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Mark R. Vickery, P.G., *Executive Director*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution .

March 28, 2011

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: FORT BEND COUNTY WCID NO. 1
TCEQ DOCKET NO. 2011-0050-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,


Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2011-0050-WR

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION OF FORT BEND	§	TEXAS COMMISSION ON
COUNTY WCID 1 FOR WATER	§	ENVIRONMENTAL QUALITY
RIGHTS PERMIT NO. ADJ 5170A	§	

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

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

I. INTRODUCTION

Fort Bend County WCID 1 (Fort Bend or Applicant) applied to TCEQ on January 28, 2008 to amend Certificate of Adjudication No. 11-5170. Certificate of Adjudication No. 11-5170 grants Fort Bend the authority, along with Gulf Coast Water Authority, to maintain seven dams and a system of reservoirs on Jones Creek, tributary of Oyster Creek, tributary of the Intracoastal Waterway, San Jacinto-Brazos Coastal Basin, and Oyster Creek, tributary of the Intracoastal Waterway, San Jacinto-Brazos Coastal Basin. Within these reservoirs, Fort Bend may impound a combined total of 8,925.48 acre-feet of water per year (afy) for recreation purposes. Fort Bend is also authorized to divert and use not to exceed 159.27 afy for industrial or agricultural purposes. This water may be used to irrigate 35 acres within the District boundaries in the Samuel M. Williams Grant. Fort Bend is further authorized to divert and use 18,000 acre-feet of water from the impounded waters of Jones and Oyster Creeks for municipal and industrial purposes in Fort Bend County. Diversion is authorized at a maximum rate of 71.56 cubic feet per second (cfs) (32,200 gallons per minute, or gpm) from a point on the perimeter of the reservoir created by Fort Bend County W.C.I.D. No. 1 Dam 2 on Oyster Creek. The time priority of this right is June 27, 1914 for the 159.27-acre-foot portion of water and May 14, 1948 for the 18,000-acre-foot portion of water and the reservoir system.

Fort Bend seeks to amend its existing permit pursuant to a Surface Water Supply Agreement with the City of Sugar Land. The application requests permission to add agricultural (irrigation) use to the authorized 18,000 acre-feet of water.

The applicant has also applied to divert the same 18,000 acre-feet of water from any point within the corporate limits of the City of Sugar Land, along the perimeters of the reservoirs on Oyster Creek created by 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. The withdrawn water would have a combined diversion rate of 71.56 cfs (32,200 gpm). Additionally, Fort Bend has applied for 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 of Sugar Land.

The Executive Director (ED) declared the City's application administratively complete on November 3, 2008. TCEQ received one timely hearing request from Gulf Coast Water Authority.

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 Texas Water Code (TWC) § 11.323.¹ TCEQ shall 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 on other water rights holders or the environment, beyond that which would occur if the water right holder seeking an amendment fully exercised its existing right.² The amendment also must "meet all other applicable requirements" of Chapter 11 of the Texas Water Code.³

¹ TWC § 11.122(a).

² TWC § 11.122(b).

³ *Id.* See also *City of Marshall*, 206 S.W. 3d 97, 109-111, (Tex. 2006).

A. Requirements for Contested Case Hearing Requests

This application was declared administratively complete on November 3, 2008. As the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Title 30, Chapter 55, Subchapter G, sections 55.250-55.256 of the Texas Administrative Code (TAC). Under those provisions, a contested case hearing may be requested by the Commission, the ED, the applicant, and affected persons. 30 TAC § 55.251(a).

A hearing requestor must make their request in writing 30 days after the publication of the notice of the application 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."⁴

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."⁵ 30 TAC § 55.256(c) provides relevant factors to be considered in determining whether a person is affected. These factors 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.⁶

⁴ 30 TAC § 55.251(b), (c); 30 TAC § 295.171.

⁵ 30 TAC § 55.256(a).

⁶ 30 TAC § 55.256(c).

In addition, governmental entities with authority under state law over issues contemplated by the application may be considered affected persons.⁷

The Commission shall grant a request for a contested case hearing if (1) the request is made by the applicant, 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.⁸

III. HEARING REQUESTS

One entity, Gulf Coast Water Authority, (Gulf Coast or Hearing Requestor) filed a timely hearing request with the Commission. Gulf Coast, in its hearing request, states that it is a political subdivision of the State of Texas that supplies water to municipal, industrial and irrigation customers in Fort Bend, Brazoria and Galveston Counties. Gulf Coast also states that it is a joint permit holder with Fort Bend and is currently authorized to divert water along the reach of the waterway that may be impacted by Fort Bend's requested amendment.

Gulf Coast holds Certificates of Adjudication (COA) 12-5178, 12-5171, and 11-5169. It holds COA 11-5169 jointly with Fort Bend's COA 11-5170, the permit that Fort Bend is seeking to amend. Gulf Coast argues that the proposed amendment would impact these water rights.

Specifically, Gulf Coast states that the proposed amendment would impact its water rights because

- 1) The proposed amendments propagate previous mistakes concerning the ownership of water impounded under COA 11-5169 and 11-5170 (previously Water Right 1467 and 1467D);
- 2) Adding industrial use to COA 11-11-5170 would impact Gulf Coast's authorization to divert any remaining water out of the currently authorized 18,000 acre-feet shared between Gulf Coast and Fort Bend;

⁷ 30 TAC § 55.256(b).

⁸ 30 TAC § 55.255(b).

- 3) Due to elevation restrictions and loss of depth in the reservoir, there is no capacity to impound rainwater in the reservoir, so water present in the reservoir is Gulf Coast's water. The only water in the reservoir available to Brazos River would be water collected during a rainfall event and diverted before it could spill out of the reservoir;
- 4) The proposed amendment could directly conflict with the State Water Plan;
- 5) The proposed amendment would conflict with Texas Water Code § 11.134(b)(3)(A).

The Commission may not grant an application to amend an existing permit if it will have an adverse impact upon other water right holders.⁹ Therefore, Gulf Coast's interest in the potential adverse effects to its existing water rights is protected by the law under which the application will be considered.¹⁰ Furthermore, a reasonable relationship exists between Gulf Coast's interest in protecting its existing water rights and the activity regulated.¹¹ Based on this showing, OPIC recommends that the Commission find that Gulf Coast has demonstrated it is affected and entitled to a hearing.

IV. CONCLUSION

For the reasons set forth above, OPIC respectfully recommends that the Commission grant the contested case hearing request of Gulf Coast. OPIC also recommends that the Commission refer this matter to the State Office of Administrative Hearings for a contested case hearing.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

⁹ TWC § 11.122(b).

¹⁰ 30 TAC § 55.256(c)(1).

¹¹ 30 TAC § 55.256(c)(3).

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2011, the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing 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.

Amy Swanholm
Amy Swanholm

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DOCKET NO. 2011-0050-WR

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