

**DOCKET NO. 2011-0050-WR**

**APPLICATION NO. 5150A BY THE § BEFORE THE TEXAS COMMISSION**  
**FORT BEND COUNTY WATER AND §**  
**CONTROL AND IMPROVEMENT § ON**  
**DISTRICT #1 FOR AN AMENDMENT §**  
**TO CERTIFICATE OF ADJUDICATION § ENVIRONMENTAL QUALITY**  
**NO. 11-5150 §**

**FORT BEND COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT #1'S  
RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING**

TO THE HONORABLE COMMISSIONERS:

The Fort Bend County Water Control and Improvement District No. 1 (herein referenced interchangeably as the "District," or "Applicant") submits this response to requests to the Texas Commission on Environmental Quality (the "TCEQ") for a contested case hearing on Application No. 5150A (the "Application") and would respectfully show the Commissioners the following:

**I. BACKGROUND**

The District owns Certificate of Adjudication No. 11-5170 (the "Certificate"), which authorizes, in part, the storage of 8,925.48 acre-feet of water in seven dams and reservoirs located in Fort Bend County, and the diversion and use of up to 18,000 acre-feet of water per annum for industrial, municipal and recreation purposes with a priority date of May 14, 1948. The District is also authorized to divert and use 159.27 acre-feet of water per annum for industrial purposes or irrigation purposes on 35 acres of land located within the boundaries of the District with a priority date of June 27, 1914. The dams and reservoirs authorized by the Certificate are located on Jones and Oyster Creeks in the Brazos River Basin.

On or about December 18, 2007, the District passed a resolution authorizing the filing of the Application to amend the Certificate. The Application seeks to amend the Certificate to add an agricultural (irrigation) purpose of use for the 18,000 acre-feet of water authorized for diversion by the District. The Application also seeks to divert the authorized 18,000 acre-feet of water from any point, within the corporate boundaries of the City, on the perimeters of the reservoirs on Oyster Creek created by the District: Fort Bend County W.C.I.D. No. 1 Dam 1, Fort Bend County W.C.I.D. No. 1 Dam 2, Fort Bend County W.C.I.D. No. 1 Dam 3, and the Horseshoe Lake Control Dam. Finally, the Application seeks an exempt interbasin transfer of the authorized 18,000 acre-feet of water from the San Jacinto-Brazos Coastal Basin to those portions of the Brazos River Basin and the San Jacinto River Basin that lie within the corporate limits of the City.

The Executive Director has prepared a draft permit (the "Draft Permit") that authorizes the District to add an agricultural (irrigation) purpose of use for the authorized 18,000 acre-feet

of water. The Draft Permit also authorizes the District an exempt interbasin transfer of the authorized 18,000 acre-feet of water from the San Jacinto-Brazos Coastal Basin to those portions of the Brazos River Basin and the San Jacinto River Basin that lie within the corporate limits of the City. The Draft Permit also authorizes the District to divert the authorized 18,000 acre-feet from any point within the corporate limits of the City, and on the perimeters of the reservoirs on Oyster Creek created by the District: Fort Bend County W.C.I.D. No. 1 Dam 1, Fort Bend County W.C.I.D. No. 1 Dam 2, Fort Bend County W.C.I.D. No. 1 Dam 3, and the Horseshoe Lake Control Dam.

## II. PROCEDURAL HISTORY

On January 28, 2008, the District submitted the Application to TCEQ. Additional information was provided to TCEQ in the form of responses to requests for information on April 28, 2008, August 1, 2008 and September 22, 2008. TCEQ staff declared the application to be administratively complete and filed with the Office of the Chief Clerk on November 3, 2008.

Notice of the Application was issued on February 29, 2009. The notice stipulated that public comments, requests for a public meeting, and requests for a contested case hearing on the application must be filed with the TCEQ Chief Clerk's office no later than thirty (30) days after publication of the notice. The Notice was published on March 5, 2009, making the deadline for filing any public comments, requests for a public meeting, and requests for a contested case hearing on the application with the TCEQ Chief Clerk's Office timely. As noted below in Section IV, one hearing request was filed.

TCEQ concluded its review of the Application, and on April 29, 2010 issued the Draft Permit. On March 16, 2011, the Applicant received notice that the above-referenced matter would be considered by the Commission at its April 20, 2011 agenda.

## III. DETERMINATION OF AFFECTED PERSONS

TCEQ rules state that a contested case hearing can only be requested by 1) the TCEQ Commissioners, 2) the TCEQ Executive Director, 3) the Applicant, and 4) any "affected person."<sup>1</sup> An "affected person" is defined as one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.<sup>2</sup> An interest common to members of the general public does not qualify as a personal justiciable interest.<sup>3</sup> Accordingly, a request for a contested case hearing must include a brief, but specific, description of the person's location and distance relative to the activity that is the subject of the application.<sup>4</sup> In addition, the person must do more than just provide a conclusory statement in the request that he or she will be harmed by the application, if granted. The person must describe

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<sup>1</sup> 30 TEX. ADMIN. CODE § 55.251(a) (2009).

<sup>2</sup> *Id.* § 55.103.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* § 55.251(c)(2).

briefly, but specifically, how and why he or she will be affected by the granting of the application.<sup>5</sup>

Persons claiming to be affected persons must also submit their hearing requests in writing to the Chief Clerk “within the time period specified in the notice.”<sup>6</sup> For purposes of the Application, the Chief Clerk’s notice directed all potential requestors to submit their requests for a contested case hearing on the matter to the Chief Clerk within the 30-day period following the date notice of the Application was published. Notice was issued by the Chief Clerk on February 25, 2009, and published on March 5, 2009, and pursuant to the terms of the notice all timely hearing requests must have been received by the Chief Clerk by no later than April 6, 2009.<sup>7</sup> All such requests not filed within this period are not timely and thus cannot be processed by the Chief Clerk.<sup>8</sup>

When determining whether an individual or entity is an “affected person,” all relevant factors are considered by the Commission, including: 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; and 5) the likely impact of the regulated activity on use of the impacted natural resource by the person.<sup>9</sup>

#### IV. EVALUATION OF HEARING REQUESTS

The Chief Clerk’s office received one (1) request for a contested case hearing from the Gulf Coast Water Authority (“GCWA”) via facsimile on April 6, 2009.<sup>10</sup> GCWA’s request was submitted by its General Manager. However, GCWA did not provide evidence that the General Manager had authority to file the hearing request on behalf of GCWA.

GCWA raises five issues that it claims makes it an affected party. Those issues are: (1) error propagation; (2) reliance on unused water; (3) water ownership; (4) state plan consistency; and (5) beneficial use. None of these issues relate to the merits of the Application, or the amendments as proposed in the Draft Permit. Indeed, there is precedent by this Commission to suggest the amendments sought by the District in the Application are the very type of amendments that will have no impact to water rights holders.<sup>11</sup> Notwithstanding this fact, the District will address each of GCWA’s issues separately.

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* §§ 55.251(b), (d), .254(a).

<sup>7</sup> See Notice of Water Rights Application for Application No. 5150A issued February 25, 2009.

<sup>8</sup> *Id.* §§ 55.251(f)(1), .254(a).

<sup>9</sup> *Id.* § 55.256(c).

<sup>10</sup> The original letter was received via first class mail by the Chief Clerk’s office on April 8, 2009.

<sup>11</sup> This application is essentially identical to the amendment application sought by the City of Abilene (Application No. 12-4150B), which the Commission considered notice issues during its August 20, 2008 agenda. The City would submit that the Commission’s action in the City of Abilene’s application should be guiding inasmuch as both applications sought to add a purpose of use and to divert from the perimeter of the reservoir. Since the Commission found that there could be no impact to water rights holders in the City of Abilene’s application, the same finding should be made in the instant application.

**1. Error Propagation in Water Right**

GCWA claims that in 1985, when the parent Water Right 1467 was amended, the quantities of impounded water allocated to GCWA and the District were allegedly reversed. However, in the intervening twenty-six (26) years, GCWA has made no effort to address and/or correct this alleged error, and has presumably been diverting and utilizing its 12,000 acre-feet of water allocated under Certificate of Adjudication 11-5169. The fact that this issue is only now being raised when the District seeks to amend its water right is disingenuous at best. The proper form for addressing this alleged concern is not by filing a hearing request on an application that has precedent to demonstrate there can be no impact to existing water rights holders, but through an amendment of GCWA's own water right, which GCWA has consciously decided not to submit for 26 years, and which has, as of this time to the District's knowledge, not been filed. This alleged impact to GCWA does not create a justiciable interest that rises to the level of an affected person on the merits of the pending Application, but instead suggests that GCWA should pursue some amendment application of its own for the relief sought.

**2. Reliance on Unused Water**

GCWA also claims that by adding an additional purpose of use, the District is impacting GCWA's ownership of the jointly impounded water. GCWA claims that it is entitled to any portion of the District's 18,000 acre-feet of water not actually consumed for municipal and industrial purposes. Pursuant to the "full use assumption," the District's use of all or a portion of its 18,000 acre-feet of water rights for agricultural purposes will not cause an adverse impact on other water rights holders or the environment of greater magnitude than if the District fully exercised its rights as currently authorized. The District can currently use all of its authorized water rights pursuant to the Certificate. For GCWA to rely upon some amount not diverted and used by the District means that it is relying on an interruptible source of supply that it is not entitled to divert and use. This alleged claim of a "justiciable interest" in water authorized for diversion and use by the District has no merit and does not meet the requirement to demonstrate that GCWA is an affected person by rule.

**3. Water Ownership**

GCWA's third claim is not completely clear, but seems to suggest that it may somehow be affected by the District diverting water authorized pursuant to the Certificate that GCWA may displace by its conveyance of water from another source of supply. In raising this alleged impact and justiciable interest, GCWA provides no evidence of authorization to convey other sources of water to and through the impoundments authorized by the Certificate. Indeed, if GCWA desires to convey water through the impoundments authorized by the Certificate, it should secure authorization from the Commission, and from the District in the form of a pass-through agreement. Otherwise, the only justiciable interest that may be harmed in such a conveyance is that of the District, not GCWA, for its actions would be impacting the ability of the District to capture state water authorized for impoundment in the reservoirs. For GCWA to allege that such an action rises to the level of making GCWA an affected person on the instant Application is not only factually inaccurate, but legally impossible.

#### **4. Consistency with State Water Plan**

GCWA alleges that the Application is inconsistent with the State Water Plan. This assertion is patently incorrect, and even if it were correct, does not create a personal justiciable interest for GCWA. The District is located within the Region H Planning Area. As noted in the Region H Plan, and the State Water Plan, *Water for Texas 2007*, the region's groundwater supplies are decreasing, and there is need to rely more upon surface water and alternative supplies. This Application is consistent with the policy of allowing the District and its customers to rely upon surface water for uses identified in the Plans. It is important to note, however, that the Application does not seek to divert additional quantities of surface water. The Application merely seeks to use existing supplies for additional purposes of use, and this is consistent with the Regional and State Water Plan policy to allow the use of alternative water strategies for the region. Based on the identified need in both the Region H and the State Water Plans for additional water supplies, the District has a significant interest in securing multiple purposes of use for its current water rights, so as to ensure that such rights can be put to the most efficient use possible. With the capability to provide water for municipal, industrial and agricultural purposes, the District will be in a better position to meet the water needs of users within the regional planning area. As such, the Application is consistent with the Region H Plan and the State Water Plan. Notwithstanding this fact, GCWA has no personal justiciable interest in the Regional or State Water Plans that would rise to the level of an affected person on the instant Application, especially given the precedent cited herein with other virtually identical applications.

#### **5. Beneficial use**

GCWA's final issue is that the Application is not intended for a beneficial use. The Certificate currently authorizes the diversion and use of state water for municipal and industrial purposes, both of which are beneficial uses. The "beneficial use" of water is defined in Texas Water Code §11.002(4) and 30 TAC §297.1(8) as the use of water "which is economically necessary for a purpose authorized by [Chapter 11 of the Texas Water Code]." An "agricultural" purpose of use is identified in Texas Water Code §11.023 as a purpose for which water may be diverted and beneficially used and is defined in 30 TAC §297.1(2) to include "irrigation." As noted by the definition in the Water Code, irrigation is considered a beneficial use. For GCWA to allege that this is not a beneficial use of state water is disingenuous. Moreover, GCWA's allegations that the Application seeks to "maintain lakes" is factually incorrect. Nowhere in the Application does the District make such a request. GCWA should not be allowed to make false accusations in order to create some alleged justiciable interest that would rise to the level of an affected person. As noted herein, there is clear precedent that the use of water already appropriated to the District for agricultural purpose, a defined beneficial use, will have no impact on existing water rights holders, and GCWA should not be allowed to circumvent this precedent by making false statements regarding the Application.

## V. CONCLUSION

In conclusion, the Application merely seeks to add an agricultural purpose of use to the Certificate. The District is currently authorized to divert and fully consume up to 18,000 acre-feet of water per annum. Unless provided otherwise, there is no restriction against the full consumption of state water authorized for diversion. Pursuant to the "full use assumption," and Commission precedent, the District's use of a portion of its 18,000 acre-feet of water rights for agricultural purposes will not cause an adverse impact on other water rights holders or the environment of greater magnitude than if the District fully exercised its rights as currently authorized. Neither will the request to divert water from the perimeter of the reservoir in lieu of a specific point have any impact on existing water rights holders. The District does not seek to increase its authorized diversion rate, or in any other way alter its existing authorization. The Application merely seeks to allow the District to use water in a more efficient manner, and within its service area in a manner that is supported in the Regional and State Water Plans.

## VI. PRAYER

The District hereby respectfully requests that the Commissioners deny GCWA's request for a contested case hearing for the reasons stated herein and issue the Draft Permit to the District. The District also prays for any and all other relief to which it may be entitled.

Respectfully submitted,

**LLOYD GOSSELINK**

**ROCHELLE & TOWNSEND, P.C.**

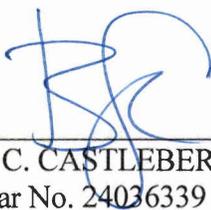
816 Congress Avenue, Suite 1900

Austin, Texas 78701

TELEPHONE: (512) 322-5810

FAX: (512) 472-0532

By: \_\_\_\_\_

  
BRAD C. CASTLEBERRY

State Bar No. 24036339

SARA R. THORNTON

State Bar No. 24066192

**ATTORNEYS FOR APPLICANT FORT  
BEND COUNTY WATER CONTROL AND  
IMPROVEMENT DISTRICT NO. 1**

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 28<sup>th</sup> day of March, 2011, a true and correct copy of the foregoing Applicant's Responses to Hearing Requests was provided by hand delivery, first-class mail, or facsimile to the persons listed below:

**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

**FOR PUBLIC INTEREST COUNSEL:**

Blas J. Coy, Jr., Attorney  
Texas Commission on Environmental Quality  
Public Interest Counsel, MC-103  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-6363  
Fax: (512) 239-6377

**FOR THE EXECUTIVE DIRECTOR:**

William Todd Galiga, Staff Attorney  
Texas Commission on Environmental Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-3578  
Fax: (512) 239-0606

**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

Iliana Marie Delgado, Technical Staff  
Ronald L. Ellis, Technical Staff  
Texas Commission on Environmental Quality  
Water Supply Division, MC-160  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-3678  
Fax: (512) 239-2214

**REPRESENTING THE PROTESTANTS:**

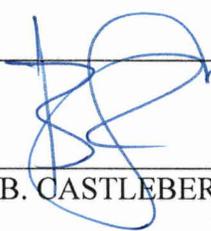
Robert Istre  
Gulf Coast Water Authority  
3630 Highway 1765  
Texas City, Texas 77591-4825  
Tel: (409) 935-2438 x17  
Fax: (512) 935-4156

**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

Molly Cagle, Attorney  
Vinson & Elkins Attorneys At Law  
The Terrace 7  
2801 Via Fortuna, Suite 100  
Austin, Texas 78746  
Tel: (512) 239-3311  
Fax: (512) 423-8552

Ron Freeman  
Freeman & Corbett  
8500 Bluffstone Cove, Suite B-104  
Austin, Texas 78759  
Tel: (512) 451-6689  
Fax: (512) 453-0865



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BRAD B. CASTLEBERRY