



JACKSON WALKER L.L.P.
ATTORNEYS & COUNSELORS

Leonard H. Dougal
(512) 236-2233 (Direct Dial)
(512) 391-2112 (Direct Fax)
ldougal@jw.com

October 9, 2009

VIA ELECTRONIC FILING

Ms. LaDonna Castañuela (MC-105)
Office of the Chief Clerk
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

RE: TCEQ Docket No. 2006-1832-WR; Application of the City of Bryan for Water Rights Permit No. 5912; **Wellborn SUD's Reply to the Responses to Hearing Requests of the City of Bryan and Executive Director**

Dear Ms. Castañuela:

Submitted for filing in the above-referenced Docket please find Wellborn SUD's Reply to the Responses to Hearing Requests of the City of Bryan and Executive Director.

Thank you for your attention to this matter.

Sincerely,

Leonard H. Dougal

LHD:pjs
Enclosure

cc: **FOR THE APPLICANT:**
Mary Kaye Moore
City Manager
City of Bryan
P. O. Box 1000
Bryan, Texas 77805-1000

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

FOR THE EXECUTIVE DIRECTOR:

Todd Galiga (MC-173)
Senior Attorney
Environmental Law Division
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

Steve Ramos (MC-160)
Technical Staff
Water Supply Division
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

FOR THE PUBLIC INTEREST COUNSEL:

Mr. Blas J. Coy, Jr. (MC-103)
Attorney
Office of Public Interest Counsel
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

FOR THE OFFICE OF PUBLIC ASSISTANCE:

Ms. Bridget Bohac (MC-108)
Director
Office of Public Assistance
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

FOR ALTERNATIVE DISPUTE RESOLUTION:

Mr. Kyle Lucas (MC-222)
Alternative Dispute Resolution
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

REQUESTER(S):

Douglas Caroom
Bickerstaff Heath Delgado Acosta LLP
3711 South MoPac Expressway
Building 1, Suite 300
Austin, Texas 78746

Ms. LaDonna Castañuela

October 9, 2009

Page 3

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

INTERESTED PERSON(S):

Carolyn Ahrens
Booth Ahrens & Werkenthin PC
515 Congress Avenue, Suite 1515
Austin, Texas 78701-3504

TCEQ DOCKET NO. 2006-1832-WR

APPLICATION OF THE	§	BEFORE THE
CITY OF BRYAN	§	
FOR WATER RIGHTS	§	TEXAS COMMISSION
PERMIT NO. 5912	§	ON ENVIRONMENTAL QUALITY

**WELLBORN SUD’S REPLY TO THE HEARING REQUEST RESPONSES
OF THE CITY OF BRYAN AND EXECUTIVE DIRECTOR**

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

Wellborn Special Utility District (“Wellborn”) files this Reply to the Hearing Request Responses of the City of Bryan (the “City”) and Executive Director (“ED”) of the Texas Commission on Environmental Quality (“Commission”) in the above-referenced matter and would show the following.

I. INTRODUCTION.

On April 20, 2007, Wellborn submitted a protest and request for contested case hearing on the City’s application for Water Rights Permit No. 5912 (the “Application”), which seeks authorization to use the bed and banks of several watercourses to transport and subsequently divert and reuse the City’s current and future groundwater-based return flows. In response to Wellborn’s request, the City and ED asserted that Wellborn does not qualify as an “affected person” entitled to a hearing.¹ However, because Wellborn has personal justiciable interests

¹ The Office of Public Interest Counsel (OPIC) reached the opposite conclusion that Wellborn does qualify as an affected person entitled to a hearing.

affected by the Application that are distinct from the interests of the general public, Wellborn is an “affected person” and should be granted a contested case hearing on the City’s Application.

II. TCEQ STANDARD FOR GRANTING HEARING REQUESTS.

The Commission must grant a request for a contested case hearing if the request is timely made by an “affected person”.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.³ An interest that is common to members of the general public does not qualify as a personal justiciable interest.⁴ However, one does not need to show that they will ultimately prevail on the merits to qualify as an affected person; a showing of the potential to suffer harm is sufficient.⁵ As a policy matter, the right to participate in agency proceedings is liberally construed in order to allow the agency the benefit of diverse viewpoints.⁶

III. WELLBORN HAS INTERESTS AFFECTED BY THE APPLICATION THAT ARE NOT COMMON TO THE GENERAL PUBLIC AND QUALIFIES AS AN AFFECTED PERSON.

Wellborn’s interests are affected by the Application in several ways that are distinct from the general public’s.

A. Wellborn Owns Riparian Property and Diverts Water Downstream of the City’s Proposed Discharge Point.

As an initial matter, Wellborn is the owner of a 24-acre tract of land (the “Property”) fronting on the Navasota River at a location approximately 10 river miles downstream of the City’s proposed discharge points. Riparian ownership alone has been shown to sufficiently

² 30 Tex. Admin. Code § 55.255(b).

³ *Id.* § 55.203(a).

⁴ *Id.*

⁵ *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 803 (Tex. App.—Austin 2000, pet. dism’d).

⁶ *Fort Bend County v. Texas Parks & Wildlife Comm’n*, 818 S.W.2d 898, 899 (Tex. App.—Austin 1991, no writ).

distinguish an individual's injury from that of the public at large.⁷ In addition, Wellborn has constructed an intake structure and surface water treatment plant on the Property, which Wellborn uses to divert and treat up to 4,000 acre-feet per year of water purchased under contract with the Brazos River Authority ("BRA"), which further distinguishes Wellborn's interest from the general public's.

B. Wellborn Could Be Subjected to Penalties or Civil Remedies for Inadvertent Diversions of the City's Return Flows.

Contrary to the City's contention that only diverters of water downstream of the City's *diversion* point could be affected by its Application, there may also be impacts to diverters, such as Wellborn, who are upstream of the diversion point, but downstream of the City's *discharge* point. The City's analysis looks narrowly at only the quantity of water available. However, because there is no visible way to distinguish the City's return flows from other water in the river, there is also the potential to inadvertently divert the City's return flows, which could result in serious consequences. As the Commission's public notice stated, if the 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." When an agency rule imposes a penalty for violation, it must define with reasonable certainty what conduct will invoke the penalty.⁸ As a result, to be enforceable, Wellborn believes special conditions will need to be placed in any permit issued to the City in order to provide fair notice to other water users of how the Commission plans to enforce the permit. As

⁷ See *Tex. Rivers Protection Ass'n v. Upper Guadalupe River Auth.*, 910 S.W.2d 147, 151 (Tex. App.—Austin 1995, writ denied).

⁸ See *TXU Generation Co. v. Public Util. Comm'n*, 165 S.W.3d 821, 838-39 (Tex. App.—Austin 2005, no pet.) ("A rule is unconstitutionally vague if it (1) does not give fair notice of what conduct may be punished, and (2) invites arbitrary and discriminatory enforcement by its lack of guidance for those charged with its enforcement.").

an entity potentially impacted by these conditions, Wellborn desires the opportunity to provide input on them, so as to protect its interests.

C. The City's Reuse Project May Directly Impact the Quality of Water Available for Diversion by Wellborn for Potable Water Supplies.

There is also the potential for the City's discharges to affect water quality, which is an important concern of Wellborn's considering it uses the water for public water supply purposes. While water is generally considered fungible, the court in *City of San Marcos v. Texas Commission on Environmental Quality* concluded that effluent discharged by the City of San Marcos was not freely exchangeable with water flowing in the San Marcos River where there was evidence that one purpose of seeking to transport the effluent was to use the river as a "preliminary 'treatment barrier'".⁹ Adverse impacts on water quality could hinder Wellborn's ability to supply treated water to its customers, which further differentiates Wellborn's interests from the general public's.

IV. WELLBORN'S CONTRACTUAL RIGHT TO USE WATER IS A SUFFICIENT BASIS FOR BEING NAMED AN AFFECTED PERSON.

Despite the several interests of Wellborn that may be affected by the Application, the ED would restrict the right to participate in a hearing to the actual water rights holder who may be affected, here BRA. However, the definition of affected person is not so limited. Wellborn has entered into a water supply contract with BRA, and the contract has been filed with the Commission pursuant to Chapter 297 of the Commission's rules.¹⁰ As such, Wellborn has the legal authority to divert and use water pursuant to the contract. Surely, Wellborn's contractual rights qualify as legal rights, powers, and economic interests affected by the Application, irrespective of whether Wellborn holds the underlying water right. The fact that one affected

⁹ 128 S.W.3d 264, 276 (Tex. App.—Austin 2004, pet. denied).

¹⁰ See 30 Tex. Admin. Code § 297.101, et. seq.

person may represent some or all of the same interests as another does not support denying the other affected person's hearing request. Instead, in such cases, the Commission should grant both hearing requests and allow the administrative law judge ("ALJ") to align the parties according to the nature of the proceeding and their relationship.¹¹

Further, as the actual diverter of water, Wellborn would likely be directly subject to penalties if an erroneous diversion were made. Imposing a penalty would clearly impact Wellborn, so the ED's conclusion that Wellborn is not an affected person appears illogical, unless the agency is also implying that there is no scenario under which Wellborn could be penalized. However, if that is not the agency's intention, Wellborn should be given an opportunity to participate in the proceedings.

Wellborn is not asking that the City's application be denied; rather, it is simply asking for a seat at the table in order to protect its interests. We note that in the event the Commission grants any hearing request on the Application, any person who can show a justiciable interest may still be granted party status by the ALJ.¹²

V. CONCLUSION.

Wellborn has specific personal justiciable interests that would be affected by the City's Application that are distinct from the interests of the general public, including (1) its ownership of riparian property and diversion of water downstream of the City's proposed discharge point; (2) the potential to be subjected to penalties or civil remedies for inadvertently diverting the City's return flows; and (3) possible impacts on the water quality available for supply to Wellborn's customers. As a result, Wellborn qualifies as an "affected person" and respectfully requests that the Commission grant Wellborn's request for a contested case hearing.

¹¹ See 30 Tex. Admin. Code § 80.109(c).

¹² *Id.* §§ 55.255(d), 80.109.

Respectfully submitted,

JACKSON WALKER L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
Telephone: (512) 236-2000
Facsimile: (512) 236-2002

By: 
Leonard H. Dougal
State Bar No. 06031400

ATTORNEYS FOR WELLBORN SPECIAL
UTILITY DISTRICT

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of October, 2009, a true and correct copy of the foregoing document was served on the following parties as indicated below:

FOR THE APPLICANT:

Mary Kaye Moore
City Manager
City of Bryan
P. O. Box 1000
Bryan, Texas 77805-1000

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

Via U.S. Mail and Facsimile 703-2785

FOR THE EXECUTIVE DIRECTOR:

Todd Galiga (MC-173)
Senior Attorney
Environmental Law Division
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

Via U.S. Mail

Steve Ramos (MC-160)
Technical Staff
Water Supply Division
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

Via U.S. Mail

FOR THE PUBLIC INTEREST COUNSEL:

Mr. Blas J. Coy, Jr. (MC-103)
Attorney
Office of Public Interest Counsel
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

Via U.S. Mail and Facsimile 239-6377

FOR THE OFFICE OF PUBLIC ASSISTANCE:

Ms. Bridget Bohac (MC-108)
Director
Office of Public Assistance
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

Via U.S. Mail

FOR ALTERNATIVE DISPUTE RESOLUTION:

Mr. Kyle Lucas (MC-222)
Alternative Dispute Resolution
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

Via U.S. Mail

FOR THE CHIEF CLERK:

Ms. LaDonna Castañuela (MC-105)
Office of the Chief Clerk
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

Via Electronic Filing

REQUESTER(S):

Douglas Caroom
Bickerstaff Heath Delgado Acosta LLP
3711 South MoPac Expressway
Building 1, Suite 300
Austin, Texas 78746

Via U.S. Mail and Facsimile 320-5638

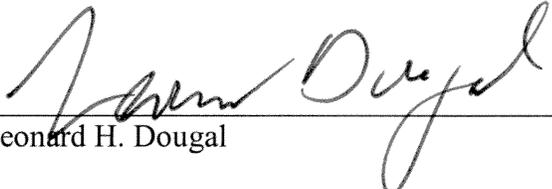
Robin A. Melvin
Graves Dougherty Hearon & Moody
401 Congress Avenue, Suite 2200
Austin, Texas 78701-4071

Via U.S. Mail

INTERESTED PERSON(S):

Carolyn Ahrens
Booth Ahrens & Werkenthin PC
515 Congress Avenue, Suite 1515
Austin, Texas 78701-3504

Via U.S. Mail



Leonard H. Dougal