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February 13, 2012

Ms. Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC-105
Austin, Texas 78711-3087

Re: Application No. 5821 for a Reservoir and Water Right Permit by the Upper Trinity
Regional Water District ("Applicant").

Dear Ms. Bohac:

On behalf of Ward Timber, Ltd and Ward Timber Holdings, Ltd. (jointly referred to as "Ward Timber"), I am filing this reply to the responses filed by Applicant, the Executive Director and the Office of Public Interest Counsel for TCEQ.

Ward Timber agrees with OPIC and disagrees with the Executive Director and Applicant that Ward Timber is not an affected person or has not shown that it is. Nevertheless, Ward Timber is including with this reply an affidavit from Jim Thompson with Ward Timber to provide additional facts regarding Ward Timber's standing and its hearing request.

Ward Timber filed its initial hearing request almost 6 years ago, and some things have changed. Ward Timber is, however, still operating basically the same in East Texas and in areas of Arkansas and Louisiana. A description of those operations is on the attached affidavit.

Ward Timber has economic interest different from the general public. It has standing before this agency and would in court on a matter such as the application. Its interests will be adversely affected if the proposed permit here is issued. The amount of land available for timber harvest in East Texas makes the business of Ward Timber possible. Reductions in such lands affect prices and availability of timber to the detriment of Ward Timber. The potential range of land reduction for timber production is discussed in the affidavit.

Moreover, Ward Timber has harvested timber for its operations on land near the proposed area to be flooded by the Ralph Hall reservoir in Fannin County. Ward Timber's interests are not speculative. Timber on the lands in the footprint of the reservoir, if not built, could be subject to purchase or lease by Ward Timber in the future.

Ward Timber also owns land on the Sulphur River downstream of the proposed reservoir site, land that is used for economic purposes by Ward Timber. That land and the associated riparian right will both be adversely affected at times by the reductions in flows in the River that will result with the issuance of the draft permit.

In terms of Texas law, Ward Timber clearly has "a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." As indicated by Texas courts that test is the same or very similar to the test for standing in Texas Courts. Ward Timber meets that test.

According to the Austin Court of Appeals' recent opinion in *City of Waco v. Texas Commission on Environmental Quality*, 346 S.W.3d 781 (Tex. App.—Austin 2011, pet. filed), a hearing requestor must establish the following elements in order to show standing to participate in a contested-case proceeding:

- (1) An injury in fact from the issuance of the permit as proposed—an invasion of a legally protected interest (here, an economic interest) that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
- (2) The injury must be fairly traceable to the issuance of the permit as proposed, as opposed to the independent actions of third parties or other alternative causes unrelated to the permit; and
- (3) It must be likely, and not merely speculative, that the injury will be redressed by a favorable decision on its complaints regarding the proposed permit (*i.e.*, refusing to grant the permit or imposing additional conditions). *Id.* at 802.

This Court also made it clear that interests that are rooted in property rights constitute legally protected interests that are distinct from those of the general public, *as a matter of law*. *Id.* at 809.

Examples of persons whom the appellate court has recognized as having a legally protected interest for purposes of standing are economic or business interests. In this case it was an interest in rented coolers where Plaintiff claimed that an ordinance restricting the size of coolers restricted their use of their property, caused them to incur additional expense, and damaged or destroyed their market for larger cooler rentals within the City limits. *Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 925-26 (Tex. App.—Austin 2010, no pet.). According to the court, the harm alleged was sufficient for the members of this group of businesses - STOP - to demonstrate an actual, concrete, and particularized infringement of their property interests. *Id.*

In *Lake Medina Conservation Society v. Texas Natural Resource Conservation Commission*, 980 S.W.2d 511, 516 (Tex. App. Austin—1998, pet. denied), the court of appeals concluded that members of an association had standing to contest an amendment to a certificate of adjudication because they had shown various interests in the lake that would be affected by the amendment, including ownership interest in lakefront property. The court noted that the impact of lower lake

levels on owners of waterfront property, waterfront businesses, and private wells in the area constitutes a sufficiently particularized injury distinct from members of the general public.

In *Texas River Protection Association v. Texas Natural Resource Conservation Commission*, 910 S.W.2d 147, 151-52 (Tex. App.—Austin 1995, writ denied), the court of appeals found the Association to have standing in a water rights case, where the Association showed that some of its members own property fronting the affected area of the river, with attendant riparian rights.

Significantly, the court also held that the alleged injury need not affect “vested” property rights to confer standing. The alleged harm for standing in a contested case on a water right may be economic, recreational, or environmental. *Id.* In that case, the Association members testified to their economic interests. The permit would also harm their canoeing-business opportunities. These alleged injuries were not common to members of the public at large.

As in the cases cited above, Ward Timber has sufficiently alleged an injury in fact that is distinct from members of the general public.

The proposed reservoir would result in economic injury to Ward Timber’s legally protected interest in its business. Were the Ralph Hall reservoir permitted and constructed, and other land taken for mitigation, Ward Timber would incur additional expense in obtaining timber. The availability of timber in the area would decrease, causing the cost to go up and affecting Ward Timber’s economic interests. This is the type of injury that has been recognized by the court of appeals as sufficient to confer standing.

Finally, the injuries claimed by Ward Timber are redressable by a favorable decision. That is, if the proposed permit were denied, Ward Timber’s interests would be protected from injury.

Ward Timber also clearly meets the test for a hearing request that is provided in TCEQ rules at 30 TAC § 55.256.

- (1) Ward Timber has both property and economic interests that are protected by the law under which the application will be considered;
- (2) Ward Timber’s location - its past harvest of timber in Fannin and many other counties throughout much of the Sulphur River basin together with Ward Timber’s desire and prospects of years of additional harvesting in such locations - meets the distance restrictions and any other such limitations imposed by law;
- (3) Impacts on Ward Timber’s property and economic interests is directly and adversely affected by the activity regulated, i.e. the diversion of water and construction of a dam and reservoir;
- (4) There will be direct impacts by this regulated activity on the use of property owned and leased by Ward Timber for its operations;

(5) There will be direct impacts by this regulated activity on use of the land and timber, the natural resources that are owned or leased by Ward Timber.

Moreover, Ward Timber is part of an integrated forestry industry, buying wood for producers and selling wood to other processors. Ward Timber depends upon both healthy forests and a healthy forest industry in East Texas. The proposal by the Upper Trinity Regional Water District will adversely affect the economics of this industry and those of Ward Timber.

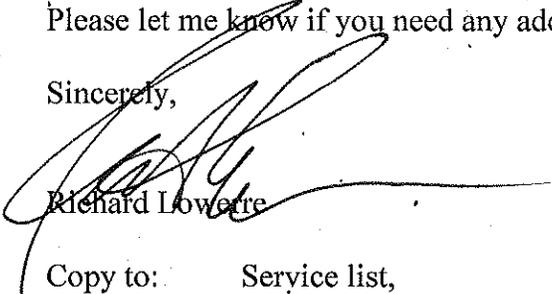
Finally, Ward Timber remains opposed to the position of the Executive Director and the applicant that the Applicant has met the test for water conservation required for interbasin transfers of water that would be authorized by this permit, if issued. Ward Timber is concerned that the decision here will allow Ralph Hall to be built without compliance with the higher water conservation requirements contemplated by the legislature for interbasin transfers of water. It could then also set a bad precedent for decisions on other proposals for reservoirs on the Sulphur River, including the Marvin Nichols Reservoir, where Ward Timber also has strong connections to the land, timber and River.

Thus, Ward Timber continues to request a contested case hearing and to be named a party to that hearing.

Ward Timber may be contacted through the undersigned attorneys at the address, phone number and fax numbers provided above. The alternative contact information for Ward Timber is P.O. Box 360, Linden, Texas 75563, (903) 756-7700.

Please let me know if you need any additional information.

Sincerely,



Richard Lowery

Copy to: Service list,
Mr. Brent Jasper, U.S. Army Corps of Engineers, Fort Worth, Texas

AFFIDAVIT OF JIM THOMPSON

STATE OF TEXAS {
 {
COUNTY OF CASS {

BEFORE ME, the undersigned notary, on this day personally appeared Jim Thompson, who, being by me, duly sworn on his oath stated that he has read the following, that every statement below is true and correct, and that every statement below is within his personal knowledge.

- 1. My name is Jim Thompson. I am over the age of 21 and am competent to testify to the following facts based on my own personal knowledge.**
- 2. I have been the Chief Financial Officer and in house Counsel for Ward Timber, Ltd. for the past fourteen (14) years.**
- 3. Ward Timber Holdings, Ltd. is a land holding company which owns lands throughout Northeast Texas and Arkansas. Ward Timber, Ltd. operates a hardwood sawmill in Linden, Texas and buy and sells wood throughout Northeast Texas, Arkansas, Louisiana and Oklahoma. The principals of Ward Timber have been in the timber business for over thirty years.**
- 4. Ward Timber's principal office is in Linden, Texas but it operates 5 woodyards throughout Northeast Texas and purchases and sells timber and land in Northeast Texas, Louisiana, Arkansas and Oklahoma. Ward Timber has over 100 employees with at least twice as many subcontractors, including truck drivers and loggers.**
- 5. Ward Timber requires on an ample and available timber supply for the operation of its business. Ward Timber harvests approximately 100,000 tons of timber each year from the Sulphur River basin alone.**
- 6. In fact, Ward Timber has purchased and harvested 425 acres of timber in Fannin County, Texas, the county of the proposed Ralph Hall Reservoir.**
- 7. Ward Timber has also leased land or purchased timber and currently has such interests within the footprint of proposed reservoir sites that have been referred to as one of the Marvin Nichols sites.**
- 8. Ward Timber also owns approximately 100 acres of land that front on the Sulphur River in Cass County. Thus, it has a riparian right to water in the Sulphur River. The value of that land depends upon flows in the River, and Ward Timber believes that significant reductions in flows caused by Ralph Hall and/or Marvin Nichols reservoirs, together with existing upstream reservoir, may reduce the value of Ward**

Timber's land.

9. **With the construction of the Ralph Hall Reservoir, the availability of timber in the Sulphur River basin and the area where Ward Timber acquires land will be reduced. Not only will the footprint of the Ralph Hall reservoir remove land from potential timber production, the mitigation for the reservoir, which will likely be required by the Corps of Engineers in addition to that proposed for this TCEQ permit, will remove additional lands from potential timber production. That mitigation will in all likelihood occur in Northeast Texas, which will further reduce Ward Timber's timber supply.**
10. **In a similar situation, the construction of the Cooper Dam for the Jim Chapman Lake, which is in the Sulphur River Basin in Delta County, removed approximately 10,000 acres of land from potential production of timber. The mitigation which occurred primarily downstream near the Sulphur River, removed over 30,000 acres of land from timber production.**
11. **Likewise, the existing Wright Patman reservoir on the Sulphur River removed over 20,000 acres in the basin from potential timber production.**
12. **The Marvin Nichols Reservoir, which is currently a protected reservoir site in the Texas Water Plan and planned for supply for Region C, could, if built, remove an additional 60,000 to 70,000 acres of land from such production. Moreover, the Texas Parks and Wildlife Department estimates that by law, additional lands, including a minimum of 163,000 acres by some estimates – could be set aside to mitigate the loss of high-quality wildlife habitat.**
13. **Thus, with the existing reservoirs and plans for Ralph Hall and Marvin Nichols, a vast amount of land within the Sulphur River Basin could be removed from the pool of land available for timber utilized by Ward Timber and other timber companies in the Sulphur River Basin. Those other companies compete with an, in some cases, cooperate with Ward Timber. One of those companies is International Paper.**
14. **Ward Timber estimates the cumulative impacts from the addition of the Ralph Hall Reservoir will adversely affect its production and, thus, profits. If mitigation occurs in certain key areas of the basin, the adverse impacts could be very significant.**
15. **Ward Timber is part of an integrated forestry industry. It is willing to be aligned with other timber companies that may be parties to the hearing.**
16. **In fact, Ward Timber depends upon its relationship with International Paper ("IP") for sale of some of its timber for use in IP's paper production. One of International Paper's plants is within the Sulphur River basin and discharges into the Sulphur River. If the proposed reservoir and diversions upstream reduce flows, the operations of International Paper could be limited by reduction in available timber**

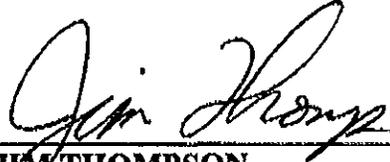
in the basin and by IP's ability to discharge its treated waste water. IP's continued presence in this basin is important and if the cumulative impacts of added reservoir and mitigation areas lead to reduction or elimination of IP's activities in the region, Ward Timber would also be adversely affected.

17. Ward Timber also disagrees with the analysis by the Executive Director in his response to comments that the water conservation identified in the application meets the requirements for water conservation for the proposed interbasin transfer of water pursuant to Section 11.085, Texas Water Code, that

the applicant for the interbasin transfer has prepared a drought contingency plan and has developed and implemented a water conservation plan that will result in the highest practicable levels of water conservation and efficiency achievable within the jurisdiction of the applicant.

18. The ED's evaluation is based on facts presented by the applicant, and Ward Timber is in a position to present additional facts, and, for some aspects, facts that are contrary to those of the applicant. Thus, Ward Timber can assist the TCEQ in its final decision on this reservoir. Given the legislature's directive that there be no interbasin transfer if the receiving area is not doing all it can to reduce the need for water, the adverse impacts on Ward Timber of the construction and operation of the Ralph Hall Reservoir under the permit proposed here will be eliminated if, as Ward Timber will show, the facts lead to the conclusion that the interbasin transfer is not appropriate under Texas law. Then the interests of Ward Timber in participating will be properly resolved.
19. Ward Timber's interests are different from those of the general public and even those of other timber companies, given Ward Timber's location and its reliance on the Sulphur River Basin for timber supply.
20. Moreover, Ward Timber has an interest in development of a proper factual test for the requirement of a higher water conservation approach for interbasin transfers, given its timber holdings in or near the footprint of the Marvin Nichols reservoir. The decision here on water conservation requirements may affect how the determination is made for a permit and interbasin transfer for the Marvin Nichols reservoir. Since the Commissioners of TCEQ have not proposed to adopt any rule or formal guidance to define the requirements for such "highest practicable levels of water conservation efficiency" in any fashion other than a case by case evaluation in permit proceedings, Ward Timber's interests are best protected by its participation in the decision on Ralph Hall.

Further the Affiant sayeth not.



JIM THOMPSON

SWORN TO AND SUBSCRIBED before me on the 10th day of February, 2012.



NOTARY PUBLIC, STATE OF TEXAS

Notary's Printed Name:

Kim Wilson

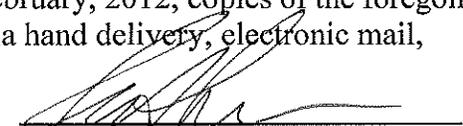


My Commission Expires:

05/11/15

CERTIFICATE OF SERVICE

By my signature below, I certify that on this 13th day of February, 2012, copies of the foregoing document were served upon the parties identified below via hand delivery, electronic mail, facsimile and/or Certified U.S. Postal Mail.


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