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August 27, 2007

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

CHIEF CLERKS OFFICE  
2007 AUG 27 PM 12:14  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

RE: TCEQ Docket No. 2007-001<sup>4</sup>~~2~~-WR  
Application No. 5920 by Alvin Starr, Pamela Starr, and Nathan Starr  
City of Dallas Response to Contested Case Hearing Requests

Dear Ms. Castañuela:

Enclosed for filing in the above referenced matter, please find the original and 11 copies of the City of Dallas Response to Contested Case Hearing Requests. Please forward this filing to the Office of General Counsel.

Thank you for your attention to this matter, and please call if I can provide any further information or assistance.

Sincerely,



Gwendolyn Hill Webb  
ATTORNEY FOR THE CITY OF DALLAS

my spw

cc: Mailing List for TCEQ Docket No. 2007-0014-WR

**TCEQ DOCKET NO. 2007-0014-WR**

**IN THE MATTER OF THE WATER § BEFORE THE TEXAS COMMISSION**  
**USE APPLICATION NO. 5920 OF § ON**  
**ALVIN, PAMELA & NATHAN STARR § ENVIRONMENTAL QUALITY**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
AUG 27 PM 12:44  
CLERK'S OFFICE

**CITY OF DALLAS' REPLY TO RESPONSES TO THE REQUESTS FOR CONTESTED CASE HEARING**

COMES NOW, the City of Dallas ("Dallas"), through Webb & Webb, counsel of record, and files this Reply to Responses to the Requests for Contested Case Hearing in the above-referenced application with the Texas Commission on Environmental Quality ("Commission"), and would respectfully show as follows:

**I. BRIEF REPLY**

The TCEQ Water Availability Model demonstrates that there is not sufficient water available for appropriation, as proposed by Application No. 5920. Accordingly, the Commission should summarily deny the application pursuant to Tex. Water Code, § 11.131. The Texas Water Code and Commission rules allow for summary denial of water rights applications when there is a determination that water is not available, such that the Commission could not legally grant the application under Tex. Water Code § 11.134. The Commission should subject Applicants' demand for a contested case hearing to the same scrutiny which occurs in a lawsuit under a motion for summary judgment.

If the Commission elects not to deny Application No. 5920 summarily, and to remand the application to SOAH for a contested case hearing, then Dallas urges the Commission to delay such remand until Applicants have identified genuine issues of material fact. Specifically, Applicants should be required to identify the factual basis under which Application No. 5920 can be granted in accordance with the legal requirements of Tex. Water Code § 11.134, without impairment to existing water rights of Dallas and others and vested riparian rights.

Finally, at any time the Commission elects to remand Application No. 5920 to SOAH, Dallas should be named a protesting party, in addition to the required statutory parties.

## II. BACKGROUND

### A. Application No. 5920 by Alvin Starr, Pamela Starr and Nathan Starr

On October 7, 2005, Alvin Starr, Pamela Starr and Nathan Starr ("Applicants") jointly filed an application with the Commission, seeking to divert and use not to exceed 320 acre-feet of water per year from the East Fork Trinity River, tributary of the Trinity River, Trinity River Basin, at a maximum diversion rate of 2.01 cfs (900 gpm), for agricultural purposes to irrigate 200 acres in Kaufman County, Texas. The application was deemed administratively complete on February 16, 2006. Notice of the Application No. 5920 was issued by the TCEQ Chief Clerk on July 3, 2006.

### B. Protests of Application No. 5920 by Dallas and North Texas Municipal Water District

After the Applicant provided published and mailed notice, Dallas timely filed its protest of the application on August 3, 2006. In its protest letter, Dallas stated:

Dallas is the holder of Certificate of Adjudication No. 08-2462 for Lake Ray Hubbard, which is located on the East Fork Trinity River approximately three (3) miles upstream of Applicants' proposed diversion point, but in the same Trinity River Basin watershed, with the same source of surface water as Applicants. Dallas' Lake Ray Hubbard water rights are senior in priority to any water rights permit which could be issued to Applicants pursuant to Application No. 5920. No draft permit is available for Dallas' review at this time.

#### Effect of Proposed Water Right:

According to the notice issued by TCEQ on July 3, 2006, the Applicants propose to divert and use not to exceed 320 acre-feet of water per year at a maximum diversion rate of 2.01cfs (900gpm). The proposed diversion and use seeks to appropriate water which may need to be used to satisfy Dallas' senior water right; in other words, there may not be sufficient water available in the watershed for Applicants' appropriation. Appropriate terms and conditions for Applicants' use of watershed inflows has not been resolved so as not to impair Dallas' existing senior water right and not to prejudice Dallas' pending water reuse permit in Lake Ray Hubbard. Both Dallas' senior water right and its pending water reuse application could be impaired by the granting of a permit to Applicants in accordance with Application No. 5920, without sufficient protections for Dallas' senior water rights.

Additionally, Dallas requested to be named a party to further proceedings concerning the application and requested a contested case hearing, asserting that the application, if granted, could adversely affect Dallas' water rights in the Trinity River Basin.

The application was also timely protested by North Texas Municipal Water District (the District") on July 19, 2006.

### C. TCEQ Staff Review

In its review of Application No. 5920, the Executive Director completed its Water Availability Analysis and determined that there was not sufficient water available for appropriation, for the proposed 320 acre-foot per year appropriation at the location requested, based on the water availability model. This conclusion was set forth in the Water Availability Team Memorandum and Addendum dated October 4, 2006 and December 27, 2006, respectively. Consequently, TCEQ water rights applications Project Manager David N. Koinm notified Applicants by letter dated October 17, 2006:

The Executive Director's staff has determined that they cannot recommend the Commission grant the amendment because there is insufficient water available for appropriation in this portion of the Trinity River Basin. . . .

You may decide to withdraw the application or request a hearing on the recommended denial of the application.

### D. Additional Procedural History

As stated above, on October 17, 2006, the Executive Director completed technical review of the Application No. 5920 (subject to the December 27, 2006 Addendum to the Water Availability Analysis), and determined that sufficient water was not available to support the issuance of a permit granting a new appropriation. Applicants were directed to withdraw the application or request a contested case hearing. Applicants replied to Mr. Koinm's October 17, 2006 letter by letter dated November 8, 2006, wherein their counsel stated: "[O]n behalf of the Starrs I hereby demand a contested case hearing regarding the above referenced matter - Application Nol 5920 for a Water Use Permit." On July 30, 2007, the TCEQ Chief Clerk designated Application No. 5920 as TCEQ Docket No. 2007-0014-WR and issued a schedule. Under the schedule, the Executive Director and the Public Interest Counsel could file responses to hearing requests by August 13, 2007, persons who filed hearing requests could file a written reply to responses by August 27, 2007, and Commission consideration of all timely filed hearing requests would occur during a public meeting on September 5, 2007.

**E. Rights to a Contested Case Hearing**

The Office of Public Interest Counsel ("OPIC") timely filed its Response to Hearing Requests on August 13, 2007. As to Applicant's right to a contested case hearing, the Assistant Public Interest Counsel stated:

[T]he Applicant clearly holds a definite and unique interest in the fate of its application to divert and use state water. . . . OPIC recommends that the Commission grant the Applicants' contested case hearing request.

As to the requests for contested case hearing of Dallas and the District, OPIC determined that, based on its existing water rights in Lake Ray Hubbard (Certificate of Adjudication No. 08-2462, as amended) Dallas demonstrated that it is an affected person entitled to a contested case hearing, based on its existing water rights.

The Executive Director timely filed its Response to Hearing Requests on August 13, 2007, stating: Both the District's and Dallas' (collectively "Protestants") requests for a contested case hearing meet the requirements in 30 Tex. Admin. Code § 55.251 and § 55.256. The Executive Director also stated that the interests claimed by Dallas and the District are protected by the law under which Application No. 5920 will be considered, that a reasonable relationship exists between the interest claimed by each of the Protestants and the activity regulated, that there is a likely impact of the regulated activity on the health, safety and use of property of Protestants, and that there is a likely impact of the regulated activity on the use of the impacted natural resource. Accordingly, the Executive Director concluded that Dallas' and the District's requests for contested case hearing should be granted.

**II. REPLY TO RESPONSES TO HEARING REQUESTS**

**A. Dallas' Rights to a Contested Case Hearing**

Dallas concurs with the Response of the Executive Director and the District, and with the Response of OPIC to the extent that all responsive pleadings state that Dallas and the District are proper parties to a contested case hearing on Application No. 5920. Dallas' protest does meet the standards of 30 Tex. Admin. Code § 55.251 and Dallas is an affected person under 30 Tex. Admin. Code § 55.256. Specifically:

1. Dallas' existing senior water rights in the East Fork Trinity River are protected by Tex. Water Code, §11.134, the law under which the application will be considered.
2. A reasonable relationship exists between protection of Dallas' existing senior water rights to impound, divert and use State water in the East Fork Trinity River, and the Commission's consideration of a proposed downstream appropriation of State water.
3. The granting of Application No. 5920 would impair Dallas' property rights in its existing water rights.
4. Granting Application No. 5920 could adversely impact Dallas' rights to divert and use water under its senior water rights, inasmuch as the Water Availability Analysis shows there is not sufficient water available for Applicants' proposed appropriation.

Unquestionably, Dallas is an affected person entitled to a contested case hearing.

#### **B. Dismissal of Application No. 5920 without Contested Case Hearing**

More importantly, Dallas joins the Executive Director and the District in urging the Commission to deny Application 5920 at its public meeting on September 5, 2007 pursuant to Tex. Water Code, § 11.131, based on the Executive Director's determination that, under the basin water availability model, sufficient water is not available for appropriation, and that the application cannot be granted under Tex. Water Code, § 11.134. Section 11.134 establishes the legal requirements which the Commission must apply in considering Application No. 5290, and states:

11.134 (b) The commission shall grant the application only if:

- (1) the application conforms to the requirements prescribed by this chapter and is accompanied by the prescribed fee;
- (2) unappropriated water is available in the source of supply;
- (3) the proposed appropriation:
  - (A) is intended for a beneficial use;
  - (B) does not impair existing water rights or vested riparian rights;
  - (C) is not detrimental to the public welfare;

\* \* \* \* \*

As it stands now, the only water availability analysis shows that water is not available in sufficient quantities for Applicants' proposed water use. Without controverting water availability analysis by Applicants, referral to the State Office of Administrative Hearings (SOAH") for a contested case hearing

would be a costly waste of resources. Applicants' demand for a contested case hearing fails to offer any legal or factual basis under which Application No. 5920 could be granted. Because Applicants have not produced a controverting water availability analysis, then there is no basis for proceeding to hearing, when there are no genuine issues of fact and law to be decided in such a hearing.

Section 11.131, Tex. Water Code, states:

**§ 11.131. EXAMINATION AND DENIAL OF APPLICATION WITHOUT HEARING.**

(a) The commission shall make a preliminary examination of the application, and if it appears that there is no unappropriated water in the source of supply or that the proposed appropriation should not be allowed for other reasons, the commission may deny the application.

(b) If the commission denies the application under this section and the applicant elects not to proceed further, the commission may order any part of the fee submitted with the application returned to the applicant.

Accordingly, §11.131, not only requires the Commission to make a preliminary determination of the application to determine if there is water available for appropriation, but also allows the Commission to deny the application, based on that preliminary determination. Section 11.131 is in the nature of a summary judgment rule, in that, in cases where an application would have to be denied ultimately under § 11.134, because unappropriated water is not available in the source of supply in sufficient quantities to meet Applicants' demand, and issuing the permit as proposed in the application would "impair existing water rights or vested riparian rights." Section 11.131 allows the Commission avoid the dedication of Commission and party resources to a cause which must ultimately fail.

Although Dallas generally supports a party's right to a contested case hearing to resolve issues of fact and law, Applicants and the parties have identified no contested issues of fact and law. The basin water availability model states that water is generally unavailable to Applicants in sufficient quantities to satisfy their proposed water use. Applicants have provided no offer of proof of evidence to the contrary, if such evidence exists. Consequently, Tex. Water Code, § 11.131 allows Application No. 5920 to be dismissed without putting the parties to the expense of public hearing, when Applicants have shown no basis under which the application can be legally granted. Efficient use of State resources suggests that

applications which cannot be legally granted, should be dismissed without hearing. Applicants should only be allowed to proceed to hearing if they provide some possibility of factual support for the granting of the application, in opposition to the Executive Director's water availability analysis. Applicants have not done so, and should not be allowed to proceed to hearing without any factual or legal support for granting their application.

### III. RELIEF REQUESTED

For the reasons stated above, Dallas respectfully requests the Texas Commission on Environmental Quality deny Application No. 5920 under Tex. Water Code, §11.131, without any referral to the State Office of Administrative Hearings for a contested case hearing, because the application cannot be legally granted under Tex. Water Code, § 11.134.

If the Commission decides to refer Application No. 5920 to SOAH, then it should delay such referral until such time as Applicants provide appropriate factual support which would tend to show that, contrary to results of the existing water availability model for the basin, water is available for the proposed appropriation and granting Application No. 5920 will not impair Dallas' existing water rights.

If the Commission refers Application No. 5920 to SOAH for a contested case hearing, then Dallas should be granted party status as an affected person.

Respectfully submitted,

**WEBB & WEBB**

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By:

  
Gwendolyn Hill Webb  
State Bar No. 21026300  
ATTORNEY FOR CITY OF DALLAS

**CERTIFICATE OF SERVICE**

By my signature, I hereby certify that, on this 27<sup>th</sup> day of August, 2007, a true and correct copy of the foregoing City of Dallas Reply to Responses for Contested Case Hearing has been sent via hand delivery, facsimile and/or first class mail to the following:

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**FOR THE EXECUTIVE DIRECTOR:**

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**FOR THE CHIEF CLERK:**

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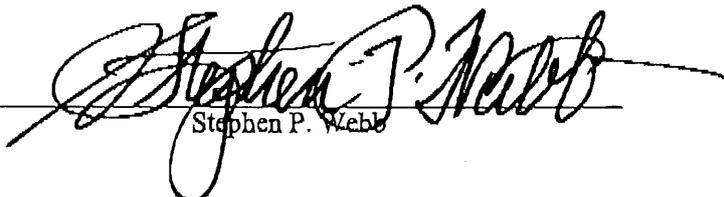
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CHIEF CLERKS OFFICE

2007 AUG 27 PM 12:45

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

  
Stephen P. Webb