Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*

Blas J. Coy, Jr., *Public Interest Counsel*

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: **CITY OF BRYAN**
TCEQ DOCKET NO. 2006-1832-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,

James B. Murphy, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2006-1832-WR

IN THE MATTER OF THE APPLICATION OF THE CITY OF BRYAN FOR AUTHORIZATION TO USE THE BED AND BANKS OF SEVERAL WATERCOURSES TO TRANSPORT GROUNDWATER-BASED RETURN FLOWS, WATER RIGHTS PERMIT NO. WRPERM 5912	§	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:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

The City of Bryan (Applicant) has applied for an authorization under TEX. WATER CODE (TWC) § 11.042(b) to use the bed and banks of several watercourses to transport current and future groundwater-based return flows from three discharge points and to subsequently divert and reuse up to 14,282.1 acre-feet (less losses) of those flows for municipal, industrial, and agricultural purposes in all or part of Brazos, Grimes, Washington, Waller, Austin, Fort Bend, and Brazoria Counties within the Brazos River Basin. The loss rate and travel time will vary, but Applicant indicates a maximum carriage loss of 9% and an average estimated travel time from the discharge points to the proposed diversion point of 8.24 days. Deliveries of water will be made to the diversion point throughout the year on a daily basis.

Applicant indicates a maximum diversion rate of 17.95 cfs (8,057 gpm) from the Brazos River at a point approximately 4.7 miles from the Brazoria County Courthouse. The proposed discharge points in Brazos County and the requested watercourses to be used for the bed and banks authorization are: (1) Burton Creek Discharge Point, which discharges into an unnamed tributary of Burton Creek for subsequent conveyance down Carters Creek, tributary of the Navasota River, tributary of the Brazos River, Brazos River Basin, approximately 3.71 miles southeast of the Brazos County Courthouse; Applicant indicates the outfall is 297 river miles upstream of the diversion point; (2) Still Creek Discharge Point, which discharges into Still Creek for subsequent conveyance down Thompsons Creek, tributary of the Brazos River, Brazos River Basin, approximately 2.58 miles west-southwest of the Brazos County Courthouse; Applicant indicates the outfall is 300 river miles upstream of the diversion point; and (3) Turkey Creek Discharge Point, which discharges into an unnamed tributary of Turkey Creek for subsequent conveyance down the Brazos River, Brazos River Basin, approximately 3.88 miles south-southwest of the Brazos County Courthouse; Applicant indicates the outfall is 295 river miles upstream of the diversion point.

TPDES Permit No. 10426001 currently authorizes the discharge of 8,961 acre-feet of water per year (8.0 mgd). TPDES Permit No. 10426002 currently authorizes the discharge of 4,481 acre-feet of water per year (4.0 mgd). TPDES Permit No. 10426003 currently authorizes the discharge of 840.1 acre-feet of water per year (0.75 mgd). The three permits total an annual authorized discharge equaling 14,282.1 acre-feet.

TCEQ received the application and partial fees on August 5, 2005. TCEQ received additional information and fees on April 14, 2006, July 6, 2006, and August 22, 2006. Pursuant to 30 TEX. ADMIN. CODE (TAC) § 281.18, the Executive Director (ED), in a letter dated

September 21, 2006, returned the applications without prejudice for lack of two "informational" items: (1) "[s]pecific, quantified ten-year target for water savings to include goals for water loss programs and goals for municipal use in gallons per capita per day (gcpd);" and (2) "[e]vidence indicating official adoption of the updated water conservation plan to include" the information stated above. In response to the return of their applications, Applicant filed a Motion to Overturn the ED's decision, which asserted the ED exceeded his statutory authority and acted arbitrarily and capriciously in his insistence that Applicant submit a water conservation plan to obtain a bed and banks authorization under TWC § 11.042(b). The Commission considered and granted the motion on December 13, 2006, holding that as a matter of law Applicant's application does not involve "state water" and must be processed solely under TWC § 11.042(b) and the Commission's bed and banks rules. The Commission confined its order to beds and banks authorizations involving exclusively groundwater-based return flows. The application is considered administratively complete as of December 20, 2006.

Notice of the application was mailed on March 20, 2007 to the 105 downstream water right holders and diverters of record in the Brazos River Basin pursuant to 30 TAC § 295.161. The deadline to request a contested case hearing was April 23, 2007. TCEQ received timely requests for a contested case hearing from the Brazos River Authority (BRA) on April 13, 2007, the Wellborn Special Utility District (Wellborn) on April 20, 2007, and the Texas Chapter of the Coastal Conservation Association (CCA) on April 11, 2007. OPIC recommends granting the hearing requests of the BRA and Wellborn and denying the hearing request of the CCA. The CCA has failed to identify one or more members with standing in their own right. OPIC requests the CCA present one or more members who would otherwise have standing in their own right. OPIC will reconsider its recommendation on the CCA's request in light of any timely filed reply.

II. APPLICABLE LAW

The Commission determined in this case that the application does not involve "state water" and must be processed solely under TWC § 11.042(b) and the Commission's bed and banks authorization rules and not under statutes and rules applicable to state water. *See* Interim Order concerning the Motion to Overturn filed by the City of Bryan and the City of College Station regarding Executive Director's decisions to return Application Nos. 5912 and 5913 pursuant to 30 TAC Section 281.18 without prejudice to their re-submission, at 2 (Dec. 20, 2006) (Interim Order). Section 11.042(b) provides:

> A person who wishes to discharge and then subsequently divert and reuse the person's existing return flows derived from privately owned groundwater must obtain prior authorization from the commission for the diversion and the reuse of these return flows. The authorization may allow for the diversion and reuse by the discharger of existing return flows, less carriage losses, and *shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability of these return flows. Special conditions may also be provided to help maintain instream uses and freshwater inflows to bays and estuaries*. A person wishing to divert and reuse future increases of return flows derived from privately owned groundwater must obtain authorization to reuse increases in return flows before the increase.

TWC § 11.042(b) (emphasis added).[1] Thus, a bed and banks authorization (1) must include conditions that protect existing water rights granted based on the use or availability of the return flows, and (2) may include conditions to help maintain instream uses and freshwater inflows to bays and estuaries. TWC § 11.042(b); 30 TAC § 297.16(a).

Commission rules provide specific application and notice requirements for bed and banks authorizations for groundwater-based effluent. *See* 30 TAC §§ 295.112 (Application to Convey Groundwater-Based Effluent in Bed and Banks) and 295.161 (Notice of Application to Convey Water in Bed and Banks). The Commission must provide notice by first class mail to every

[1] Commission rules contain an additional requirement that the water discharged into the watercourse or stream not cause a degradation of water quality as provided by 30 TAC § 307.5. *See* 30 TAC § 297.16(c) (applying the antidegradation rule to subsection 297.16(a), which mirrors the language of TWC § 11.042(b)).

water right holder of record downstream of the discharge point at least thirty days prior to Commission consideration of the application, and to the Texas Parks and Wildlife Department and OPIC. 30 TAC § 295.161(a) and (c). Published notice is not required. *Id.* § 295.161(d).

There is an open question, however, whether there is a right to a contested case hearing on a bed and banks authorization because neither the statute nor Commission rules specifically address hearing requirements for applications under TWC § 11.042(b). Based on the broad language of the Commission rules related to requests for contested case hearings, OPIC concludes there is a right to a hearing on an authorization under TWC § 11.042(b).

As an initial matter, the statute is silent on hearing requirements for bed and banks authorizations. The hearing requirement provided in TWC § 11.133 applies to applications for a new or amended permit to appropriate state water, and is thus inapplicable to this case. *See* TWC §§ 11.121 and 11.122. No statutory provisions suggest a hearing right is not provided on the application, and none specifically provide a hearing right.

Commission rules, however, appear to provide a hearing right on a bed and banks authorization. The Commission must conduct or refer a contested case hearing on "any application" if certain requirements of Chapter 55, Subchapter D are met:

> The commission may conduct a contested case hearing on *any application. If the commission has received a request for a contested case hearing, which it determines is in compliance with § 55.251 and § 55.255 of this title (relating to Requests for Contested Case Hearing, Public Comment; and Commission Action on Hearing Request)*, if it determines that a contested case hearing would serve the public interest, or if a commissioner requests a contested case hearing, *the commission shall conduct a contested case hearing or refer the matter to the State Office of Administrative Hearings for a contested case hearing*. See § 295.157 of this title (relating to Notice of Hearing).

30 TAC § 295.172 (emphasis added). In addition, section 295.174 lists certain applications where no right to hearing exists except when requested by the Commission:

> The sections in this subchapter relating to requests for contested case hearings and the requirements to hold contested case hearings in certain circumstances do not apply to applications for temporary water use permits, emergency water use permits, or authorization to divert water from unsponsored and storage-limited projects for domestic and livestock purposes. In these specified instances, the commission may conduct such hearings as it deems appropriate. However, the commission shall conduct a hearing on a temporary permit if it has been provisionally issued and if the permit has been cancelled upon request of the executive director under § 295.181 of this title (relating to Provisional Disposition of Application for Temporary Permit).

30 TAC § 295.174. Because the Commission did not include a bed and banks authorization in this list of applications exempt from a hearing right, it appears the Commission did not intend to limit the hearing right for an application under TWC § 11.042(b).

Finally, as a practical matter, the Notice of Water Rights Application issued in this case for Application No. 5912 invites a request for a contested case hearing. It is contrary to the public interest to not provide a right to hearing after issuing the notice with such an invitation. Therefore, pursuant to 30 TAC §§ 295.172 and 55.250, and because the application was declared administratively complete after September 1, 1999, this application is subject to the requirements of 30 TAC §§ 55.250–55.256.

Under those provisions, the Commission, Executive Director (ED), applicant and affected persons may request a contested case hearing. 30 TAC §§ 55.251(a). A hearing requestor must make their request in writing within the time period specified in the notice and identify the requestor's personal justiciable interest affected by the application, specifically noting the "requestor's location and distance relative to the activity" 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." 30 TAC §§ 55.251(b)–(d).

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." 30 TAC § 55.256(a).

Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.256(b). Relevant factors to be considered in determining whether a person is affected include but are 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) likely impact of the regulated activity on the health, safety, and use of 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.

30 TAC § 55.256(c).

A group or association may request a contested case hearing if:

(1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
(2) the interests the group or association seeks to protect are germane to the organization's purpose; and
(3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

30 TAC § 55.252(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements. 30 TAC § 55.252(b).

The Commission shall grant a request for a contested case hearing if (1) the request is made by the applicant or the ED, or (2) the request is made by an affected person, timely filed with the chief clerk, and made pursuant to a right to hearing authorized by law. 30 TAC § 55.255(b).

III. DISCUSSION

A. Brazos River Authority

The BRA is authorized to divert and use state water pursuant to Certificate of Adjudication Nos. 12-5155 through 12-5165 and Permit No. 2925A. The BRA does not indicate the location of the diversion points for these water rights. It states that one or more of these water rights may be impaired by the proposed amendments.

The BRA holds existing water rights that were potentially granted or amended based on the use or availability of Applicant's discharges. *See* TWC § 11.042(b); 30 TAC § 297.16(a). As a result, the BRA's interests as a water rights holder are protected by the law under which this application will be considered, and there is a reasonable relationship between the interests claimed and the regulated activity. *See* 30 TAC § 55.256(c)(1) and (3). A factual hearing is the proper forum to determine the extent to which the BRA's water rights were granted based on Applicant's discharges.

In addition, the BRA's enabling legislation empowers it to coordinate and regulate the watershed, including groundwater and freshwater inflows. TEX. SPECIAL DIST. LOCAL LAWS CODE § 8502.004. As a result, the BRA, as a governmental entity, has statutory authority over the issues relevant to the application. *See* 30 TAC § 55.256(c)(6). Therefore, the BRA possesses a personal justiciable interest related to a legal right that is potentially affected by this application. OPIC concludes the BRA is an affected person entitled to a contested case hearing.

B. Wellborn Special Utility District

Wellborn is a conservation and reclamation district in Brazos County. Wellborn provides potable water to approximately 3100 customer connections in Brazos County, including areas near the City of College Station. Wellborn has a contract with the BRA to divert and use 4,000

acre-feet of water from the Navasota River at a location downstream of one or more of Applicant's discharge points. Wellborn is also the owner of a 24-acre tract of land fronting on the Navasota River, where Wellborn plans to construct an intake structure and surface water treatment plant. This proposed plant is located approximately 18 river miles downstream of Applicant's discharge point.

Wellborn is concerned the application will adversely affect its ability to divert and use water from the Navasota River. Wellborn also expresses concern that the application does not identify conditions distinguishing Applicant's water for reuse from Wellborn's water. Wellborn requests special conditions to identify and account for the volume of water discharged by Applicant, the source of such water, and carriage and channel losses.

As a governmental entity, Wellborn has statutory authority over and interest in the issues relevant to the application. *See* 30 TAC § 55.256(c)(6). Special utility districts may be created:

> (1) to purchase, own, hold, lease, and otherwise acquire sources of water supply; to build, operate, and maintain facilities for the transportation of water; and to sell water to towns, cities, and other political subdivisions of this state, to private business entities, and to individuals;
> (2) for the establishment, operation, and maintenance of fire-fighting facilities to perform all fire-fighting activities within the district; or
> (3) for the protection, preservation, and restoration of the purity and sanitary condition of water within the district.

TWC § 65.012. Wellborn's statutory mandate to provide water may be adversely affected by the application.

In addition, there is a reasonable relationship between the regulated activity and the interest Wellborn claims in constructing an intake structure and water treatment plant. *See* 30 TAC § 55.256(c)(3). Wellborn's proposed plant is 18 miles downstream of Applicant's diversion point, and therefore, the plant is potentially affected by Applicant's use of return flows. Although Wellborn does not hold a water right, the factors in 30 TAC § 55.256(c) weigh in favor

of finding Wellborn is an affected person. Wellborn appears to hold an interest not common to members of the general public, and therefore, OPIC concludes Wellborn is an affected person entitled to a contested case hearing.

C. Texas Chapter of the Coastal Conservation Association

The CCA is a nonprofit organization dedicated to the conservation of marine resources in Texas. The CCA does not assert a water right on the Brazos River, but claims an interest in the quality and quantity of freshwater inflows for the health of bays and estuaries and natural marine breeding habitats. The CCA states that it has approximately 50,000 members, some of whom fish in and around the mouth of the Brazos River and are concerned the application will decrease freshwater flows.

The CCA's interest in freshwater inflows to bays and estuaries and instream uses is protected by the law under which the application will be considered. *See* TWC § 11.042(b). *See also* 30 TAC § 55.256(c)(1). There is a reasonable relationship between the interest in freshwater inflows and the authorization to reuse discharged effluent. *See* 30 TAC § 55.256(c)(3). Approval of the bed and banks authorization likely impacts the use of the natural resources of the Brazos River for fishing by potentially reducing the amount of freshwater inflows to bays and estuaries. 30 TAC § 55.256(c)(5).

The CCA, however, has failed to show it meets the requirement for associational standing in 30 TAC § 55.252(a)(1). Although the interests the association seeks to protect appear germane to the CCA's purpose in conserving marine resources and the claim does not appear to require the participation of individual members, the CCA's hearing request does not identify one or more members who would otherwise have standing to request a hearing in their own right as required by 30 TAC § 55.252(a)(1). Pursuant to 30 TAC § 55.252(b), OPIC requests the CCA

provide an explanation of how it meets this requirement. Until that explanation is provided, OPIC cannot recommend granting the CCA's hearing request.

The CCA may address this deficiency in a reply timely filed and served on all persons on the attached mailing list by October 9, 2009. Based on the pending request, the CCA does not meet the requirement of associational standing and is not entitled to a contested case hearing. However, OPIC will reconsider its position based on any timely filed reply.

IV. CONCLUSION

OPIC recommends granting the hearing request submitted by the Brazos River Authority and the Wellborn Special Utility District. OPIC recommends denying the hearing request submitted by the Texas Chapter of the Coastal Conservation Association. OPIC requests the Texas Chapter of the Coastal Conservation Association present one or more members who would otherwise have standing in their own right in a timely filed reply, and reserves the right to change its recommendation pending receipt of any such timely reply.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By:_____
James B. Murphy
Assistant Public Interest Counsel
State Bar No. 24067785
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-4014 Phone
(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2009 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing was 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, electronic mail, or by deposit in the U.S. Mail.

James B. Murphy

MAILING LIST
CITY OF BRYAN
TCEQ DOCKET NO. 2006-1832-WR

FOR THE APPLICANT:
Mary Kaye Moore, City Manager
City of Bryan
P.O. Box 1000
Bryan, Texas 77805-1000
Tel: (979) 209-5100

Jim Mathews
Mathews & Freeland, LLP
P.O. Box 1568
Austin, Texas 78767-1568
Tel: (512) 404-7800
Fax: (512) 703-2785

FOR THE EXECUTIVE DIRECTOR:
Todd Galiga, Senior 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 Castañuela
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

REQUESTERS:
Douglas Caroom
Bickerstaff Heath Delgado Acosta, LLP
3711 S. MoPac Expy.
Building 1, Suite 300
Austin, Texas 78747

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

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