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July 19, 2010

Via electronic filing

Chief Clerk
Attn: Agenda Docket Clerk
MC 105 Office of Chief Clerk
Texas Commission of Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

RE: TCEQ Docket No. 2009-0356-WR; Brazos River Authority's Reply to Responses to Hearing Requests on Gulf Coast Water Authority's Certificate of Adjudication No. 12-5322E

Dear Ms. Castanuela:

The Brazos River Authority (BRA) files this further reply to the responses to the contested case hearing requests on Gulf Coast Water Authority's (GCWA) application to amend Certificate of Adjudication No. 12-5322. BRA's hearing request should be granted because the proposed diversion sought by the amendment may impair BRA's existing water rights.

The responses filed August 31, 2009 by the Executive Director (ED) and the Office of Public Interest Counsel (OPIC) have sufficiently set forth the applicable standards governing an affected person's request for contested case hearing. Both the ED and the OPIC recognize that BRA's hearing request has complied with those standards and should be granted.

Neither GCWA's initial response to BRA's hearing request, filed August 31, 2009 by GCWA's General Manager, nor its further response filed by counsel July 2, 2010 provides a basis to deny BRA's hearing request. GCWA's filings incorrectly and incompletely characterize the nature of BRA's water rights (CA 12-5166 and CA 12-5167) directly impacted by GCWA's proposed amendment, and now also challenge the adequacy of BRA's hearing request. For the reasons previously outlined in BRA's reply filed September 11, 2009,¹ and set forth again below, BRA has established its status as an "affected person" entitled to a contested case hearing on GCWA's amendment application:

¹ Regarding this second, more recent, argument, BRA would note that both the ED and the OPIC concluded that BRA's contested case hearing request should be granted based on its original (Sept. 27, 2006) filing seeking such a hearing. GCWA's new argument challenging the sufficiency of that filing is not only contrary to TCEQ staff's own analysis under applicable rules, but also ignores the additional information BRA has supplied in its previous reply regarding its hearing request.

The question presented is whether BRA has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by GCWA's application that is not common to the general public. Both the ED and the OPIC conclude that the answer is "yes," as does BRA. GCWA, however, asserts that the amendment would not impair the rights of BRA and cites three arguments. BRA disagrees, and responds to GCWA's arguments as follows:

1) BRA has two water rights (CA 12-5166 and CA 12-5167) that authorize diversion at the same pump station as GCWA's proposed diversion point. GCWA first argues that BRA has no right to "use, enjoy, nor benefit from the diversion" because GCWA owns the diversion facilities. GCWA's argument, however, merely describes the current state of affairs under current contracts between GCWA and BRA. BRA supplies water to GCWA at its diversion point under BRA's water right pursuant to two water supply contracts. Under the water rights, BRA has a legal right to use the diversion point. Because the contracts are set to expire in 2022 and 2027, the current contractual relationship is not a permanent one. GCWA's amendment, however, is permanent and guarantees that BRA will be impacted in the future.

2) GCWA next argues that BRA has not perfected CA 12-5166 because BRA has not reported any diversions to the TCEQ at this diversion point. The argument, however, misses the point: BRA has an existing valid permit that has not been cancelled and this right is potentially impacted by GCWA's requested amendment. GCWA further argues that because BRA's permit only authorizes excess flows, the diversion of water by any party can not infringe upon the permit. Again, GCWA misses the point. The fact that BRA's right is junior in time makes the impact greater and more certain.

3) GCWA contends that the water authorized for diversion under CA 12-5167 (water released from BRA's upstream reservoirs) is different and separate from the water authorized under its proposed amendment. While true, the argument actually *supports* BRA's standing because it emphasizes BRA's interest in ensuring that water released for downstream diversion is not impacted and BRA's interest in ensuring that an adequate accounting plan is developed to distinguish between water authorized under the proposed amendment and water authorized under other water rights.

For these reasons, GCWA's argument in its July 2, 2010 Response, that "BRA no longer has any interest in that 'interjacent' diversion point" is factually and legally incorrect.

Two other specific potential impacts not addressed by GCWA also should be noted. First is the impact resulting from the interbasin transfer authorization. BRA, and other water right holders subject to environmental flow restrictions, may be impacted by the portion of the amendment authorizing use in Galveston County. The amendment would authorize GCWA to take up to 155,000 af/yr to Galveston County. Such action would deprive the Brazos River Basin of return flows on that water that might otherwise have occurred, allowing the water to be available to satisfy environmental flow requirements in the Brazos River. To the extent those return flows are not available, all water right holders subject to environmental flow requirements downstream would be impacted.

Second, the water accounting that will be required for GCWA at the diversion point will impact BRA. BRA's interbasin transfer authorization for water supplied to GCWA only allows M&I use outside the basin. GCWA will be diverting for irrigation use in addition to M&I. BRA needs to be involved in the development of the accounting plan used to assure compliance with the requirements of all the permits involved (including its own) at the common diversion facility.

Accordingly, for the reasons stated above, BRA's hearing request on Certificate of Adjudication No. 12-5322E should be granted.

Sincerely,



Douglas Caroom

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served on the persons on the attached service list by first class U.S. mail, postage prepaid, on this 19th day of July, 2010.



Douglas G. Caroom

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