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

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 13, 2007

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

CHIEF CLERKS OFFICE

2007 AUG 13 PM 3:38

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

**RE: ALVIN STARR, PAMELA STARR, AND NATHAN STARR  
TCEQ DOCKET NO. 2007-0014-WR**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Emily A. Collins".

Emily Collins, Attorney  
Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2007-0014-WR

2007 AUG 13 PM 3:39

IN THE MATTER OF THE  
APPLICATION OF ALVIN STARR,  
PAMELA STARR, AND NATHAN  
STARR FOR WATER RIGHTS  
PERMIT NO. WRPERM 5920

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BEFORE THE  
CHIEF CLERKS OFFICE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO REQUESTS FOR HEARING**

COMES NOW, the Office of Public Interest Counsel ("OPIC") of the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") and files this Response to Requests for Hearing in the above-referenced matter, and would respectfully recommend referring this matter to the State Office of Administrative Hearings ("SOAH").

**I. INTRODUCTION**

Alvin Starr, Pamela Starr, and Nathan Starr ("Applicant" or "the Starrs") applied to TCEQ on October 7, 2005, for a Water Use Permit to divert and use up to 320 acre-feet of water per year at a maximum diversion rate of 2.01 cfs (900gpm) from the East Fork of the Trinity River in the Trinity River Basin for agricultural purposes to irrigate 200 acres of grass farm in Kaufman County, Texas.

The Executive Director ("ED") declared the Starr's application administratively complete on February 16, 2006. The Applicant published notice of its water rights application on July 27, 2006, in the *Forney Messenger*, a newspaper of general circulation in Kaufman County. The comment and hearing request period ended on August 28, 2006. TCEQ received two hearing requests from water rights holders in the Trinity River Basin concerned about water availability, environmental flows, conservation, protection and effective utilization of groundwater resources

and the effects of the requested appropriation on the hearing requestors' ability to divert and use their own water rights. Pursuant to TWC § 11.134(b)(2), (3)(B), the Executive Director ("ED") recommended that the Commission deny the Starr's application in a letter dated October 17, 2006. The Applicant requested a contested case hearing on November 8, 2006. Pursuant to the analysis provided below, OPIC recommends granting the hearing requests and referring this matter to SOAH to determine if the Starr's application meets the requirements of applicable law.

## II. APPLICABLE LAW

Persons seeking to appropriate state water or to begin construction of work designed for the storage, taking or diversion of water must first obtain a permit from the Commission to make the appropriation. TWC § 11.121 (2006). Applications to appropriate unappropriated state water must be made pursuant to the requirements in TWC section 11.124. In accordance with TWC section 11.134, the Commission must consider the following issues in its decision to grant or deny the application: whether unappropriated water is available; whether the proposed appropriation is intended for a beneficial use, does not impair existing water rights or vested riparian rights, is not detrimental to the public welfare, considers assessments performed under sections 11.147(d) and (e) and sections 11.150, 11.151, and 11.152, and addresses water supply needs consistent with the state and applicable regional water plans; and whether the applicant will avoid waste and achieve water conservation. TWC § 11.134(b) (2006).

### A. Requirements for Contested Case Hearing Requests

This application was declared administratively complete on February 16, 2006. As the application was declared administratively complete after September 1, 1999, it is subject to the

requirements of Title 30, Chapter 55, Subchapter G, sections 55.250-55.256 of the Texas Administrative Code ("TAC"). Under those provisions, a contested case hearing may be requested by the Commission, the Executive Director, the Applicant, and affected persons. 30 TAC § 55.251(a).

A hearing requestor must make their request in writing 30 days after the publication of the notice of the application 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), (c); 30 TAC § 295.171.

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). 30 TAC section 55.256(c) provides relevant factors to be considered in determining whether a person is affected. These factors 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). In addition, governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.256(b).

The Commission shall grant a request for a contested case hearing if (1) the request is made by the applicant, 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). The Applicant may request a direct referral to SOAH, but an application may only be directly sent to SOAH if "the executive director, the applicant, the public interest counsel and all timely hearing requestors agree on a list of issues and maximum expected duration of the hearing." 30 TAC § 55.254(g).

### III. HEARING REQUESTS

#### A. The Starrs Have A Right to a Contested Case Hearing.

The ED, in a letter dated October 17, 2006, stated that he cannot recommend that the Commission grant the Starr's water rights application "because there is insufficient water available for appropriation in this portion of the Trinity River Basin." In response to the ED's letter, the Applicant requested a contested case hearing by letter dated November 8, 2006. While all hearing requestors must substantially comply with the requirement to describe their justiciable interest in an application and actually request a contested case hearing,<sup>1</sup> the Applicant clearly holds a definite and unique interest in the fate of its application to divert and use state water. Accordingly, 30 TAC section 55.255(b)(1) mandates that the Commission grant an Applicant's request for a contested case hearing. Therefore, OPIC recommends that the Commission grant the Applicant's contested case hearing request.

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<sup>1</sup> 30 TAC § 55.251(a), (c) (2007).

**B. The Hearing Requests of North Texas Municipal Water District and the City of Dallas Both Demonstrate Affected Person Status.**

TCEQ received timely hearing requests contesting the Starr's application from the North Texas Municipal Water District ("NTMWD") and the City of Dallas. NTMWD states in its hearing request that it has pending water rights applications, including the East Fork Reuse Project, and holds existing water rights in the Trinity River Basin.<sup>2</sup> NTMWD states concern that the proposed appropriation will affect the amount of water available in the East Fork Trinity River, and, thereby, reduce stream flow. NTMWD also states concern with the application in regard to adequate conservation, protection and effective utilization of groundwater resources, and adequate consideration of the public welfare. NTMWD contends that the appropriation may impact their ability to meet current and future water supply needs of its member cities and customers.

The Commission may grant an application only when the proposed use will not impair existing water rights.<sup>3</sup> Therefore, NTMWD's interest in the potential adverse effects to its existing water rights is protected by the law under which the application will be considered.<sup>4</sup> Furthermore, a reasonable relationship exists between the interest claimed and the activity regulated as NTMWD states that it has pending and senior water rights that may be impacted by the activity permitted by the requested appropriation.<sup>5</sup> Similarly, the proposed appropriation

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<sup>2</sup> NTMWD also states that it holds Temporary Permit No. 5871, and believes that its rights stemming from that permit may be adversely affected by the Starr's proposed appropriation.

<sup>3</sup> TWC § 11.134(b)(3)(B).

<sup>4</sup> 30 TAC § 55.256(c)(1).

<sup>5</sup> 30 TAC § 55.256(c)(3).

may affect water availability<sup>6</sup> and, thereby, the regulated activity may impact NTMWD's use of its own appropriations.<sup>7</sup> Based on this showing, OPIC recommends that the Commission find that NTMWD has demonstrated that it is an affected person entitled to a hearing.

Similarly, the City of Dallas states in its hearing request that it holds Certificate of Adjudication No. 08-2462 for Lake Ray Hubbard, which is located on the East Fork Trinity River approximately three miles upstream of the Applicant's proposed diversion point. The City states concern regarding water availability and, therefore, potential impairment of its senior water rights in the East Fork Trinity River.

The Commission may grant an application only when water is available<sup>8</sup> and the proposed use will not impair existing water rights.<sup>9</sup> Therefore, the City's interest in the potential adverse effects to its existing water rights is protected by the law under which the application will be considered.<sup>10</sup> Furthermore, a reasonable relationship exists between the interest claimed and the activity regulated as the City states that it has pending and senior water rights that may be impacted by the activity permitted by the requested appropriation.<sup>11</sup> Similarly, the proposed appropriation may affect water availability and, thereby, the regulated activity may impact the

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<sup>6</sup> 30 TAC § 297.42.

<sup>7</sup> 30 TAC § 55.256(c)(4), (5).

<sup>8</sup> 30 TAC § 297.42.

<sup>9</sup> TWC § 11.134(b)(3)(B).

<sup>10</sup> 30 TAC § 55.256(c)(1).

<sup>11</sup> 30 TAC § 55.256(c)(3); *see also United Copper v. Grissom*, 17 S.W.3d 797, 803 (Tex.App.-Austin 2000) (citing *Heat Energy Advanced Tech., Inc. v. West Dallas Coalition for Env't Justice*, 962 S.W.2d 288 (Tex.App.-Austin 1998, pet. denied)) (stating that the affected person standard "does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will *potentially suffer harm* or have a justiciable interest that will be affected.") (emphasis added).

City's use of its own appropriations.<sup>12</sup> Based on this showing, OPIC recommends that the Commission find that the City of Dallas has demonstrated that it is an affected person entitled to a hearing.

#### IV. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission grant the contested case hearing requests of the North Texas Municipal Water District, the City of Dallas, and the Applicant and refer this matter to SOAH for a contested case hearing to determine whether the Starr's application meets the requirements of applicable law.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

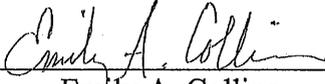
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<sup>12</sup> 30 TAC § 55.256(c)(4), (5).

**CERTIFICATE OF SERVICE**

I hereby certify that on August 13, 2007, the original and eleven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing were 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 or by deposit in the U.S. Mail.

  
\_\_\_\_\_  
Emily A. Collins

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