic Clark  
 2776 County Road 312  
 Glen Rose, Texas 76043-6061

Alva Cox  
 City of Granbury  
 116 W. Bridge St.  
 Granbury, Texas 76048-2160

Leonard H. Dougal  
 Jackson Walker LLP  
 100 Congress Ave., Ste. 1100  
 Austin, Texas 78701-4072

Maurice & Ginger English  
 P.O. Box 2280  
 Glen Rose, Texas 76043-2280

Adam Eyres, President  
 Rhino Ridge Outfitters, Inc.  
 P.O. Box 2027  
 Glen Rose, Texas 76043-2027

Dorothy Gibbs  
 P.O. Box 636  
 Glen Rose, Texas 76043-0636

CHIEF CLERKS OFFICE

2010 APR 19 PM 4: 58

 TEXAS  
 COMMISSION  
 ON ENVIRONMENTAL  
 QUALITY

Apr 19 10 03:41p

P.9

Richard L. Giesecke  
3205 Cornell Ave.  
Dallas, Texas 75205-2933

John Graves  
P.O. Box 667  
Glen Rose, Texas 76043-0667

Bridges Hague  
P.O. Box 2857  
Glen Rose, Texas 76043-2857

James R. & Melodie Isham  
P.O. Box 84  
Rainbow, Texas 76077-0084

Robert Istre  
3630 Highway 1765  
Texas City, Texas 77591

Jean F. King  
P.O. Box 2367  
Glen Rose, Texas 76043-2367

R. Kip Lewis  
1102 Martin Ave.  
Round Rock, Texas 78681-7324

Mary Lee Lilly  
P.O. Box 2857  
Glen Rose, Texas 76043-2857

Richard Lowerre  
Lowerre Frederick Perales Allmon & Rockwell  
707 Rio Grande St. Ste. 200  
Austin, Texas 78701-2719

Donald McArthur, Vice President  
Texas Genco II LP  
12301 Kurland Dr.  
Houston, Texas 77034-4812

Robin A. Melvin  
Graves Dougherty Hearon & Moody  
P.O. Box 98  
Austin, Texas 78767-0098

Raymond & Debra Pitts  
3030 County Road 312  
Rainbow, Texas 76077-2904

Martin C. Rochelle  
Lloyd Gosselink  
816 Congress Ave. Ste. 1900  
Austin, Texas 78701-2442

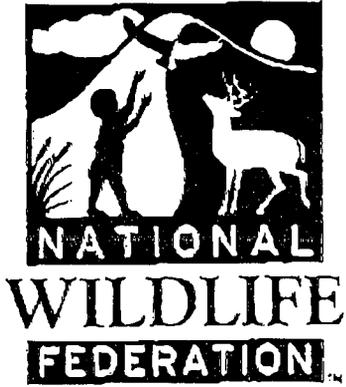
Andrew L. Strong  
Pillsbury Winthrop Shaw Pittman LLP  
909 Fannin St. 22<sup>nd</sup> Floor  
Houston, Texas 77010-1014

Jerry Swink  
P.O. Box 69  
Rainbow, Texas 76077-0069

Scott & Linna Trees  
2932 County Road 312  
Glen Rose, Texas 76043-6060

H. Jane Vaughn  
12200 Mitchell Bend Ct.  
Granbury, Texas 76048-9600

Lawrence Wilson  
P.O. Box 473  
Nemo, Texas 76070-0473



**NATIONAL WILDLIFE FEDERATION**  
 South Central Resource Center  
 44 East Avenue, Suite 200  
 Austin, Texas 78701

Phone: 512/476-9805  
 Fax: 512/476-9810

**FACSIMILE TRANSMITTAL**

<b>TO:</b>  Office of the Chief Clerk	<b>FROM:</b>  Myron Hess
<b>COMPANY:</b> TCEQ	<b>DATE:</b> 4/19/10
<b>FAX NUMBER:</b> 239-3311	<b>NO. PAGES INCLUDING COVER:</b> 9
<b>RE:</b> TCEQ Docket No. 2005-1490-WR	
<b>NOTES/COMMENTS:</b>	

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
 2010 APR 19 PM 4: 58  
 CHIEF CLERKS OFFICE