Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 25, 2009

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: Application by City of College Station for Water Rights Permit 5913

Dear Ms. Castañuela:

Enclosed for filing, please find one original and 7 copies of the "*Executive Director's Response to Hearing Requests.*"

Please file-stamp this document and return a file-stamped copy to Shana Horton, Staff Attorney, Environmental Law Division, MC 173.

If you have any questions, please do not hesitate to contact me at (512) 239-1088.

Sincerely,

Shana L. Horton

Shana L. Horton
Staff Attorney
Environmental Law Division

cc: Mailing List

TCEQ DOCKET NO. 2006-1831-WR

APPLICATION OF THE	§	**BEFORE THE**
	§	
CITY OF COLLEGE STATION	§	
	§	**TEXAS COMMISSION ON**
FOR WATER RIGHTS	§	
	§	
PERMIT NO. 5913	§	**ENVIRONMENTAL QUALITY**

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to three hearing requests filed regarding the City of College Station' (College Station) application for authorization under Texas Water Code Section 11.042 for indirect reuse of groundwater-based effluent. The Executive Director recommends granting the hearing request of the Brazos River Authority and denying the hearing requests of Wellborn Special Utility District and the Texas Chapter of the Coastal Conservation Association.

I. BACKGROUND

The City of College Station (College Station) uses solely privately-owned groundwater to provide retail water service to customers. The groundwater is later returned from the retail users to College Station's wastewater treatment plants. The water is then treated and discharged into Carters Creek and Lick Creek, tributaries of the Brazos River. College Station seeks authorization to divert and reuse up to 12,881 acre-feet (af) per year of historic and future groundwater-based return flows discharged from the two treatment plants for municipal, industrial, and agricultural use in whole or part of Brazos, Grimes, Washington, Waller, Austin, Fort Bend, and Brazoria Counties. The diversion point lies approximately 300 miles downstream on the Brazos River. Additionally, College Station seeks authorization to use the bed and banks of the Brazos River and tributaries to convey these return flows from the discharge points at the treatment plants to the diversion point.

College Station filed this application on August 4, 2005. On September 21, 2006, the application was returned as not administratively complete because the Applicant had not provided an adopted conservation plan. On October 16, 2006, the Applicant filed a Motion to Overturn (MTO) regarding the ED's decision to return the application. The Commission heard the MTO at its December 13, 2006 agenda and granted the MTO.

The application was remanded to the ED with the direction to the ED to analyze the application for administrative completeness under TWC § 11.042 only. The ED declared the application administratively complete on December 20, 2006. On March 20, 2007, notice of the application was mailed to downstream water right holders and diverters of record in the Brazos River Basin, pursuant to 30 TAC § 295.161. The comment period ended April 23, 2007.

II. THE EVALUATION PROCESS FOR HEARING REQUESTS

The application is subject to the procedures for evaluating hearing requests on applications declared administratively complete on or after September 1, 1999 in 30 Texas Administrative Code, Chapter 55, Subchapter G (Sections 55.250-55.256).

Title 30, Sections 55.251 (b) and (c) of the Texas Administrative Code specify that a hearing request must:

(1) be in writing and be filed with the Office of the Chief Clerk during the public comment period;
(2) give the name, address, and daytime telephone number of the person who files the request;
(3) identify the person's personal justiciable interest affected by the application including a brief, but specific, written statement explaining in plain language 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 members of the general public; and
(4) request a contested case hearing.

A hearing request must comply with requirement (1) above and must "substantially comply" with requirements (2) through (4). 30 TEX. ADMIN. CODE § 55.251(c).

A request for a contested case hearing must be granted if the request is made by an affected person and the request:
(A) complies with the requirements of 30 TEX. ADMIN. CODE § 55.251;
(B) is timely filed; and
(C) is pursuant to a right to hearing authorized by law.
30 TEX. ADMIN. CODE § 55.255(b)(2).

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. An interest common to the general public does not constitute a justiciable interest. 30 TEX. ADMIN. CODE § 55.256(a).

A group or association will qualify for party status only if:
(1) one or more members of the association would otherwise have standing to request a hearing in their own right;

(2) the interests the association seeks to protect are germane to its purpose; and
(3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

30 TEX. ADMIN. CODE § 55.252.

To determine whether a person is an affected person, all relevant factors must be considered, including but not limited to:
(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) the likely impact of the regulated activity on the health, safety, and use of property of the person;
(5) the 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.

30 TEX. ADMIN. CODE § 55.256(c).

III. ANALYSIS OF HEARING REQUESTS

Hearing requests were received from:
1. Brazos River Authority
2. Wellborn Special Utility District
3. Coastal Conservation Association of Texas

All of the hearing requests were timely filed and comply with the form and content requirements of 30 TAC Section 55.251.

1. Brazos River Authority

The Brazos River Authority (BRA) holds several water rights downstream of the discharge points. Additionally, BRA is authorized to manage its water rights as a system, and to do so conveys water and diverts from the same portion of the Brazos River that the Applicant proposes to use to convey its return flows. BRA would like to have input on special conditions to be included in the bed and banks authorizations to prevent impairment of any of its rights. As a water right holder using the same reach of the river to convey its water as College Station has applied to use to convey its effluent, BRA has an interest in the permit that is not common to the general public. Thus, BRA is an affected person under the standards set out in Chapter 55 and its hearing request should be granted.

2. Wellborn Special Utility District

Wellborn Special Utility District (Wellborn) claims it is affected by College Station's application because Wellborn is a provider of potable water to approximately 3,100 customer connections and it diverts part of that water under a contract with BRA from a location downstream of one or more of the Applicants' proposed discharge points. Wellborn contends that the authorization for College Station to convey and reuse effluent will adversely affect Wellborn's ability to divert and use water at its surface water treatment plant approximately 10 miles downstream of the Applicant's discharge points. Further, Wellborn expressed concern that the applications do not identify special conditions to be placed on the proposed bed and banks permit that would distinguish the water Wellborn is entitled to divert from the water the cities claim the right to convey and reuse. Wellborn contends that proper identification and accounting in the bed and banks permits for the volume of water discharged by the cities, the source of such water, and carriage and channel losses will be necessary to protect the rights of other water users, including Wellborn. Wellborn wishes to provide input as to special conditions to be put into the permit to protect its interests.

Wellborn makes a second argument in its hearing request on College Station's application that was not made in the City of Bryan application, based on its claim to a portion of the groundwater effluent. In addition to the surface water it diverts under its contract with BRA, part of the water Wellborn provides to its retail customers is groundwater from its private well. Some of Wellborn's customers are close enough to the City of College Station that they have connected to College Station's sewer system. Their wastewater is conveyed to one of College Station's wastewater treatment plants, the discharge from which College Station is asking to reuse. Therefore, some small portion of the discharge is made up of groundwater originating from Wellborn's wells. Wellborn has not applied for reuse of this effluent. According to the statute, an authorization under TWC § 11.042 may allow for the diversion and reuse by the *discharger* of existing return flows. In this case, College Station is the discharger, and has applied to reuse the effluent. Wellborn is not a discharger and therefore does not have a right to these return flows.

The Executive Director recommends denying the request of Wellborn SUD because Wellborn does not hold any water rights that could be affected by the application. The statutes and rules related to reuse are designed to protect water rights holders. Indeed, statutes and rules related to water availability exist to protect those who have a superior legal right to use water in the basin. BRA will be obligated to fulfill its obligations under the contract for water whether or not this application is granted. If water is not available for Wellborn's use, Wellborn's legal remedy is in enforcing its contract with BRA under contract law, not in enforcing any water right under the Water Code. Wellborn's contract with BRA is not a legal right protected by the laws under which this application will be considered. Further, if BRA is a party to the contested case hearing, it will represent and attempt to protect its water rights, which in turn protects those to whom BRA has promised to sell water. The ED has consistently taken the position that holders of

contracts for water do not have standing to contest an application based solely upon the contract. Further, Wellborn's claim of ownership of a portion of the effluent is without merit and it does not have the right to apply for reuse of the water, under the statute, because it is not the "discharger".

3. Coastal Conservation Association of Texas

The Texas Chapter of the Coastal Conservation Association (CCA) filed a timely hearing request on behalf of its approximately 50,000 members. In its hearing request, CCA states that some of its members fish in and around the mouth of the Brazos River and have an interest in maintaining natural marine breeding habitats in that area. CCA is concerned that if the application is granted, freshwater flows to the mouth of the Brazos River will decrease, to the detriment of natural marine breeding habitats.

Under 30 TAC §55.252, in order for an association such as the CCA to qualify as an affected person, one or more members of the association must otherwise have standing to request a hearing in their own right. CCA's hearing request does not include the names of any specific members. Without names of specific members, it is impossible for the ED to determine whether one or more members of the association would otherwise have standing to request a hearing in their own right, as required by the rule. Therefore, the ED recommends denying CCA's hearing request unless it produces additional information to prove standing.

Additionally, the interest claimed in maintaining marine breeding habitats at the mouth of the Brazos River is an interest common to the general public; therefore, the interests claimed do not meet the definition of "personal justiciable interest". This is consistent with prior responses to hearing requests by the ED in which a general recreational interest has been claimed. For these reasons, the CCA's hearing request should be denied.

IV. EXECUTIVE DIRECTOR'S RECOMMENDATION

The Executive Director recommends that the Commission take the following actions:

1. Grant the hearing request of the Brazos River Authority.

2. Deny the hearing requests of Wellborn Special Utility District and the Texas Chapter of the Coastal Conservation Association.

3. Refer the case to the State Office of Administrative Hearings.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark Vickery, Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Robert Martinez, Director
Environmental Law Division

Shana L. Horton

Shana L. Horton, Staff Attorney
Environmental Law Division
State Bar No. 24041131
P. O. Box 13087, MC-173
Austin, Texas 78711-3087
(512) 239-1088

CERTIFICATE OF SERVICE

I certify that on September 25, 2009, the original and 7 copies of the Executive Director's Response to Hearing Requests was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk and a copy was sent by first-class mail, electronic mail, or facsimile to all persons listed below.

Shana L. Horton

Shana L. Horton, Staff Attorney
Environmental Law Division
Texas Commission on Environmental Quality

Jim Mathews
Mathews & Freeland, LLP
P.O. Box 1568
Austin, Texas 78767-1568

Douglas Caroom
Bickerstaff Heath Delgado Acosta LLP
3711 S. MoPac Expy.
Building 1, Suite 300
Austin, Texas 78746

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

Robin A. Melvin
Graves Dougherty Hearon & Moody
401 Congress Ave., Suite 2200
Austin, Texas 78701-4071

Kyle Lucas
TCEQ Alternative Dispute Resolution MC 222
P.O. Box 13087
Austin, Texas 78711-3087
Via Email to: klucas@tceq.state.tx.us

James Murphy
TCEQ Office of the Public Interest Counsel MC 103
P.O. Box 13087
Austin, Texas 78711-3087
Via Email to: jmurphy@tceq.state.tx.us