

DOCKET No. 2006-1723-WR

IN THE MATTER OF THE APPLICATION	§	BEFORE THE TEXAS COMMISSION
	§	
TO AMEND	§	ON
	§	
CERTIFICATE OF	§	ENVIRONMENTAL QUALITY
	§	
ADJUDICATION No. 08-4277A	§	

2008 OCT 13 PM 4:46  
 CHIEF CLERKS OFFICE  
 TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**AMERICAN RICE GROWERS COOPERATIVE ASSOCIATION'S AND  
 CITY OF HOUSTON'S JOINT RESPONSE  
 TO HEARING REQUESTS ON APPLICATION TO AMEND  
CERTIFICATE OF ADJUDICATION No. 08-4277A**

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

COME NOW AMERICAN RICE GROWERS COOPERATIVE ASSOCIATION AND THE CITY OF HOUSTON and file this their joint response in opposition to the request for a Contested Case Hearing filed in the matter of the Application to Amend Certificate of Adjudication No. 08-4277A (the "Certificate"), and in support thereof would show the Commissioners as follows:

**I.  
Introduction**

On August 29, 1997, American Rice Growers Cooperative Association - Dayton Division ("American Rice") and the City of Houston (the "City") filed their joint application to amend Certificate of Adjudication No. 0-4277 (the "Application"). At the time of the filing, American Rice was the sole owner of the Certificate, but had contracted with the City to sell the water right to the City pursuant to that certain "Water Right Purchase Agreement" dated August 21, 1997 (the "Agreement"). A copy of the Agreement was included as an attachment to the Application.

Following the filing of the Application, and the publication of notice by TCEQ, four hearing requests were received by the Commission. Three of the requests, which were filed by the Tarrant Regional Water District, Frost Properties, Ltd. and Chocolate Bayou Water Company (acting by and through its successor in interest, Gulf Coast Water Authority), were subsequently withdrawn. The fourth, and sole remaining request for hearing still pending before the TCEQ, was filed by the "Alders Group."

## II.

### Alders' Protest

The "Alders Group," which is comprised of Weldon Alders, Midland Investments, LLC and the A. Reese Brown Family Limited Partnership, filed their hearing request because they opposed "the following aspects" of the Application to Amend:

1. The change of use to any County other than Liberty and any Basin other than the Trinity River Basin; and
2. The use of water for any other use than irrigation.

The Alders Group claims to own approximately 9,200 acres of land within the "service area" of American Rice as well as lands upon which a dam and reservoir authorized by the Certificate and two of the authorized diversion points are located. The Alders Group does not, however, claim to have any ownership interest in the Certificate or the water right. Historically, the Alders Group or its predecessors in title purchased from time-to-time water for irrigation pursuant to annual contracts with American Rice and its predecessor entities. The Alders Group does not have any claim, nor has it expressly asserted any claim to a permanent water right either in the Certificate or other water associated with the irrigation operations of American Rice.

The assertions made by the Alders Group do not support their having standing as an affected person with respect to the "aspects of the application" that the Alders Group states they are opposing. Moreover, the Alders Group does not claim to be a stock holder or shareholder of the American Rice Group identified on Schedule 2 of the Agreement.

To the extent that the Alders Group claims any right to purchase water from American Rice it is because their predecessors in title were identified on Schedule 3 of the Agreement as entities owning land in the American Rice "Service Area." That fact, however, only means that they own land eligible to be irrigated with water purchased from American Rice pursuant to its rules and regulations, assuming water is available to purchase. The Alders Group will continue to have that eligibility once the Application is amended to add other uses to the existing authorization for irrigation use assuming water is available and not otherwise contracted or committed for other uses.

Additionally, the request in the Application to authorize the use of the water in other areas, *e.g.*, Counties or Basins, consistent with the City of Houston's municipal and industrial water supply needs does not make the Alders Group an affected party. Moreover, the request for expanded use which results in an interbasin transfer does not trigger the requirements of Section 11.085 because the Application was filed prior to the effective date of the 1997 amendments to Senate Bill 1 amending Section 11.085, Texas Water Code.

Even assuming that the Alders Group has acquired property within the irrigation service area of American Rice's predecessor in title, the Dayton Canal Company, this does not give rise to an automatic transfer of any irrigation water rights under the Certificate to the Alders Group as the hearing request appears to suggest. *See* 30 TAC Section 297.81(b). Specifically, the sale of

the water rights involved in this matter is not governed by the Commission's Rules that provide for irrigation rights to be appurtenant to the land and therefore, a sale of the land conveys a proportionate amount of the appurtenant irrigation rights (*see Id.*, Section 297.81(a)). Instead, the following facts make it clear that American Rice owns the water rights evidenced by the Certificate because subsection 297.81(b) (30 TAC), which provides that a water right does not attach to irrigated land when the water right is held by a water corporation, water district, river authority, or governmental entity authorized to supply water to others, is the controlling regulation in this case:

- 1) In the instant transaction, the Seller, American Rice, as the sole shareholder of the Dayton Canal Company, acquired all of the assets and liabilities of the Dayton Canal Company upon its dissolution on March 27, 1997.
- 2) On March 26, 1997, Dayton Canal Company conveyed its water rights to American Rice.
- 3) The assets of the Dayton Canal Company were incorporated into the canal system located in Liberty County of American Rice which used those assets to provide irrigation water service to lands within a service area in Liberty County known as the "Dayton Service Area."
- 4) As part of its ownership and operation of the canal system, American Rice owned water rights in the Trinity River based upon certified filing No. 553 as amended by certified filing Nos. 553A and B.
- 5) These certified filings were subsequently adjudicated by the Texas Water Commission and following the approval of a final order by the 334<sup>th</sup> Judicial District Court of Chambers County on October 30, 1985, American Rice's water rights were described in Certificate of Adjudication No. CA-80-4277.
- 6) At the time it acquired its water rights from the Dayton Canal Company, American Rice filed the required "change of ownership" form and attachments and fees with the Commission.
- 7) American Rice subsequently contracted with the City of Houston to sell the certificate it had acquired from Dayton Canal Company and the associated water rights to the City.
- 8) With respect to the Alders Group's claim to be entitled to water source because its predecessors in title were listed on Schedule 3 of the Agreement, the Seller's

representations in the Agreement make it clear that Schedule 3 constitutes only a list of all the owners of land in the service area. There is no representation, "or indication that the persons or entities listed on Schedule 3 have an ownership right or other claim to the Certificate or any other water rights affected by the Application. In fact, the contract provides that the "Seller [American Rice] has not entered into any contracts or agreements to provide water service, whether written or oral, except as described in Schedule 4." Schedule 4, entitled "Water Service Agreements" provides as follows:

All water service agreements are oral with respect to the sales of water to farmers. For 1996 water was provided to eight (8) customers, and it is anticipated that water will be provided to eleven (11) customers for 1997. Approximately 10,000 acre-feet of water was provided to irrigation customers in 1996.

Under these facts, only by express conveyance can the water right be transferred. Accordingly, the application of subsection 297.81(b) precludes any claim by the Alders Group to having any ownership interest in the water associated with the Certificate.

III.

Conclusion & Prayer

Accordingly, for the reasons set forth above, the Alders Group is not an "affected person" and, therefore, the request for contested case hearing should be denied.

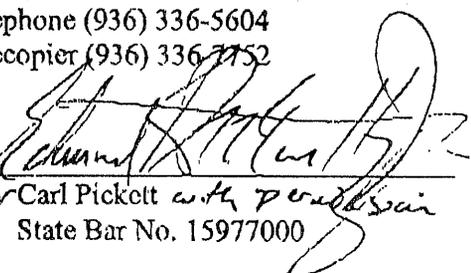
Respectfully submitted:

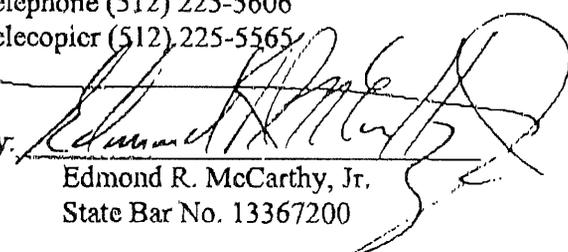
PICKETT & PICKETT, P.C.

JACKSON, SJOBERG, MCCARTHY & WILSON, L.L.P.

Carl Pickett  
P.O. Box 10225  
Liberty, Texas 77575  
Telephone (936) 336-5604  
Telecopier (936) 336-7752

Edmond R. McCarthy, Jr  
711 West 7<sup>th</sup> Street  
Austin, Texas 78701  
Telephone (512) 225-5606  
Telecopier (512) 225-5565

By:   
For Carl Pickett with permission  
State Bar No. 15977000

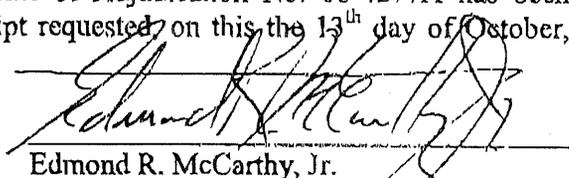
By:   
Edmond R. McCarthy, Jr.  
State Bar No. 13367200

ATTORNEYS FOR THE AMERICAN RICE  
GROWERS COOPERATIVE ASSOCIATION

ATTORNEYS FOR THE CITY OF HOUSTON

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the City of Houston's Response to Hearing Requests on the Application to Amend Certificate of Adjudication No. 08-4277A has been served via U.S. Mail, certified mail, return receipt requested on this, the 13<sup>th</sup> day of October, 2008 to the following:

  
Edmond R. McCarthy, Jr.

**FOR THE EXECUTIVE DIRECTOR:**

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

Steve Ramos, Technical Staff  
Texas Commission on Environmental Quality  
Water Rights Division, MC-160  
P.O. Box 13087  
Austin, TX 78711-3087  
Tel: (512) 239-6538  
Fax: (512) 239-2214

**FOR PUBLIC INTEREST COUNSEL:**

Mr. Blas J. Coy, Jr., Attorney  
Texas Commission on Environmental Quality  
Public Interest Counsel, MC-103  
P.O. Box 13087  
Austin, TX 78711-3087  
Tel: (512) 239-6363  
Fax: (512) 239-6377

**FOR OFFICE OF PUBLIC ASSISTANCE:**

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

**FOR ALTERNATIVE DISPUTE RESOLUTION:**

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

**REQUESTERS:**

John D. Stover  
Law Offices of John D. Stover  
515 S. 1<sup>st</sup> St.  
Lufkin, TX 75901-3867

**WITHDRAW OF REQUEST(S):**

Ford J. Frost, Vice President  
FPL Farming LTD.  
1331 Lamar St., Suite 1350  
Houston, TX 77010-3025  
  
Robert Istre, General Manager  
Gulf Coast Water Authority  
3630 FM 1765  
Texas City, TX 77591-3677

Lawrence L. Bellatti  
Andrews Kurth, L.L.P.  
600 Travis St., Suite 4200  
Houston, TX 77002-3009

Fred B. Werkenthin, Jr.  
Booth Ahrens & Werkenthin, P.C.  
515 Congress Ave., Suite 1515  
Austin, TX 78701-3504

2008 OCT 13 PM 4: 46  
CHIEF CLERKS OFFICE

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

INTERESTED PERSONS:

Lee Munz

Texas State Soil & Water Conservation Board

P.O. Box 658

Temple, TX 76503-0658

LAW OFFICES OF

**JACKSON, SJOBERG, MCCARTHY & WILSON, L.L.P.**

711 WEST 7TH STREET  
AUSTIN, TEXAS 78701-2785  
(512) 472-7600  
FAX (512) 225-5565

DAVID E. JACKSON\*  
JOHN MATTHEW SJOBERG\*  
EDMOND R. MCCARTHY, JR.  
ROBERT WILSON

\*BOARD CERTIFIED IN OIL,  
GAS AND MINERAL LAW  
TEXAS BOARD OF LEGAL SPECIALIZATION

October 13, 2008

2008 OCT 13 PM 4:45  
CHIEF CLERK'S OFFICE  
SHERIDAN GILKERSON THOMPSON  
LAURA KELLEY  
ELIZABETH A. TOWNSEND  
OF COUNSEL  
LICENSED IN TEXAS AND  
TENNESSEE  
TEXAS COMMISSION  
ON ENVIRONMENTAL  
QUALITY

LaDonna Castanuela  
Chief Clerk  
ATTN: Agenda Docket Clerk, Mail Code 105  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3311

via Fax & Regular Mail

Re: Docket No. 2006-1723-WR; Application No. 08-4277A; Application by  
the American Rice Growers and the City of Houston to amend Certificate  
of Adjudication No. 08-4277

Response to Hearing Requests

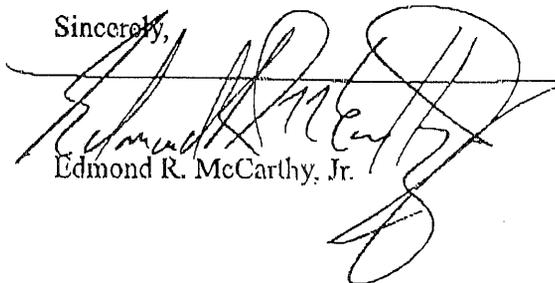
Dear Ms. Castanuela:

Enclosed please find the American Rice Growers Cooperative Association's and City of  
Houston's Response to the Request for Contested Case Hearing filed in the matter of the  
Application to Amend Certificate of Adjudication No. 08-4277A. By copy of this letter, the  
enclosed document has been served on the Parties identified on the Certificate of Service.

Thank you for your assistance. If you should have any questions, you can reach me here  
in Austin at (512) 225-5606.

Best wishes.

Sincerely,



Edmond R. McCarthy, Jr.

ERM/tn  
Encl.

cc: Certificate of Service (via Regular Mail)

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
P 01  
2008 OCT 13 PM 4: 45  
CHIEF CLERKS OFFICE

Law Offices Of  
**JACKSON, SJOBERG, McCARTHY & WILSON, L.L.P.**  
711 WEST 7<sup>TH</sup> STREET  
AUSTIN, TEXAS 78701-2785  
(512) 472-7600  
FAX (512) 225-5565  
SENDER'S DID (512) 225-5606

**FACSIMILE TRANSMISSION**

**CONFIDENTIALITY NOTICE:** The documents accompanying this facsimile transmission contain confidential information which is legally privileged and intended only for the use of the recipient named below. We request immediate notification by telephone of misrouted facsimile transmissions so that we may arrange for return of those documents to us. If you receive this facsimile transmission in error, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of the information contained in this facsimile transmission, is strictly prohibited.

**DATE:** October 13, 2008 **NO. PAGES (including cover):** 9

**TO:** LaDonna Castanuela, Chief Clerk ATTN: Agenda Docket Clerk **FAX NO.:** 239-3311 **CONTACT NO.:**

**FROM:** Edmond R. McCarthy, Jr. **C/M NO.:** Houston/Dayton Canal

**RE:** Response to Hearing Requests

**ATTACHMENT:** yes

**MESSAGE:**

**ORIGINALS TO FOLLOW:** YES  NO