

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



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 5, 2010

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: TCEQ Docket No. 2009-1832-DIS
Petition for Creation of Backbone Creek MUD No. 1

Dear Ms. Castañuela:

Enclosed for filing, please find an original and 7 copies of the *Executive Director's Response to Hearing Request*.

Please file stamp these documents and return a file-stamped copy to James Aldredge, Staff Attorney, Environmental Law Division, MC 173.

If you have any questions, please do not hesitate to contact me at (512) 239-2496.

Sincerely,

A handwritten signature in black ink, appearing to read "James Aldredge", written over a horizontal line.

James Aldredge
Staff Attorney
Environmental Law Division

CC: Mailing List

Enclosure

MAILING LIST
BACKBONE CREEK MUNICIPAL UTILITY DISTRICT NO. 1
DOCKET NO. 2009-1832-DIS; INTERNAL CONTROL NO. 06242009-D01

For the Applicant:

Andy Carson, President
Backbone Creek MUD No. 1
7232 County Road 120
Marble Falls, Texas 78654

Aaron Googins, P.E.
King Engineering Associates, Inc.
2211 South IH 35, Suite 200
Austin, Texas 78741

For the Public Interest Counsel
via electronic mail:

Blas J. Coy, Jr., Attorney
Texas Commission on Environmental Quality
Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711-3087

For the Office of Public Assistance
via electronic mail:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
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Austin, Texas 78711-3087

Requestors:

Jack Bandy
6876 County Road 120
Marble Falls, Texas 78654-7914

Ray & Rhonda Boatwright
301 Timber Ridge Road
Marble Falls, Texas 78654-7845

Nancy J & Terry Floyd
515 Timber Ridge Road
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Debra & Jim Gallagher
1170 Timber Ridge Road
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Elizabeth & Jim Gee
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Bob Gilbertson
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Ron Saidikowski
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Gabriele & Volker Steffen
100 Big Oak Lane
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Courtesy Copy to:

The Honorable Donna Klaeger
Burnet County Judge
220 South Pierce
Burnet, Texas 78611

TCEQ DOCKET NO. 2009-1832-DIS

| | | |
|-------------------------------------|---|------------------------------|
| Petition by | § | Before the |
| CACTUS CANYON QUARRIES, INC. | § | |
| for the creation of | § | TEXAS COMMISSION ON |
| BACKBONE CREEK MUNICIPAL | § | |
| UTILITY DISTRICT NO. 1 | § | ENVIRONMENTAL QUALITY |

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUEST

I. Introduction

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this Response to Hearing Request (Response) on the application of Cactus Canyon Quarries, Inc. for the creation of Backbone Creek Municipal Utility District No. 1 (the District). A timely hearing request for a contested case hearing was filed by the following individuals: Ben Redler, Janice McGill, Terry & Nancy J. Floyd, Ray & Rhonda Boatwright, Jim & Debra Gallagher, Joe D. Gonzalez, Volker & Gabriele Steffen, Steven Rodgers, Jack Bandy, Ron Saidikowski, Jim & Elizabeth Gee, and Bob Gilbertson (the Requestors). The Executive Director recommends that the hearing request be granted.

A map prepared by the TCEQ Geographic Information System office depicting the approximate boundaries of the proposed district and the approximate locations of the Requestors is attached to this Response and marked as Attachment A.

II. Background

Cactus Canyon Quarries, Inc., along with other landowners in interest (Petitioners), has petitioned the TCEQ for the creation of a Municipal Utility District to be named Backbone Creek Municipal Utility District No. 1. The District would overlie privately-owned property approximately two miles west of the intersection of State Highway 281 and County Road 120 near Marble Falls, Burnet County, Texas. The property is commonly owned by the Petitioners. The District would not be within the corporate boundaries or extra territorial jurisdiction of any city, town, or village in Texas. The stated purpose of the District is to provide nonpotable water for any purpose, including, but not limited to, irrigation water to agricultural lands. No development is planned. Necessary improvements are considered minor and no single-family connections exist within the proposed district.

III. Procedural History

The application was declared administratively complete on July 16, 2009 and was filed with the Chief Clerk on August 6, 2009. The application notice was published on August 19, 2009 and again on August 26, 2009 in the *Burnet Citizens Gazette*. Notice of the application was posted in Burnet County on August 26, 2009. The period for comment and hearing requests ended on September 25, 2009.

The District would not be within the corporate boundaries or extra territorial jurisdiction of any city, town, or village in Texas and, therefore, no consent by a city is required. The Burnet County Commissioners Court reviewed the petition and submitted its written opinion as required by TEX. WATER CODE §54.0161(b) in a letter dated September 1, 2009.

IV. The Evaluation Process for Hearing Requests

Procedures for providing public notice, and for the Commission's consideration of hearing requests, are found in 30 TEX. ADMIN. CODE (TAC) Chapter 55. Subchapter G therein governs applications filed pursuant to TEX. WATER CODE Chapter 49 which are declared administratively complete on or after September 1, 1999. This application was filed under Chapter 49 and declared administratively complete on July 16, 2009; therefore it is subject to the procedural requirements of 30 TAC Chapter 55, Subchapter G.

A. Response to Request

The Executive Director, the Public Interest Counsel, and the Applicant may each submit written responses to a hearing request. 30 TAC §55.254(e). In order for the Commission to consider a hearing request, the Commission must first determine whether the request meets certain requirements. A hearing request may only be filed by the Commission, the Executive Director, the Applicant, or affected persons when authorized by law. 30 TAC §55.251(a).

B. Hearing Request Requirements

A hearing request must substantially comply with the following:

- (1) give the name, address, and daytime telephone number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group.
- (2) 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;

- (3) request a contested case hearing; and
- (4) provide any other information specified in the public notice of application.

30 TAC §55.251(c).

C. Affected Person Status

Rules governing the determination of affected person status are found in Section 55.256 which states generally that:

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 members of the general public does not qualify as a personal justiciable interest.

30 TAC §55.256(a).

When considering whether a requestor is an affected person, the Commission shall consider all relevant factors 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) likely impact of the regulated activity on the health, safety, and use of property of the person; and
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person.

30 TAC §55.256(c).

D. Commission Action on Hearing Request

The determination of the validity of a hearing request is not, in itself, a contested hearing in the matter. 30 TAC Subchapter G provides that, upon evaluation of a hearing request, the Commission may:

- (1) determine that a hearing request does not meet the requirements of this subchapter, and act on the application;
- (2) determine that the hearing request does not meet the requirements of this subchapter, and refer the application to a public meeting to develop public comment before acting on the application;
- (3) determine that a hearing request meets the requirements of this subchapter, and direct the chief clerk to refer the application to SOAH for a hearing; or

- (4) direct the chief clerk to refer the hearing request to SOAH. The referral may specify that SOAH should prepare a recommendation on the sole question of whether the request meets the requirements of this subchapter. The referral may also direct SOAH to proceed with a hearing on the application if the judge finds that a hearing request meets the requirements of this chapter. If the commission refers the hearing request to SOAH it shall be processed as a contested case under the APA.

30 TAC 55.255(a).

V. Analysis of the Request

A. Analysis of the Hearing Request

The Executive Director has analyzed the hearing request to determine whether it complies with Commission rules and whether the requestor qualifies as an affected person.

1. Whether the Requestor Complied with 30 TAC §55.251(c)

The period for timely filing a request for a contested case hearing for this permit application ended on September 25, 2009. The hearing request was received on September 4, 2009. The hearing request provided the names and addresses of the individuals filing the request. Daytime telephone numbers were not included. The request stated a personal justiciable interest of being located within close proximity to the District, and of concerns that the District's primary source of water supply is also a source of recharge of groundwater for the requestor's water wells. The request expressly requested a contested case hearing.

The Executive Director recommends that the Commission find that the hearing request substantially complies with the requirements of 30 TAC §55.251(c).

2. Whether the Requestors are Affected Persons

The Requestors state that they are concerned about impacts to groundwater that may arise as a result of the creation of the District. Specifically, the Requestors expressed concerns that withdrawal of water from an inactive quarry hole may adversely impact groundwater levels and their ability to pump water from private, shallow wells near the District boundaries. The law under which the District would be created requires the Commission to consider, among other factors, whether the creation of the District will have an unreasonable effect on groundwater level within the region, recharge capability of a groundwater source, and water quality. TEX. WATER CODE §54.021(b)(3). The Requestors Question whether creation of the District may impact natural resources in the area. As a result, the Requestors have raised an interest that is protected by the law under which the application will be considered.

The Executive Director recommends that the Commission find that the Requestors are affected persons under 30 TAC §55.256.

VI. Executive Director's Recommendations

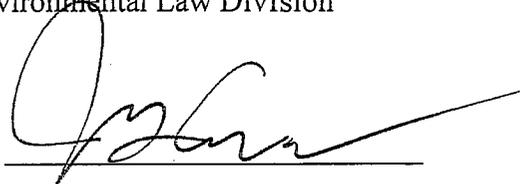
The Executive Director respectfully recommends that the Commission finds that the Requestors have a right to a contested case hearing on this application for the reason that they are affected persons pursuant to 30 TAC §55.256. The Executive Director further recommends that the Commission determines that the hearing request meets the requirements of 30 TAC Chapter 55, Subchapter G, and directs the chief clerk to refer the application to the State Office of Administrative Hearings for a hearing pursuant to 30 TAC §55.255(a)(3).

Respectfully submitted,
Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Robert Martinez, Director
Environmental Law Division

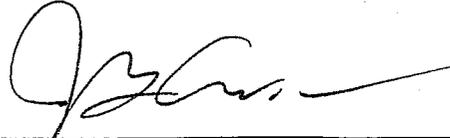
By



James Aldredge, Staff Attorney
Environmental Law Division
State Bar No. 24058514
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
(512) 239-2496
Representing the Executive Director of the
Texas Commission on Environmental Quality

CERTIFICATE OF SERVICE

I certify that on March 5, 2010, an original and seven copies of the "Executive Director's Response to Hearing Request" relating to the petition for the creation of Backbone Creek Municipal Utility District No. 1 was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, and a complete copy was transmitted by mail or electronic mail to all persons on the below service list.



James Aldredge, Staff Attorney
Environmental Law Division
State Bar No. 24058514

For the Applicant:

Andy Carson, President
Backbone Creek MUD No. 1
7232 County Road 120
Marble Falls, Texas 78654

Aaron Googins, P.E.
King Engineering Associates, Inc.
2211 South IH 35, Suite 200
Austin, Texas 78741

For the Public Interest Counsel:

Blas J. Coy, Jr., Attorney
Texas Commission on Environmental Quality
Public Interest Counsel, MC-103
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For the Office of Public Assistance:

Bridget Bohac, Director
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Courtesy Copy to:
The Honorable Donna Klaeger
Burnet County Judge
220 South Pierce
Burnet, Texas 78611

Attachment A

TCEQ Geographic Information System Map

Backbone Creek MUD No. 1 Hearing Request

Protecting Texas by
Reducing and
Preventing Pollution



Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
P.O. Box 13087
Austin, Texas 78711-3087

March 1, 2010

0 0.125 0.25 Miles

Projection: GCS North American NAD 1983
(Geographic)
Scale 1:12,295

Legend

- Hearing Requestor (physical address)
- River / Creek
- Waterbody
- MUD Property Boundary

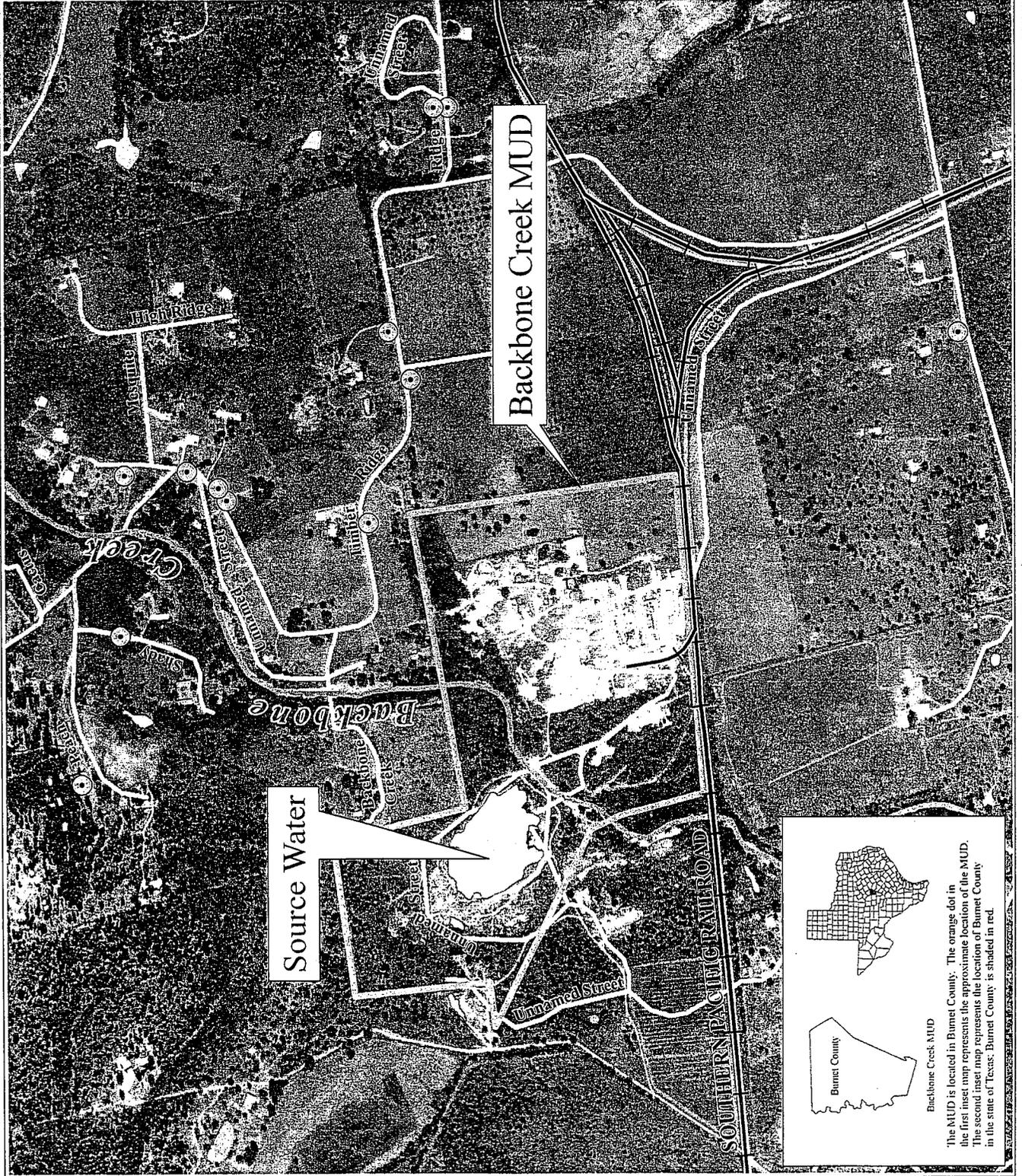
Source: This map was requested by TCEQ's Office of Legal Services (OLS). The MUD property boundary was created by the Texas General Land Office using the survey documents provided by OLS.

Hearing Requestor addresses were provided by OLS and geocoded using Tele Atlas Streets 2009-2010 geodatabase technology.

Measurements provided are estimates and have not been measured with precise ground-based instrumentation.

The DOQQ (Digital Orthophoto Quarter Quadrangle) aerial imagery was obtained from the USDA Farm Service Agency's National Agriculture Imagery Program (NAIP). The imagery is from 2009 at one-meter resolution.

This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This map was not generated by a licensed surveyor, and is intended for illustrative purposes only. No claims are made to the accuracy or completeness of the data or to its suitability for a particular use. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.



Source Water

Backbone Creek MUD

Burnet County

Backbone Creek MUD

The MUD is located in Burnet County. The orange dot in the first inset map represents the approximate location of the MUD. The second inset map represents the location of Burnet County in the state of Texas; Burnet County is shaded in red.