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October 9, 2009

LaDonna Castañuela
Office of the Chief Clerk - MC 105
Texas Commission on Environmental Quality
12100 Park 35 Circle
Building F, 1st Floor
Austin, Texas 78753

CHIEF CLERKS OFFICE

2009 OCT -9 PM 3:44

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: TCEQ Docket No. 2006-1831-WR; Reply of the Brazos River Authority to Responses on Hearing Requests for Water Rights Permit No. 5913

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced case is the Reply of the Brazos River Authority to Responses on Hearing Requests. Please return a file-stamped copy to me in the enclosed postage-paid envelope.

Thank you for your attention to this matter.

Sincerely,


Douglas G. Caroom

Enclosures

cc: All Parties of Record

TCEQ DOCKET NO. 2006-1831-WR

APPLICATION OF
THE CITY OF COLLEGE STATION
FOR WATER RIGHTS
PERMIT NO. 5913

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

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COMMISSION
ON ENVIRONMENTAL
QUALITY

REPLY OF THE BRAZOS RIVER AUTHORITY
TO RESPONSES ON HEARING REQUESTS

COMES NOW the Brazos River Authority (BRA) and files its reply to Responses to Hearing Requests filed by the City of College Station, the City of Bryan, the Executive Director and the Office of Public Interest Counsel, and would show the following:

I. INTRODUCTION

The City of College Station ("College Station" or the "City") seeks authorization, pursuant to Texas Water Code § 11.042(b), to reuse its groundwater based wastewater effluent return flows, even though it has no current or planned use for the water. The proposed diversion point is approximately at the point that the Brazos River enters the Gulf of Mexico – a point at which the salinity level renders the water unsuitable for almost all beneficial uses. Thus, College Station's suggestion that it could only impact users who divert further downstream (in the middle of the Gulf of Mexico?) does not merit serious consideration.

What College Station is arguing, essentially, is that no one can have any interest in their application because they seek only to divert privately owned groundwater based discharges – a proposition that is plainly incorrect.

Quite to the contrary, because College Station seeks to establish a superior right, outside the state's system of appropriative water rights, its application and the proper administration of any right recognized in response to it, is a matter of potential concern for every water right holder and every water user downstream of College Station's discharge point.

II. BRA STANDING

BRA holds water rights to eleven reservoirs in the Brazos River Basin, including one that is located downstream from College Station.¹ BRA is authorized to operate

¹ Allens Creek Reservoir, while not on the main stem of the Brazos River, derives most of its water supply from "scalping" Brazos River flows. Thus, it will be impacted much in the same fashion as a downstream reservoir on the main stem.

those reservoirs as a system and makes deliveries of water to numerous purchasers at diversion points downstream from College Station's discharge.

Both the Executive Director and Office of Public Interest Council (OPIC) recognize that BRA is affected significantly differently than the general public and has standing to contest the City's application. The Executive Director notes specifically that BRA has an interest in making sure that its deliveries get to its downstream customers without interference from College Station's sought after bed and banks authorization.

OPIC additionally, and properly, notes that BRA is a governmental entity, the statutory authority of which relates to conservation and beneficial use of waters of the Brazos River Basin, both groundwater and surface water. Pursuant to Commission Rules, this interest also may be sufficient to qualify BRA as an affected person. 30 TAC § 55.256(b).

The City contests BRA's standing, primarily because its application involves reuse of privately owned groundwater based effluent, in which the City argues BRA has no interest. The argument is plainly an illogical legal fiction.

The City's claimed privately owned water is unavoidably commingled with state water to which many others, including BRA, have claims. Since the City is asserting a superior right to its "privately owned" water (and the Executive Directors seems intent on recognizing it, even under a plainly fictitious application), establishing appropriate conditions to ensure proper accounting for state water and the applicant's water are a matter of interest to every water right holder in the basin. Similarly, establishing appropriate environmental flow requirement for the City's bed and banks authorization is a matter of concern for every water right holder that is, itself, subject to environmental flow requirements.

III. OTHER PARTIES

OPIC recognizes that Wellborn Special Utility District (Wellborn) qualifies as an affected person, entitled to contest the City's application. The Executive Director does not. The Executive Director asserts that Wellborn's interest in diverting water supplied by BRA for diversion downstream of the City's discharge point is not a legally sufficient interest and that it should be protected by BRA.

BRA believes that Wellborn's interests are sufficient to support party status. Commission rules do not require that an affected party be a water right holder. Wellborn's interest in being able to divert water free from controversy, contest, or potential liability² is distinctly different than the interest of the general public.

² The Commission's Notice of the City's application plainly states, "If this application is granted, unlawful diversion and taking of such water in transit may result in administrative penalties, criminal penalties, or the applicant may elect to pursue private civil remedies as provided by law."

Additionally, BRA cannot be relied upon to protect Wellborn's interest in the contest hearing; nor should BRA be obligated to do so. The City has protested BRA's pending System Operation Permit application – a major and complex application that is intended to provide a very substantial and needed future water supply for the Brazos River Basin and associated coastal basins. BRA is actively engaged in negotiating a settlement with the City that would result in the mutual withdrawal of protests to each party's pending application. If those negotiations are successful, BRA intends to withdraw its protest – not because the protest is weak or groundless, but because far more is at stake for BRA in the System Operation Permit application. If this occurs, Wellborn will need to represent its own interest in the City's application and BRA cannot be relied upon to do so.

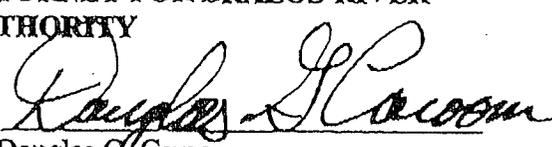
IV. CONCLUSION

BRA requests that the Commission recognize its status as an affected party and direct that a contested case hearing be held on the basis of BRA's protest. BRA also requests that Wellborn and any other water right holder or user downstream from the City's point of discharge desiring to participate be granted party status.

Respectfully Submitted,

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ATTORNEY FOR BRAZOS RIVER
AUTHORITY

By: 
Douglas G. Caroom

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2009, a true and correct copy of the foregoing document 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.

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