Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 31, 2009

Re: **TCEQ DOCKET NO. 2009-0356-WR**, Executive Director's response to hearing requests on Application No. 12-5322E by Gulf Coast Water Authority to add a diversion point on the Brazos River in Fort Bend County and to add Galveston County as a place of use within Applicant's authorized service area in the San Jacinto-Brazos Coastal Basin via an exempt interbasin transfer.

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced matter, please find the original and 7 copies of the Executive Director's Response to the Hearing Requests. Please forward this filing to the Office of the General Counsel. If you have any questions, please call me at 239-6257.

Sincerely,

Ross W. Henderson,
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

TCEQ DOCKET NO. 2009-0356-WR

APPLICATION OF GULF COAST WATER AUTHORITY TO AMEND CERTIFICATE OF ADJUDICATION NO. 12-5322 BY ADDING A DIVERSION POINT IN FORT BEND COUNTY AND A REQUEST FOR AN EXEMPT INTERBASIN TRANSFER TO ADD GALVESTON COUNTY TO ITS SERVICE AREA; APPLICATION NO. 12-5322E.	§ § § § § § § § § §	**BEFORE THE** **TEXAS COMMISSION ON** **ENVIRONMENTAL QUALITY**

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

TO THE HONORABLE COMMISSIONERS:

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to hearing request for Gulf Coast Water Authority's (GCWA or Applicant) application to amend Certificate of Adjudication No. 12-5322. The Executive Director supports issuance of the permit if certain special conditions are included. The Executive Director received hearing requests on the application from Dow Chemical Company (Dow), NRG Texas Power, LLC or (NRG), Brazos River Authority (BRA), Terry Hlavinka/Terrance Hlavinka Cattle Co. (Hlavinka), Capt. Scott Hickman/ Circle H. Outfitters and Charters (Circle H), Anthony Duke, Jr. and Cindy Duke, Anthony and Carolyn Duke, and Ineos Olefins & Polymers (Ineos). Ineos subsequently withdrew its hearing request. The ED recommends approval of the hearing request from BRA and denial of the remaining six hearing requests.

I. BACKGROUND

The Application

Certificate of Adjudication No. 12-5322 authorizes Gulf Coast Water Authority to divert and use not to exceed 155,000 acre-feet of water per year at a maximum combined diversion rate of 900 cfs (405,000 gpm) from the Brazos River, Brazos River Basin, for municipal, industrial, and agricultural (irrigation) purposes within the owner's service area in Fort Bend, Brazoria, and Harris Counties in the Brazos River Basin, San Jacinto River Basin, and San Jacinto-Brazos Coastal Basin pursuant to an exempt interbasin transfer. The Time Priority for diversion and use from the currently authorized diversion point is: February 8, 1929, for the first 40,000 acre feet at 400 cfs; March 14, 1955, for the next 40,000 acre feet at 668 cfs; and July 25, 1983 for the remaining 75,000 acre feet of water at 900 cfs. Applicant seeks to amend the Certificate to add a diversion point approximately 3.9 miles upstream of the currently authorized point on the east bank of the Brazos River in Fort Bend County. This proposed diversion point is also currently authorized by Certificates of Adjudication No. 12-5168 and No. 12-5171, owned by Applicant, and Certificates of Adjudication No. 12-5166 and No. 12-5167, owned by the Brazos River Authority. The Time Priority for the Applicant's Certificate No. 12-5322 at the proposed diversion point would remain the same as the original diversion point except that it would be junior to interjacent water rights between the existing and proposed new diversion point as those rights existed on August 24, 2006. The only interjacent water rights of record are the aforementioned Certificates of Adjudication No. 12-5166 and No. 12-5167, both owned by the Brazos River Authority.

Applicant also seeks an exempt interbasin transfer pursuant to Texas Water Code §11.085(v)(3) to authorize Galveston County as a place of use within its authorized service area in the San Jacinto-Brazos Coastal Basin. Applicant is not requesting an increase in the diversion amount or the diversion rate.

The Executive Director has recommended approval of the draft permit amendment with the aforementioned time priority limitations (with respect to interjacent water right holder BRA) and with a special condition requiring the Applicant to submit and maintain a daily accounting plan before the Applicant may divert water at the new diversion point. If the Applicant does not submit an approved accounting plan before an amendment is issued in this proceeding, the Applicant would be required to file a new amendment application with a proposed accounting plan subject to notice and hearing before diversion at the new point would be allowed. The ED supports issuance of the permit if the special condition is included in the permit.

Procedural History

The previous owner of this water right, Chocolate Bayou Water Co., applied to the Commission to add an upstream diversion point many more miles upstream in 2004 (Docket No. 2004-1997-WR). The previous application was protested by some of the same water rights holders protesting this application, was referred to SOAH, and then subsequently withdrawn by the applicant (Dow, NRG, BRA – also GCWA, the applicant in this case, protested that application as well).

A new application was received from Chocolate Bayou on June 12, 2006 and declared administratively complete on August 24, 2006. Notice was mailed to BRA, the only Interjacent

Water Right Holder in the Brazos River Basin, on September 26, 2006. The deadline for comment and hearing requests ended on October 16, 2006. The Commission received hearing requests from Dow Chemical Company (Dow), NRG Texas Power, LLC or (NRG), Brazos River Authority (BRA), Terry Hlavinka/Terrance Hlavinka Cattle Co. (Hlavinka), Capt. Scott Hickman/ Circle H. Outfitters and Charters (Circle H), Anthony Duke, Jr. and Cindy Duke (Duke's1), Anthony and Carolyn Duke (Duke's2), and Ineos Olefins & Polymers (Ineos). Ineos subsequently withdrew its hearing request. The hearing requests submitted by NRG and Duke's1 were both untimely, but later became timely when the new applicant was required to re-notice the application.

GCWA was required to re-notice the application when it acquired the water rights (and the amendment application) from Chocolate Bayou. The second notice was mailed to BRA, the only Interjacent Water Right Holder in the Brazos River Basin, on September 25, 2007. The second comment period ended on October 15, 2007. No new requests for a hearing were received.

A public meeting was held in Angleton, Texas on January 25, 2007 and the Executive Director's Response to Comments (from both comment periods) was submitted to the Commission on July 17, 2008. Technical review for the application is complete.

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 (TAC) Chapter 55, Subchapter G (Sections 55.250-55.256).

Title 30, Sections 55.251 (b) and (c) of the TAC require a hearing request to:

(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).

Interbasin Transfer

A portion of the application at issue involves adding Galveston County as a place of use within the Applicant's authorized service area in the San Jacinto-Brazos Coastal Basin. This is an exempt interbasin transfer from a basin to its adjoining coastal basin pursuant to Texas Water Code §11.085(v)(3). The water code requires an application, but the exemption exempts the transfer from requirements of notice and hearing. However, the ED included the interbasin transfer in the notice to interjacent water right holder (BRA) because it was part of the same application to add an upstream diversion point. The ED does not recommend any parties be granted a hearing request based upon Gulf Coast Water Authority's request to add Galveston County to its service area. As a matter of law, any request for a hearing predicated on harm caused by this interbasin transfer should not be referred.

Hearing requests

BRA - INTERJACENT WR HOLDER

A timely hearing request was received from BRA on September 27, 2006. BRA has two water rights (Certificate of Adjudication Nos. 12-5166 and No. 12-5167) that share a diversion point that is coincident with GCWA's proposed diversion point in this application. This makes BRA interjacent to GCWA's proposed diversion point. The Commission's rules only require notice to interjacent WR holders when a request to add a diversion point is submitted. As such, BRA was the only party to receive notice in this matter. BRA states that one or more of its rights might be impaired by the granting of the application and that certain special conditions might protect BRA from any impairment. The Commission's past practice has been to allow interjacent water rights holders the opportunity to contest such an amendment and explain how their rights may be impacted. BRA's hearing request complied with all of the requirements of TEXAS ADMIN. CODE § 55.255. Additionally, an examination of the relevant factors under 30 TEX. ADMIN. CODE § 55.256(a) shows that BRA has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application that is not common to the general public. Specifically, the following factors support referral of BRA's request for a hearing:

Whether the interest claimed is protected by the law under which the application will be considered

BRA has a valid permit or certificate of adjudication which entitles it to use State water. The Commission will not grant an application if it would impair existing water rights or vested riparian rights. TWC §11.134(b)(3)(B). Further, a request for an amendment requires the

Commission to consider whether the requested change will "cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment." TWC §11.122. The proposed change could potentially affect Interjacent Water Right Holders by interrupting the water supply at the proposed diversion point to an extent that does not currently exist for BRA.

Whether a reasonable relationship exists between the interest claimed and the activity regulated

Protecting the Interjacent Water Right Holders' water rights from impairment is reasonably related to the Commission's consideration of GCWA's water right amendment. As stated above, under TWC § 11.122, the Commission must consider protection of these water rights.

Whether there is a likely impact of the regulated activity on the health, safety, and use of property of the person

The Interjacent Water Right Holders' existing water rights are property rights. The issuance of the GCWA amendment could impair those water rights.

Whether there is a likely impact of the regulated activity on the use of the impacted natural resource

Granting this amendment could impact the Interjacent Protestants' ability to take this water under their current water rights.

For all of the aforementioned reasons, the Executive Director recommends referral of BRA's hearing request.

DOW - DOWNSTREAM WR HOLDER

A timely hearing request was received from Dow on October 16, 2006. Dow's hearing request complied with all of the requirements of TEXAS ADMIN. CODE § 55.255. Dow holds Certificate of Adjudication No. 12-5328. Dow's diversion points are located downstream of GCWA's existing and proposed diversion points. Despite the fact that the amendment will not change the authorized amount or rate of GCWA's diversions and that all of GCWA's diversions will remain upstream from Dow, Dow argues that the amendment could reduce the water available to it. Dow states that the usage patterns in Galveston County may differ and the interbasin transfer will reduce return flows that Dow might otherwise have access to.

Dow was a protestant in the previously withdrawn application by Chocolate Bayou to add an upstream diversion point (for the same permit now transferred to GCWA) (See Docket No. 2004-1997-WR). The Commission denied Dow's hearing request in that previous application and should do so here as well.

First, Dow's arguments center on changes that would only occur due to the interbasin transfer. As was previously stated above, that interbasin transfer is exempt from notice and hearing requirements under Texas Water Code §11.085(v)(3). Second, a request for an amendment requires the Commission to only consider whether the requested change will "cause adverse impact on other water right holders or the environment on the stream *of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment*." TWC §11.122. (emphasis added). The Commission must treat the applicant's right as if it was fully exercised. According to the terms of GCWA's permit, GCWA holds the right to divert a full 155,000 acre-feet of water

upstream of Dow. This fact will not change if the proposed amendment is granted - the relative rights and remedies between the parties will remain unchanged. Therefore, Dow cannot be harmed by the proposed amendment.

NRG - UPSTREAM WR HOLDER

NRG filed an untimely hearing request that became timely when the applicant was required to re-notice the application due to change in ownership of the underlying permit. Once the notice became timely, NRG's request complied with the requirements of 30 TEXAS ADMIN. CODE § 55.255. However, similar to a downstream water right holder, an upstream water right holder's legal rights and remedies relative to the applicant remain unchanged and therefore the upstream water right holder is also not affected.

NRG's water right no. 12-5320 is upstream of both the existing and proposed diversion points. The amendment will not change the amount or rate of GCWA's diversions and GCWA's diversions will remain downstream from NRG. NRG argues that it should be allowed to participate in the hearing to ensure that the amendment will account for the amounts of water to be taken at each diversion point and their relative priority dates to prevent GCWA from making an unwarranted call on the river.

NRG was a protestant in the previously withdrawn application by Chocolate Bayou to add an upstream diversion point (for the same permit now transferred to GCWA) (See Docket No. 2004-1997-WR). However, that application was to add a diversion point much further upstream, and which made NRG interjacent in that 2004 case. NRG's hearing request was approved by the Commission in the previous case, but should be denied in this matter since NRG is not interjacent to the existing and proposed diversion points.

A request for an amendment requires the Commission to only consider whether the requested change will "cause adverse impact on other water right holders or the environment on the stream *of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.*" TWC §11.122. (emphasis added). The Commission must treat the applicant's right as if it was fully exercised. According to the terms of GCWA's permit, GCWA holds the right to divert a full 155,000 acre-feet of water downstream of NRG. This fact will not change if the proposed amendment is granted - the relative rights and remedies between the parties will remain unchanged. Just like Dow's downstream rights, the relative rights and remedies between GCWA and NRG will remain unchanged. NRG's position will not change because NRG will still remain upstream from GCWA. Therefore, NRG cannot be harmed by the proposed amendment.

OTHER PROTESTANTS

Three of the four remaining protestants identified themselves as farmers. They are: Anthony Duke Jr. and Cindy Duke; Anthony and Carolyn Duke; and Terry Hlavinka. None of them named a certificate of adjudication owned by them; therefore, the ED assumes that they do not possess one. They each identified themselves as farmers who once purchased water from Chocolate Bayou Water Company, but none has indicated they have a long term contract with Chocolate Bayou or GCWA.

Mr. Hlavinka

Mr. Hlavinka states that as a farmer who purchases water from Chocolate Bayou, he is a stakeholder that wants to know more about the proposed transfer of water out of the current river basin. The Executive Director understands that Mr. Hlavinka is concerned about the application, however, Mr. Hlavinka's request should be denied. First, as previously discussed, the hearing request is predicated on the exempt interbasin transfer of water to Galveston County. Under 30 TEX. ADMIN. CODE § 55.256(a), a hearing request must be based on "an interest claimed that is protected by the law under which the application will be considered." Texas Water Code §11.085(v)(3) exempts the interbasin transfer from notice and hearing requirements. Therefore, the transfer should not be grounds for a hearing request in this matter.

Second, 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). The Texas Water Code does not contemplate the protection of others unless they have a water right or other property right that can be affected by the amendment. Mr. Hlavinka does not own a water right, nor has he identified a contract that obligates GCWA or Chocolate Bayou to provide him water. Even if he could identify a contract, the Commission has denied hearing requests of contract holders in the past because they have no legally protected right that is being affected.

Anthony Duke Jr. and Cindy Duke
Anthony Duke and Carolyn Duke

The Dukes are concerned that they will no longer be able to purchase water from GCWA when the amendment is passed because they believe GCWA intends to sell the water now provided to farming customers in Fort Bend County to municipal customers in Galveston

County. While they do not provide a certificate of adjudication, they argue that they have acquired "equity rights" in Chocolate Bayou's permit as longtime "beneficial users" or customers on the canal system.

The Executive Director understands the Dukes' concern that they may no longer be able to purchase water from GCWA to use on their farms. However, as noted above, the interbasin transfer is exempt from Commission consideration pursuant to Texas Water Code §11.085(v)(3). These protests could be denied on this basis alone.

Assuming their protests could be construed to apply to the adding of the diversion point- the Commission has not granted status to customers of water rights holders in the past, especially ones that have not demonstrated that they have a contract. The protestants have not identified a right that is an interest claimed that is protected by the law under which the application will be considered. Under the Water Code, the Commission will not grant an application if it would impair existing water rights or vested riparian rights. TWC §11.134(b)(3)(B). The Protestants raise the issue of "equity rights" and cite to *State v. Hidalgo County Water Control. And Improvement District No. 18*, 443 S.W.2d 728 as their 'protected' right. The case cited is not relevant or applicable to the Dukes. The case's scope was limited to a specific class of formerly recognized Spanish land grant riparian right claims in the lower Rio Grande Valley. A complicated ruling in *Hidalgo* resolved a problem caused when riparian water rights in the valley had been recognized for 30 years were voided in a later ruling. It was that 30 years of development of those rights combined with the construction of a dam during that time period that caused the court to issue an equitable relief to those specific claimants. *See In re the Adjudication of WATER RIGHTS OF the CIBOLO CREEK WATERSHED OF the SAN ANTONIO RIVER BASIN*, 568 S.W.2d 155 (Tex – App. 1978). The case has not been construed

to apply in the Brazos River basin. Furthermore, even if such a right could exist, it should have been adjudicated when all of the other water rights were adjudicated in the basin. The Commission has never made a determination regarding the Duke's claim for 'equity water rights' and this proceeding would not be the proper venue for that determination. Finally, the Commission has never recognized 'equity water rights' as a basis for standing in a water rights amendment application such as this.

Captain Scott Hickman - Circle H. Outfitters and Charters

The final requestor is Captain Scott Hickman - Circle H. Outfitters and Charters. He complains that the amendment may interfere with his commercial waterfowl hunting operation for which he leases many thousands of acres of land for hunting and bird watching. The Executive Director understands that Captain Hickman is concerned that the application may harm his hunting and bird watching operation, however, he does not state where his lands are in relation to the permit amendment or how the amendment could affect him. The request does not identify the person's personal justiciable interest affected by the application. It does not state the location and distance of the protestant's property to the activity that is the subject of the application. It merely states that he has thousands of acres of land leased for hunting and bird-watching, but does not state where these lands are in relation to the proposed diversion point. The request does not state how and why the requestor believes he will be affected by amendment in a manner not common to members of the general public. It does not state how the requestor would be affected at all. This request should be denied because it does not substantially comply with the minimum requirements of 30 TEX. ADMIN. CODE § 55.251(c).

III. CONCLUSIONS

For the reasons stated above, the Executive Director recommends that BRA's hearing request be granted and that all other requests be denied.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Mark R. Vickery, P.G., Executive Director

Robert Martinez, Director
Environmental Law Division

By _____
Ross Wyatt Henderson, Staff Attorney
Environmental Law Division
State Bar of Texas No. 24046055
P.O. Box 13087; MC 173
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2009, a true and correct copy of the foregoing document was sent by first class, agency mail and/or facsimile to the persons on the attached Mailing List.

_____
Ross Wyatt Henderson

MAILING LIST
GULF COAST WATER AUTHORITY
DOCKET NO. 2009-0356-WR; PERMIT NO. ADJ 5322

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Please see attached for the list of requesters and commenters.

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JERRY LOCKE
RICETEC, INC.
1225 FM 2917 RD
ALVIN TX 77511-9036

JIMMY MCCORNICK
JCM FARMS INC
111 W ADOUE ST
ALVIN TX 77511-2401

MICHAEL F MILLER
PO BOX 779
GALVESTON TX 77553-0779

MIKE O'DAY
3905 E PEAR ST
PEARLAND TX 77581-4262

MELANIE OLDHAM
CITIZENS FOR CLEAN AIR & WATER IN BRAZORIA CO
316 COUNTY ROAD 893
ANGLETON TX 77515-9488

WILFRED PELTIER
209 E MULBERRY ST STE 300
ANGLETON TX 77515-4746

SHERILYN PLENTL
111 E LOCUST ST BLDG A-29 STE 290
ANGLETON TX 77515-4642

SHERRY PLENTL
BRAZORIA CO GROUNDWATER CONS DIST
1101 WESTERN AVE
ANGLETON TX 77515-4257

TOM REID
MAYOR, CITY OF PEARLAND
3519 LIBERTY DR
PEARLAND TX 77581-5416

MARY RUTH RHODENBAUGH
BRAZORIA CO
2005 COUNTY ROAD 347
BRAZORIA TX 77422-8074

DAVID SPOOR
717 COTHARN DR
ANGLETON TX 77515-3313

JOHN SPOOR
SPOOR FARMS
11 CAY CT
ANGLETON TX 77515-3801

RICHARD E TILLMAN
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MARINE ADVISORY SERVICE
21017 COUNTY ROAD 171
ANGLETON TX 77515-8903

ARTHUR H VELASQUEZ
PO BOX 983
ROSHARON TX 77583-0983

BILL WALKER
1104 OAK PARK DR
ANGLETON TX 77515-7868

MARK WALKER
NRG TEXAS
1001 CONGRESS AVE #360
AUSTIN TX 78701-5000

JOHN D WARREN
816 CONGRESS AVE STE 1700
AUSTIN TX 78701-2643

MICHAEL WOLLAM
2800 OWEN ST
ALVIN TX 77511-3739

JAMES D YARBROUGH
123 ROSENBERG ST
GALVESTON TX 77550-1494

JERI YENNE
CRIMINAL DIST ATTY, BRAZORIA COUNTY
111 E LOCUST ST STE 408A
ANGLETON TX 77515-4642