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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 20, 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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2007 DEC 20 PM 3:32
CHIEF CLERKS OFFICE

**RE: TEXAS MUNICIPAL POWER AGENCY
TCEQ DOCKET NO. 2007-0973-WR**

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Christina Mann".

Christina Mann, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

TCEQ DOCKET NO. 2007-0973-WR

IN THE MATTER OF THE
APPLICATION OF TEXAS
MUNICIPAL POWER AGENCY FOR
WATER RIGHTS PERMIT NO.
WRPERM 5858

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§

BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

2007 DEC 20 PM 3:33

CHIEF CLERKS OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUEST 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 Request for Hearing in the above-referenced matter, and would respectfully recommend referring this matter to the State Office of Administrative Hearings (SOAH).

I. INTRODUCTION

Texas Municipal Power Agency (Applicant) applied to TCEQ on August 9, 2004, for authorization to maintain 31 existing on-channel reservoirs on multiple watercourses in the Brazos River Basin, Grimes County and impound a combined amount of 8,487.80 acre-feet of water for recreational, domestic, livestock, parks and wildlife, and game preserve purposes. Later, TCEQ staff amended the draft permit after determining that 5 of the reservoirs are off-channel and will not impound state water.¹ Therefore, Applicant is now requesting authorization to maintain 26 existing on-channel reservoirs and impound a combined amount of 3,515.4 acre-feet of water for recreational, domestic, livestock, parks and wildlife, and game preserve purposes.

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

¹ See letter dated May 29, 2007 from Iliana Delgado to Brad Castleberry and amended draft water use permit No. 5858.

the Railroad Commission of Texas. No diversion of state water is proposed. Since no consumptive use is associated with the requested appropriation, the ED did not require water conservation and drought contingency plans. The priority date for the water use permit is October 21, 2004.

As Applicant has requested to impound water of the state, a permit is required by Texas Water Code section 11.121. 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. Applicant published notice in the *Navasota Examiner* on February 23, 2005. Two timely hearing requests were received from Brazos River Authority (BRA) and Chocolate Bayou Water Company (Chocolate Bayou) before the comment period closed on March 25, 2005. Chocolate Bayou subsequently withdrew its hearing request on July 20, 2005.

BRA submitted a hearing request stating that its senior downstream water rights could be adversely impacted by granting the application. Pursuant to the analysis provided below, OPIC recommends granting the request and referring this matter to the State Office of Administrative Hearings (SOAH) to determine if the BRA's existing water rights will be impaired.

II. APPLICABLE LAW

A. Requirements for Affected Person

This application was declared administratively complete on October 21, 2004. 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 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 that will 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 an affected person, (2) the request is timely filed with the chief clerk, and (3) the request is made pursuant to a right to hearing authorized by law. 30 TAC § 55.255(b).

B. Requirements for Water Use Permit

Section 11.022 of the Texas Water Code (TWC) provides that "the right to the use of state water may be acquired by appropriation in the manner and for the purposes provided in this

chapter.” Section 11.121 provides that a permit is required before an applicant begins work designed for the storage of state water.² Section 11.023 describes the purposes (beneficial uses) for which state water may be stored. Section 11.134(b) provides in pertinent part that the Commission shall grant an application to use state water only if:

- (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;
 - (D) considers the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152;
 - (E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement;

III. HEARING REQUEST

In its hearing request, BRA lists its 13 water rights in the Brazos River Basin which the proposed water use permit will potentially adversely impact. BRA does not further explain how the water use permit would impair its rights. Nevertheless, the Commission may grant an application only when the proposed use will not impair existing water rights. BRA's stated concerns about potential impairment to its multiple existing water rights within the same basin are protected by the law under which the application will be considered.³ Furthermore, a reasonable relationship exists between the interest claimed and the activity regulated as BRA states that it has senior water rights that may be impacted by the activity permitted by the

² OPIC notes that these reservoirs have been in existence for some time and presumably the reservoirs have been storing state water for some of that time. Texas Water Code Section 11.121 requires a person to first obtain a permit from the commission before beginning construction of any work designed for the storage, taking, or diversion of water.

³ 30 TAC § 55.256(c)(1).

proposed draft permit.⁴ Based on this showing, OPIC recommends that the Commission find that BRA has demonstrated that it is an affected person entitled to a hearing.

OPIC recognizes that Applicant is not proposing to divert water of the state or otherwise change the manner in which it has been using its reservoirs. Nevertheless, this permit application and hearing process represents an first opportunity for BRA to address concerns related to protection of its senior water rights.

IV. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission grant the contested case hearing request of the Brazos River Authority and refer this matter to SOAH for a contested case hearing to determine whether the Brazos River Authority's existing water rights will be adversely impacted by Applicant's proposed use.

Respectfully submitted,

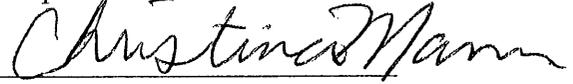
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⁴ 30 TAC § 55.256(c)(3).

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2007, the original and eleven true and correct copies of the Office of Public Interest Counsel's Response to Request 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.



Christina Mann

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TCEQ DOCKET NO. 2007-0973-WR

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