

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



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

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: **BACKBONE CREEK MUNICIPAL UTILITY DISTRICT NO. 1**
TCEQ DOCKET NO. 2009-1832-DIS

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez by jla".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 P.O. BOX 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

P.O. Box 13087

Austin, Texas 78711-3087

512-239-1000

Internet address: www.tceq.state.tx.us

TCEQ DOCKET NO. 2009-1832-DIS

**PETITION FOR THE CREATION § BEFORE THE
OF BACKBONE CREEK MUNICIPAL § TEXAS COMMISSION ON
UTILITY DISTRICT NO. 1 § ENVIRONMENTAL QUALITY**

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

To the members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the "Commission") files this Response to Hearing Request.

I. Introduction

A petition from Cactus Canyon Quarries, Inc., Sandra L. Carl, Richard Hoepfner, and Kathy McDonald (Petitioners) for creation of Backbone Creek Municipal Utility District No. 1 (District) was filed with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ.

The petition states the following: (1) the Petitioners are the holder of title to all of the land to be included in the proposed District; (2) there are no lien holders on the property to be included in the proposed District; (3) the proposed District will consist of four tracts and will contain approximately 103.017 acres located within Burnet County, Texas; and (4) no portion of land within the proposed District is within the corporate boundaries or extraterritorial jurisdiction of any city, town or village in Texas.

The territory to be included in the proposed District is set forth in a metes and bounds description designated as Exhibit "A" in the application materials and is depicted in the vicinity map designated as Exhibit "B" of the application materials.

The petition further states that the proposed District will be created primarily for the purpose to provide nonpotable water, including but not limited to irrigation water to agricultural lands. The proposed District may provide: (1) control, storage, and distribution of storm water; (2) reclamation and irrigation of arid, semi-arid, and other land needing irrigation; (3) reclamation and drainage of overflowed land and other land needing drainage; (4) conservation and development of water; (5) control, abatement, and change of any shortage or harmful excess of water; (6) fire suppression water for neighborhoods adjacent to the proposed District; (7) dust and pollution control water for commercial enterprises in, adjacent to, or near the proposed District; (8) protection, preservation, and restoration of the purity and sanitary condition of water within the State; (9) preservation of natural resources of the State; and (10) any services now or hereafter allowed by law, including but not limited to TEXAS WATER CODE Chapters 49 and 54, consistent with the purposes for which the District is created as more particularly described in an engineer's report filed simultaneously with the filing of the petition.

The application was declared administratively complete on July 16, 2009. On August 19, 2009 and August 26, 2009, the Notice of District Petition was published in the *Citizens Gazette*.

In response to the notice, the TCEQ received a request for a contested case hearing from the Timber Ridge Subdivision Property Owners' Association. For the reasons discussed herein, OPIC recommends that the Commission approve the hearing request.

II. Applicable Law

A. Requirements to Obtain a Contested Case Hearing

Under 30 Texas Administrative Code (TAC) § 55.251(a), the following may request a contested case hearing:

- (1) the commission;
- (2) the executive director;
- (3) the applicant; and
- (4) affected persons, when authorized by law.

Section 55.251(b) states that a request for a contested case hearing by an affected person must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time provided by subsection (d).

Section 55.251(c) states that 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.

The Commission has also set forth specific criteria for determining whether a group or organization should be considered an "affected person." 30 TAC § 55.252(a) states that a group or association may request a hearing if:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

According to § 55.255(b), a request for a contested case hearing shall be granted if the request is: made by an affected person; complies with the requirements of § 55.251; timely filed with the chief clerk; and pursuant to a right to hearing authorized by law.

Section 55.256(a) defines "affected person" as 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.

To determine if someone is an affected person, § 55.256(c) states that all relevant factors shall be considered, including, but not limited to, the following:

- (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.

B. Requirements Applicable to a Petition for Creation of a MUD

This petition is subject to Chapter 54 of the Texas Water Code (TWC), which provides for the creation of MUD's. Section 54.021 states as follows:

(a) If the commission finds that the petition conforms to the requirements of Section 54.015 and that the project is feasible and practicable and is necessary and would be a benefit to the land to be included in the district, the commission shall so find by its order and grant the petition.

(b) In determining if the project is feasible and practicable and if it is necessary and would be a benefit to the land included in the district, the commission shall consider:

(1) the availability of comparable service from other systems, including but not limited to water districts, municipalities, and regional authorities;

(2) the reasonableness of projected construction costs, tax rates, and water and sewer rates; and

(3) whether or not the district and its system and subsequent development within the district will have an unreasonable effect on the following:

(A) land elevation;

(B) subsidence;

(C) groundwater level within the region;

(D) recharge capability of a groundwater source;

(E) natural run-off rates and drainage;

(F) water quality; and

(G) total tax assessments on all land located within a district.

(c) If the commission finds that not all of the land proposed to be included in the district will be benefited by the creation of the district, the commission shall so find and exclude all land which is not benefited from the proposed district and shall redefine the proposed district's boundaries accordingly.

(d) If the commission finds that the petition does not conform to the requirements of Section 54.015 of this code or that the project is not feasible, practicable, necessary, or a benefit to the land in the district, the commission shall so find by its order and deny the petition.

(e) A copy of the order of the commission granting or denying a petition shall be mailed to each city having extraterritorial jurisdiction in the county or counties in which the district is located who requested a hearing under Section 49.011.

III. Hearing Request

OPIC notes that correspondence from the Burnet County Commissioner's Court was received by the TCEQ concerning the formation of the Backbone Creek MUD. While OPIC did review this correspondence, a hearing was not specifically requested and OPIC has therefore treated the correspondence as comment only.

A hearing request was submitted by Ben Redler on behalf of the Timber Ridge Property Owners' Association on September 4, 2009. The request states that the water to be accessed by the proposed MUD is "hydraulically related to the water...under our own land...and its source recharges our existing residential wells." The request states concerns related to groundwater levels within the region as well as recharge capability of a groundwater source.¹ OPIC finds that these concerns are protected by the law under which the application will be considered.² It appears likely that the Timber Ridge POA is an affected person. The request states that members of the Association are in close proximity, "only a few hundred feet," from the proposed MUD.

However, because the request does not state the organization's purpose and provide details showing one or more members who would otherwise have standing to request a hearing in their own right, OPIC seeks confirmation that the Timber Ridge POA meets the requirements of 30 TAC § 55.252(a) related to standing requirements for groups or associations.

¹ TWC §54.021(b)(C) & (D).

² *Id.* and 30 TAC §55.256(c)(1).

30 TAC §55.252(b) states that the public interest counsel “may request that a group or association provide an explanation of how the group or association meets the requirements of subsection (a) of this section.” Pursuant to this authority, OPIC requests that the Timber Ridge POA file a reply by March 19, 2010, specifying the purpose of their organization and specifically naming an individual member of the organization and showing how that member would otherwise have standing to request a hearing in their own-right. On the submission of this information, OPIC will recommend that the request by the Timber Ridge POA be granted and the matter referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

IV. Conclusion

Pursuant to 30 TAC §55.252(b), OPIC requests that the Timber Ridge POA submit a reply detailing the purpose of their organization and name an individual who would otherwise have standing to request a hearing in their own right. If this information is provided, OPIC recommends that the hearing request be granted and the matter referred to SOAH for a contested case hearing.

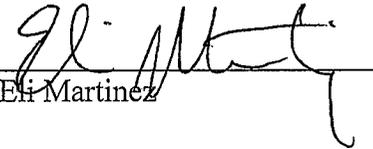
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
Eli Martinez
Assistant Public Interest Counsel
State Bar No. 24056591
P.O. Box 13087, MC-103
Austin, TX 78711-3087
Tel: 512-239-3974
Fax: 512-239-6377

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2010, the original and seven true and correct copies of the Office of the Public Counsel's Response to Hearing Request 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.


Eli Martinez

MAILING LIST
BACKBONE CREEK MUNICIPAL UTILITY DISTRICT NO. 1
TCEQ DOCKET NO. 2009-1832-DIS

FOR THE APPLICANT:

Andy Carson, President
Backbone Creek MUD No. 1
7232 County Road 120
Marble Falls, Texas 78654
Tel: (830) 798-9951 Fax: (830) 693-2916

Aaron Googins, P.E.
King Engineering Associates, Inc.
2211 South IH 35, Suite 200
Austin, Texas 78741
Tel: (512) 462-4921 Fax: (512) 462-1372

FOR THE EXECUTIVE DIRECTOR:

Todd Galiga, Senior Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600 Fax: (512) 239-0600

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000 Fax: (512) 239-4007

**FOR ALTERNATIVE DISPUTE
RESOLUTION**

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010 Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300 Fax: (512) 239-3311

REQUESTERS:

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

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

Nancy J & Terry Floyd
515 Timber Ridge Road
Marble Falls, Texas 78654-7800

Debra & Jim Gallagher
1170 Timber Ridge Road
Marble Falls, Texas 78654-7837

Elizabeth & Jim Gee
1200 Timber Ridge Road
Marble Falls, Texas 78654-7882

Bob Gilbertson
125 Shady Lane
Marble Falls, Texas 78654-7812

Joe D Gonzalez
300 Timber Ridge Road
Marble Falls, Texas 78654-7844

Janice McGill
1150 Timber Ridge Road
Marble Falls, Texas 78654-7837

Ben Redler
500 Timber Ridge Road
Marble Falls, Texas 78654-7800

Steven Rodgers
701 Timber Ridge Road
Marble Falls, Texas 78654-7836

Ron Saidikowski
1762 Timber Ridge Road
Marble Falls, Texas 78654-7847

Gabriele & Voker Steffen
100 Big Oak Lane
Marble Falls, Texas 78654-7809