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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 31, 2009

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

**RE: GULF COAST WATER AUTHORITY  
TCEQ DOCKET NO. 2009-0356-WR**

Dear Ms. Castañuela:

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

Sincerely,

  
James B. Murphy, Attorney  
Assistant Public Interest Counsel

Enclosure

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**TCEQ DOCKET NO. 2009-0356-WR**

**IN THE MATTER OF THE  
APPLICATION OF GULF COAST  
WATER AUTHORITY TO AMEND  
CERTIFICATE OF  
ADJUDICATION NO. 12-5322**

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**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

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

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in the above-referenced matter and respectfully shows the following.

**I. INTRODUCTION**

Chocolate Bayou Water Company (Chocolate Bayou) applied to amend Certificate of Adjudication No. 12-5322 (Certificate) to add a diversion point approximately 3.9 miles upstream of the existing diversion point on the Brazos River and to include Galveston County as a place of use in its authorized service area, thereby requesting an exempt interbasin transfer to the San Jacinto-Brazos Coastal Basin. Chocolate Bayou does not request an increase in the diversion amount or rate. During the processing of this application, Gulf Coast Water Authority (Gulf Coast) purchased Chocolate Bayou and its water rights.

The Certificate authorizes Chocolate Bayou to maintain and impound water in three off-channel reservoirs (Juliff, Bonney, and Liverpool Reservoirs) and divert and use water from the Brazos River, Brazos River Basin, not to exceed 155,000 acre-feet of water per year for municipal, agricultural, and industrial purposes within its authorized service area in Fort Bend,

Brazoria, and Harris Counties. The Certificate further authorizes transfer of water from the Brazos River Basin to the adjoining San Jacinto-Brazos Coastal Basin for municipal, agricultural, and industrial purposes within the authorized service area. The diversion is subject to a special condition restricting diversion to streamflow exclusive of contract water released by the Brazos River Authority for downstream use.

The TCEQ received the application on June 12, 2006, declared it administratively complete on August 24, 2006, and mailed notice on September 26, 2006. The TCEQ conducted a public meeting on January 25, 2007, at which representatives from Gulf Coast appeared and announced that Gulf Coast had purchased Chocolate Bayou and its water rights. Subsequently, Gulf Coast applied to the TCEQ to change the ownership records for the water right, which the TCEQ completed on July 27, 2007. On September 25, 2007, the TCEQ mailed a revised notice reflecting the change in ownership. The deadline to request a contested case hearing was October 15, 2007.

The TCEQ received timely comments and requests for a contested case hearing from NRG Texas LP (NRG), Dow Chemical Company (Dow), Anthony Duke, Sr. and Carolyn Duke, Anthony Duke, Jr. and Cindy Duke, and Capt. Scott Hickman on October 16, 2006, the Brazos River Authority (BRA) on September 27, 2006, and Terrance Hlavinka on July 27, 2006. The TCEQ also received timely comments from Anthony Duke, Sr. and Carolyn Duke on February 26, 2009, which incorporated by reference the comments they filed on October 16, 2006 and additional comments they filed on July 11, 2006, and from Terrance Hvalinka on October 16, 2006. In addition, the TCEQ received timely comments and a request for a contested case hearing from INEOS Olefins & Polymers USA on October 16, 2006, which it withdrew on May 15, 2007. OPIC recommends granting the hearing requests submitted by NRG, Dow, and

the BRA, and recommends denying the hearing requests submitted by Anthony Duke, Sr. and Carolyn Duke, Anthony Duke, Jr. and Cindy Duke, Capt. Scott Hickman, and Terrance Hvalinka.

## II. APPLICABLE LAW

Water rights holders must obtain authority from the TCEQ to alter their water right, including changing the place of use, purpose of use, point of diversion, rate of diversion, acreage to be irrigated, or any other change to their current authority under TEX. WATER CODE (TWC) § 11.323. TWC § 11.122(a). The TCEQ must approve the requested amendment unless the amendment increases the amount of water to be diverted, the rate at which the water will be diverted, or the requested change would have an adverse impact upon other water rights holders or the environment, beyond that which would occur if the water right holder seeking an amendment fully exercised the existing right. TWC § 11.122(b). *See also* 30 TEX. ADMIN CODE (TAC) § 297.45. In addition, the TCEQ may approve an amendment only if it would not be detrimental to the public welfare. 30 TAC § 297.46. The TCEQ also must consider effects on surface water and groundwater quality, groundwater uses, aquatic and wildlife habitat, bays and estuaries, and instream flows necessary to support recreation, navigation, and federally listed species. 30 TAC §§ 297.47, 297.53–297.56. The TCEQ must include any “condition, restriction, limitation or provision reasonably necessary for the enforcement and administration of the water laws of the state and the rules of the commission.” 30 TAC § 297.59(a). Finally, the amendment also must “meet all other applicable requirements” of TWC Ch. 11. TWC § 11.122(b). *See also City of Marshall v. Uncertain*, 206 S.W.3d 97, 109–111 (Tex. 2006).

This application was declared administratively complete on August 24, 2006. Because the application was declared administratively complete after September 1, 1999, it is subject to the requirements of 30 TAC §§ 55.250–55.256. 30 TAC §§ 55.250, 295.171. Under those provisions, the Commission, Executive Director (ED), applicant and affected persons may request a contested case hearing. 30 TAC §§ 55.251(a), 295.171.

A hearing requestor must make their request in writing within the time period specified in the notice 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)–(d).

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). Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.256(b). Relevant factors to be considered in determining whether a person is affected 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).

The Commission shall grant a request for a contested case hearing if (1) the request is made by the applicant or the ED, 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).

### III. DISCUSSION

#### A. NRG Texas LP

NRG is authorized to divert and use state water in the Brazos River Basin approximately 15 miles upstream of the proposed diversion point pursuant to Certificate of Adjudication No. 12-5320 and states that its rights and interests in the Brazos River Basin may be impaired by the proposed amendments. Specifically, NRG states that it holds a senior water right to Chocolate Bayou and a junior water right to Gulf Coast and is concerned that moving Chocolate Bayou's diversion point to the same point as Gulf Coast's may cause NRG to forego pumping during a call on the river when it is otherwise entitled to divert water, negatively impacting NRG's electric power generation operations and the customers it serves. It requests permit conditions and an accounting plan prior to issuance of the requested amendment.

NRG's interests as a water right holder are protected by the law under which this application will be considered, and there is a reasonable relationship between the interests claimed and the regulated activity. 30 TAC § 55.256(c)(1), (3). *See also* TWC § 11.122(b); 30 TAC § 297.45. Therefore, NRG possesses a personal justiciable interest related to a legal right that is potentially affected by this application. OPIC concludes NRG is an affected person entitled to a contested case hearing.

**B. Brazos River Authority**

The BRA is authorized to divert and use state water in the Brazos River Basin pursuant to Certificate of Adjudication Nos. 12-5155 through 12-5165 and Permit No. 2925A. Certificate of Adjudication Nos. 12-5166 and 12-5177 are adjacent to, and the remainder upstream of, Gulf Coast's proposed diversion point. The BRA states that one or more of these water rights may be impaired by the proposed amendments.

The BRA's interests as a water rights holder are protected by the law under which this application will be considered, and there is a reasonable relationship between the interests claimed and the regulated activity. 30 TAC § 55.256(c)(1), (3). *See also* TWC § 11.122(b); 30 TAC § 297.45. Therefore, the BRA possesses a personal justiciable interest related to a legal right that is potentially affected by this application. OPIC concludes the BRA is an affected person entitled to a contested case hearing.

**C. Dow Chemical Company**

Dow is authorized to divert and use state water in the Brazos River Basin a few miles downstream of Chocolate Bayou's diversion point pursuant to Certificate of Adjudication No. 12-5328 and states that its rights and interests may be impaired by the proposed amendments. Specifically, Dow states that it has difficulty obtaining water during low flow conditions because a salt wedge from the Gulf of Mexico moves upstream to the vicinity of its diversion points. It is concerned the proposed expansion of the place of use to include Galveston County may reduce the amount of water available and preclude the possibility of return flows being available. It is also concerned the proposed amendment to include Galveston County will change the pattern of use from primarily springtime irrigation when flows are high to other times of the year when flows are low.

Dow's interests as a water right holder are protected by the law under which this application will be considered, and there is a reasonable relationship between the interests claimed and the regulated activity. 30 TAC § 55.256(c)(1), (3). *See also* TWC § 11.122(b); 30 TAC § 297.45. Therefore, Dow possesses a personal justiciable interest related to a legal right that is potentially affected by this application. OPIC concludes Dow is an affected person entitled to a contested case hearing.

**D. Anthony Duke, Sr. and Carolyn Duke**

Anthony and Carolyn Duke are rice farmers within the boundary of Chocolate Bayou's service area in Brazoria County who rely on Chocolate Bayou to provide irrigation water. They state that the proposed amendment is vague and deceptive and fails to ensure Gulf Coast will continue to sell water for rice irrigation or address how water is allocated during drought conditions. They are concerned the amendment will devastate their rice farming operation and the operations of other rice farmers in the area and will adversely affect wildlife and cattle ranchers in the area. They state that the proposed amendment is a transbasin transfer rather than an interbasin transfer. They are also concerned the amendment will cause navigation problems requiring notification to the U.S. Army Corp of Engineers. They state that Gulf Coast does not own the Bonney Reservoir and no transfer of water rights should be allowed.

Anthony and Carolyn Duke assert an "equity right" to water from Chocolate Bayou based on historical beneficial use dating back to 1935. To support their claim, they cite to various statutory provisions including the Water Rights Adjudication Act, codified at TWC §§ 11.301–341, the Irrigation Act of 1895, Act of Mar. 9, 1895, 24th Leg., R.S., ch. 21, and the Irrigation Act of 1913, Act of Apr. 9, 1913, 33rd Leg., R.S., ch. 171, and to *State v. Hidalgo County Water Control and Imp. Dist. No. 18*, 443 S.W.2d 728 (Tex. Civ. App. 1969).

The cited references do not demonstrate the Dukes hold an equity water right. Subsequent to the *Hidalgo County* decision cited above, the Texas Supreme Court held that equity rights were limited to the particular facts of that case and the case cannot be used as authority for the creation of additional equity rights. *In re Adjudication of Water Rights of the Brazos III Segment of the Brazos River Basin*, 746 S.W.2d 207, 210 (Tex. 1988). Regardless, the Commission does not have jurisdiction in this amendment proceeding to adjudicate such a claim. Furthermore, the Water Rights Adjudication Act requires a recordation of a claim to a water right. TWC § 11.301.<sup>1</sup>

It does not appear from the Dukes' request they have ever filed a record of appropriation in accordance with statutory requirements or adjudicated their claim for an equity water right. As a result, the claim of an equity right is insufficient to demonstrate the Dukes are affected persons entitled to a contested case hearing.

Although Commission review of their concerns regarding the interbasin transfer is limited under TWC § 11.085(v)(3) because the water is going to an adjoining basin, the Commission may consider the remaining concerns regarding Gulf Coast not providing water to the Dukes if they can show, among other factors, their interests in the water are protected by the law governing the amendment application. 30 TAC § 55.256(c)(1). However, there is no statutory or regulatory provision authorizing the TCEQ to require a supplier to enter into a contract to deliver water to a customer. Statutory and regulatory provisions require prevention of adverse effects on other water rights holders and the environment, but there is no corresponding protection for customers under contract. The Dukes' environmental concerns appear to be

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<sup>1</sup> Although Anthony and Carolyn Duke cited TWC §§ 5.301 and 5.303, they appear to refer to §§ 11.301 and 11.303.

interests common to members of the general public and therefore insufficient to demonstrate affected person status.

Assuming the Dukes hold only a contractual agreement for water delivery with Chocolate Bayou, it does not appear the interest claimed is one protected by the law under which the application will be considered under 30 TAC § 55.256(c)(1). However, any person may file a complaint with the TCEQ pursuant to TWC § 11.041 for a supplier's failure to deliver water under the terms of a valid contract or other entitlement. Based on the Duke's hearing request, there is insufficient information on the nature of the agreement or contract for water delivery with Chocolate Bayou to conclude they are affected persons entitled to a contested case hearing.

**E. Anthony Duke, Jr. and Cindy Duke**

Anthony Duke, Jr. and Cindy Duke are rice farmers with property adjoining Chocolate Bayou's irrigation canals in Brazoria County who rely on Chocolate Bayou to provide irrigation water. They state that they could be economically ruined by the transfer of water to Galveston County if they are unable to obtain water from Gulf Coast, and the transfer will adversely affect the citizens, livestock, agriculture, aquaculture, wildlife, waterfowl, and bays and estuaries of Brazoria County.

As discussed in section III.D. above, a water delivery contract alone is insufficient to demonstrate affected person status. Furthermore, Commission review of their concerns regarding the interbasin transfer is limited under TWC § 11.085(v)(3). Accordingly, there is insufficient information to conclude Anthony Duke, Jr. and Cindy Duke are affected persons entitled to a contested case hearing.

**F. Terrance Hlavinka**

Terrance Hlavinka operates multiple farming operations in Brazoria County that rely on Chocolate Bayou for irrigation and expresses concern about the impact of the proposed amendment on his farms. As discussed in section III.D. above, a water delivery contract alone is insufficient to demonstrate affected person status. Accordingly, there is insufficient information to conclude Terrance Hlavinka is an affected person entitled to a contested case hearing.

**G. Capt. Scott Hickman**

Capt. Scott Hickman operates a commercial hunting and bird watching operation on thousands of leased acres in Brazoria County and expresses concerns about the application. His request lacks information concerning the location of his leased acres relative to areas likely to be affected by the application. Furthermore, his request fails to specify how the proposed amendment would have an impact on his business operations. While this impact may be inferred, OPIC finds the present request deficient. Capt. Hickman may address these deficiencies in a reply timely filed and served on all persons on the attached mailing list by September 14, 2009. Based on the pending request, Capt. Hickman appears to hold an interest common to members of the general public and is not entitled to a contested case hearing. However, OPIC will reconsider its position based on any timely filed reply.

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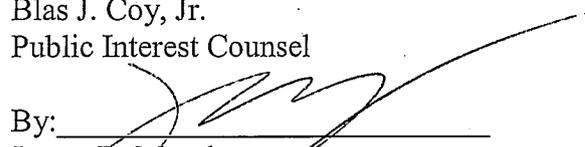
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#### IV. CONCLUSION

OPIC recommends granting the hearing requests submitted by NRG, Dow, and the BRA, and recommends denying the hearing requests submitted by Anthony Duke, Sr. and Carolyn Duke, Anthony Duke, Jr. and Cindy Duke, Capt. Scott Hickman, and Terrance Hvalinka.

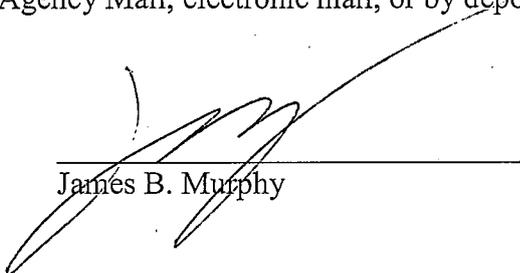
Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2009 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing was 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, electronic mail, or by deposit in the U.S. Mail.

  
James B. Murphy



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**TCEQ DOCKET NO. 2009-0356-WR**

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