

TCEQ DOCKET NO. 2007-0973-WR

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APPLICATION BY TEXAS  
MUNICIPAL POWER AGENCY  
FOR A WATER RIGHTS PERMIT  
NO. 5858

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BEFORE THE  
TEXAS COMMISSION ON CHIEF CLERKS OFFICE  
ENVIRONMENTAL QUALITY

## EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUEST

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to the hearing request on the Texas Municipal Power Agency's (TMPA) application for a Water Rights Permit No. 5858. Two hearing requests were timely filed by the Brazos River Authority (BRA) and Chocolate Bayou Water Company (Chocolate Bayou). Chocolate Bayou withdrew its hearing request on July 20, 2005. The Executive Director recommends that the remaining request by BRA be granted.

### I. BACKGROUND

#### The Application

TMPA applied for Water Use Permit No. 5858 to permit existing reservoirs on TMPA's site. The reservoirs are located on Gibbons Creek Lignite Mine and are the result of mining operations and reservoirs created for sedimentation control. The site is active and permitted by the Railroad Commission of Texas. No diversion of state water is proposed. TMPA only requests the impoundment of state water.

TMPA had originally requested the authorization to maintain thirty-one existing on-channel reservoirs in the Brazos River Basin and impound a combined amount of 8,487.80 acre-feet of water for recreational, domestic, livestock, parks and wildlife, and game preserve purposes. Since the original application, TMPA has shown in a certified engineer's report that five of the thirty-one reservoirs are off-channel and would not impound state water. TMPA is now seeking authorization to maintain twenty-six on-channel reservoirs in the Brazos River Basin and seeking an impoundment of 3,515 acre-feet of water for the same uses in Grimes County.

TMPA requests the following twenty-six on-channel reservoirs be authorized: Pond 1, Pond 5A, Pond 6A, Pond 7A, Pond 9A, Pond 10A/10B, Pond 12A, Pond 13A, Heifer Creek Pond, Pond HR-2, Pond HR-5, Pond HR-6, Pond HR-7, Pond A1P-2, Pond B1P-2, Pond B1P-3, Pond B1P-4, Pond B2P-1, B2P-2, B2P-6, B2P-7, G1P-1, G1P-2, G1P-3, G1P-4, and G1P-5.

The priority date for the Water Use Permit is October 21, 2004. No consumptive use is associated with the requested appropriation, therefore water conservation and drought

contingency plans are not required for the application.

Special conditions are included in the Water Use Permit, such as the requirement for a riparian buffer of greater than or equal to 50 feet around the reservoirs, with the exception of reasonable access points. TMPA is also required to follow mining operation and reclamation points for Gibbons Creek Lignite Mine Area, as approved by the Railroad commission. Also, TMPA has a system of dams that will have a means to release and pass inflows of state water that TMPA is not authorized to store.

### Procedural History

The application was received on August 9, 2004 with additional information submitted on September 23, 2004 and October 15, 2004. The application was declared administratively complete and filed with the Office of Chief Clerk on October 21, 2004. Notice was mailed to water rights holders in the Brazos River Basin on February 4, 2005 and notice was published in the *Navasota Examiner* on February 23, 2005. The comment period closed on March 25, 2005. Two timely hearing requests were received from Brazos River Authority (BRA) and Chocolate Bayou Water Company (Chocolate Bayou). Chocolate Bayou subsequently withdrew its hearing request on July 20, 2005.

The BRA filed a System Operations Permit, Application No. 5851, on October 14, 2004. The water availability analysis for the BRA System Operations Permit entailed several complex assessments which potentially affect water availability for the entire Brazos River Basin. The TMPA technical analysis was delayed until the water availability analysis had been conducted for the BRA System Operations Permit. For this reason, TCEQ staff conducted a technical review of TMPA's application and produced the Environmental memorandum on April 24, 2005 and the Hydrology memorandum on October 25, 2006.

The draft permit was mailed to TMPA and the protestant (BRA) on January 25, 2007. The TMPA provided comments on the draft permit on March 30, 2007 and a revised draft permit was mailed to TMPA and the protestant on April 18, 2007. After further review on April 24, 2007, TMPA removed the request for five reservoirs that were off-channel. The hydrology memo was amended to reflect the removal of the five reservoirs on April 24, 2007. The revised draft permit was mailed to the protestant and TMPA on May 29, 2007 for comment. No additional comments were received and on June 28, 2007 an agenda date was requested.

## II. RESPONSE TO HEARING REQUESTS

### Legal Authority

The application is subject to the procedures for evaluating hearing requests on applications declared administratively complete on or after September 1, 1999 in 30 Texas Administrative Code, Chapter 55, Subchapter G (Sections 55.250-55.256).

Title 30, Sections 55.251 (b) and (c) of the Texas Administrative Code (30 TEX. ADMIN. CODE) specify that a hearing request must:

- (1) be in writing and be filed with the Office of the Chief Clerk during the public comment period;
- (2) give the name, address, and daytime telephone number of the person who files the request;
- (3) identify the person's personal justiciable interest affected by the application including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application 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; and
- (4) request a contested case hearing.

A hearing request must comply with requirement (1) above and must "substantially comply" with requirements (2) through (4). 30 TEX. ADMIN. CODE § 55.251(c).

A request for a contested case hearing must be granted if the request is made by an affected person and the request:

- (A) complies with the requirements of 30 TEX. ADMIN. CODE § 55.251;
- (B) is timely filed; and
- (C) is pursuant to a right to hearing authorized by law.

30 TEX. ADMIN. CODE § 55.255(b)(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. An interest common to the general public does not constitute a justiciable interest. 30 TEX. ADMIN. CODE § 55.256(a).

To determine whether a person is an affected person, all relevant factors must be considered, including but 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) the likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) the likely impact of the regulated activity on the 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 TEX. ADMIN. CODE § 55.256(c).

### Hearing Request

The BRA listed thirteen water rights that they assert may be impaired if TMPA's Water Use Permit is authorized, eleven of which are upstream with two downstream of the Applicant's proposed permit. Specifically, BRA states that its potentially affected water rights include: Certificate 12-155 (Possum Kingdom Lake); Certificate No. 12-5156 (Lake Granbury); Certificate No. 12-5157 (Lake Whitney); Certificate No. 12-5158 (Lake Aquilla); Certificate No. 12-5159 (Lake Proctor); Certificate No. 12-5160 (Lake Belton); Certificate No. 12-5161 (Lake Stillhouse Hollow); Certificate No. 12-5162 (Lake Georgetown); Certificate No. 12-5163 (Lake Granger); Certificate No. 12-5164 (Lake Somerville); Certificate No. 12-5165 (Lake Limestone); Permit No. 4146 (Lake Alan Henry); and Permit No. 2925A (proposed Allens Creek Reservoir).

The proposed Allens Creek Reservoir, Permit No. 2925A, has been permitted as of January 16, 2002, and is authorized to begin construction on the reservoir on September 1, 2018, and to complete construction by September 1<sup>st</sup>, 2021.

### Analysis

The BRA has substantially complied with the formalities for requesting a hearing in 30 TEX. ADMIN. CODE §55.251 (b) and (c) in that the hearing request was written, timely, contact information was provided, a justiciable interest was identified, and the request was not withdrawn.

The BRA is a governmental entity which has authority under state law over issues contemplated by the TMPA application and therefore is an affected person, pursuant to 30 TEX. ADMIN. CODE § 55.256(b). The BRA owns senior water rights in the Brazos River Basin which could be potentially affected by TMPA's Water Use Permit. The closest senior water right is BRA Permit No. 5164, which is located 29.2 miles downstream from TMPA's site. The proposed Allens Creek Reservoir, BRA Permit No. 2925A, was permitted in 2002 and is 62.71 land miles from TMPA's site.

The BRA has substantially complied with the hearing request formalities in 30 TEX. ADMIN. CODE §55.251 (b) and (c) and as a governmental entity with statutory authority over water rights in the Brazos River Basin, is an affected person pursuant to 30 TEX. ADMIN. CODE §55.256 (b). Additionally, BRA has listed thirteen senior water rights that may be impaired by TMPA's Water Use Permit No. 5858. Pursuant to 30 TEX. ADMIN. CODE §55.256(c), the BRA meets affect person status by showing that they have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. Therefore, the Executive Director recommends that BRA's hearing request be granted.

**Length of Contested Case Hearing**

If the Commission decides to grant a hearing request and refer the application to SOAH, the Executive Director recommends that the hearing be no more than six months.

Respectfully submitted,

Texas Commission on Environmental  
Quality

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REPRESENTING THE  
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CERTIFICATE OF SERVICE

I certify that on December 20, 2007, the foregoing Executive Director's Response to Hearing Request was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, and sent by first-class mail, agency mail, or facsimile to all persons on the attached mailing list.



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**DOCKET NO. 2007-0973-WR; PERMIT NO. WRPERM 5858**

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