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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 29, 2014

Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: NORTH TEXAS MUNICIPAL WATER DISTRICT
TCEQ DOCKET NO. 2014-0913-WR**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Aaron Tucker".

Aaron Tucker, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2014-0913-WR

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION OF NORTH TEXAS	§	
MUNICIPAL WATER DISTRICT	§	TEXAS COMMISSION ON
FOR WATER USE	§	
PERMIT NO. 12151	§	ENVIRONMENTAL QUALITY

**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

North Texas Municipal Water District (NTMWD or "the District") has applied for a Water Use permit to construct and maintain a dam and reservoir (Lower Bois d'Arc Creek Reservoir) with a maximum normal operating capacity of 367,609 acre-feet of water and a surface area of 16,526 acres on Bois d'Arc Creek, tributary of the Red River, Red River Basin in Fannin County, Texas. The District seeks authorization to divert and use not to exceed 175,000 acre-feet of water per year from any point on the perimeter of the proposed reservoir at a maximum combined diversion rate of 365.15 cubic feet per second, the equivalent of 163,889 gallons per minute, for municipal, industrial, and agricultural purposes, including the right to use water within the reservoir for in-place recreational purposes. The District requests interbasin transfer authorization to use the water within its service area in the Red, Sabine, and Trinity River Basins, and within Fannin County in the Sulphur River Basin.

The application was received on December 29, 2006. The application was declared administratively complete on June 26, 2007. Notice of the application was mailed on July 31, 2007. Notice was published in eleven newspapers twice over a two-week period. The Paducah Post on August 7, 2007 and August 14, 2007. The Amarillo Globe News, Corsicana Daily Sun, Dallas Morning News, Houston Chronicle, Motley County Tribune, Palestine Herald Press, and Wichita Falls Times Record News on August 9, 2007 and August 16, 2007. The Athens Review, Beaumont Enterprise, and Crosby County Examiner on August 10, 2007 and August 17, 2007. Public meetings were held in Greenville on September 10, 2007, Bonham on September 11, 2007 and McKinney, Texas on September 13, 2007. The deadline to request a contested case hearing was September 17, 2007, 30 days after the last date of publication.¹

Several individuals, governmental entities, and one organization requested a contested case hearing before the deadline and have not withdrawn their requests. The organization, Citizens to Save Bois d'Arc Creek, requested a hearing. Bois d'Arc Municipal Utility District and Texas Parks & Wildlife also requested a hearing. The following individuals submitted timely individual hearing requests: Monika Blaine; R.P. Crawford; Lela Foreman; Larry D. Franklin; John Gregory Hall; Mabel Holmes; Chad Knight; Dustin Knight; Rebecca and Ronnie Knight; Renea Knight; Glenn Lee; Maeta Lee; Gordon Locke; Lem Locke; Cathy J. Melson; Ruby F. Odom; Carlos A. Pardo; Joseph, John, and Wes Reed, Cathy Ryser; Charles Ryser; Donna Ryser; Nathan Ryser; William Sebastian; John W. Welch; Dorothy L. and John Rex Withcer; Harold Dean Witcher, Jr.; Charles E. Yarbrough; Charles Michael Yarbrough; and John Edward Yarbrough.

¹ 30 TAC § 295.171; 30 TAC § 295.151(b)(10); 30 TAC § 55.251(d).

The following individuals and organizations requested a contested case hearing but have since withdrawn those requests: Mary and W.L. Carson; Tommy and Amy Carson; Harry and Lynda Hammet; Kenneth Hassell; Ronnie Goodwin; Scott Lipsett; John Loschke; Edward and Ellen Mills; Stewart Richardson; Judy Russell; Kenneth Russell; Karen A. and Mary Ann Strickland; Mary Ann Strickland; Elizabeth Faye Wedell; the Lone Star Chapter of the Sierra Club; the National Wildlife Federation; and the Texas Conservation Alliance. James G. Blaine, Paula Brennecke, Ellen Melson, Nathan Melson, and Erich Ryser submitted hearing requests after the deadline of September 17, 2007. Since these five hearing requests were not submitted in a timely manner they will not be analyzed.²

II. APPLICABLE LAW

Section 11.022 of the Texas Water Code (TWC) provides that “the right to the use of state water may be acquired by appropriation in the manner and for the purposes provided in this chapter.” Further, no person may appropriate any state water or begin construction of any work designed for storage, taking, or diversion of water without first obtaining a permit to make the appropriation. TWC § 11.121. Section 11.134(b) provides in pertinent part that the Commission shall grant an application to use state water only if:

- (2) unappropriated water is available in the source of supply;
- (3) the proposed appropriation:
 - (A) is intended for a beneficial use
 - (B) does not impair existing water rights or vested riparian rights;
 - (C) is not detrimental to the public welfare;

² See 30 TAC § 55.251(b), (d).

- (D) considers the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152;
 - (E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement; and
- (4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation...

Section 11.147(d) and (e) of the Water Code also requires the Commission to consider the effect of a proposed permit on existing instream uses and water quality as well as impacts on fish and wildlife.

A. Requirements for Contested Case Hearing Requests

This application was declared administratively complete on December 29, 2006. As the application was declared administratively complete after September 1, 1999 and was not filed under Texas Water Code, §§11.036, 11.041, or 12.013, it is subject to the requirements of Title 30, Chapter 55, Subchapter G, sections 55.250-55.256 of the Texas Administrative Code (TAC).³ Under those provisions, a contested case hearing may be requested by the Commission, the ED, the applicant, and affected persons.⁴ A hearing requestor must make their request as specified in the notice of the application.⁵ The hearing request must be submitted to the commission within 30 days after the publication of the notice of application.⁶

A hearing request must “substantially comply” with the requirements of 30 TAC § 55.251(c). A request should “identify the person's personal justiciable interest affected by the application including a brief, but specific, written statement explaining in

³ 30 TAC § 55.250.

⁴ 30 TAC § 55.251(a).

⁵ 30 TAC § 295.151(b); 30 TAC § 295.151(b)(10).

⁶ 30 TAC § 295.171.

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.”⁷

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.”⁸ 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.⁹

A group or association may request a contested case hearing only if the group or association meets all of the following requirements: (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.¹⁰ In addition,

⁷ 30 TAC § 55.251(b), (c).

⁸ 30 TAC § 55.256(a).

⁹ 30 TAC § 55.256(c).

¹⁰ 30 TAC § 55.252(a).

governmental entities with authority under state law over issues contemplated by the application may be considered affected persons.¹¹

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.¹²

III. HEARING REQUESTS

A. Organizations Requesting a Hearing

One organization, Citizens to Save Bois d'Arc Creek (CSBDC), has requested a hearing. The organization lists Harold D. Witcher, Jr. as the president and contact person. The request lists his address as near the location of the proposed reservoir, in the same basin. Additionally, thirteen individuals in their hearing requests noted that they are also members of CSBDC. The organization has members that live near the proposed reservoir and who own land that would be affected. CSBDC is concerned about the control of water resources in Northeast Texas, the lack of conservation efforts by the customers of the District, and the potential impact of the reservoir on the water quality, wildlife, and ecosystems of Bois d'Arc Creek.

OPIC recommends the Commission find that CSBDC is affected. Harold D. Witcher, Jr., a resident of the basin where the reservoir would be built, would have standing on his own to request a hearing. In addition, the interests CSBDC seeks to protect are germane to the organization's purpose. Finally, neither the claim asserted

¹¹ 30 TAC § 55.256(b).

¹² 30 TAC § 55.255(b).

nor the relief requested by Harold D. Witcher, Jr. requires the participation of the individual members.

Therefore, OPIC recommends that the Commission finds that Citizens to Save Bois d'Arc Creek is affected.

B. Governmental Entities Requesting a Hearing

Bois d'Arc Municipal Utility District and Texas Parks & Wildlife requested a hearing, and OPIC recommends the Commission find that both are affected.

Bois d'Arc Municipal Utility District ("Bois d'Arc MUD") is municipal utility district, as defined by Chapter 54 of the Texas Water Code, created on June 6, 1979 by H.B. 21717 of the 66th Legislature. Bois d'Arc MUD is headquartered in Honey Grove and operates Certificate of Convenience and Necessity No. 11753 in Fannin County. According to Bois d'Arc MUD approximately 85% to 90% of the proposed reservoir will be located within the CCN. Furthermore, the proposed reservoir will inundate at least 35% of Bois d'Arc MUD's service area and several miles of Bois d'Arc MUD's easements and facilities to the detriment of Bois d'Arc MUD, its customers, and constituents. Finally, Bois d'Arc MUD is concerned about the interbasin transfer of water and its effect on Bois d'Arc MUD, its customers, and constituents. Bois d'Arc MUD has requested a contested case hearing.

Bois d'Arc MUD is a governmental entity that would be affected under 30 TAC § 55.256(b) and (c)(6). The purpose of a municipal utility district is among other things: the control, storage, preservation, and distribution of its storm water and floodwater, the water of its rivers and streams for irrigation, power, and all other useful purposes; the conservation of its water; the control, abatement, and change of any storage or harmful excess of water; the protection, preservation, and restoration of the purity and

sanitary condition of water within the state; and the preservation of all natural resources of the state.¹³ Ultimately, the proposed reservoir project could impact water availability and water costs in Bois d'Arc MUD. Therefore OPIC finds Bois d'Arc MUD is affected.

Texas Parks & Wildlife Department (TPWD) is the state governmental agency with the primary responsibility for protecting the state's fish and wildlife resources. Texas Water Code § 11.147(f) provides that for applications for a permit to store, take, or divert water, TPWD—at its option—may be a party in hearings on the applications. In making a final decision on any application for a permit, the Commission, in addition to other information, evidence, and testimony, shall consider all information, evidence, and testimony presented by TPWD. TPWD is concerned with the effect of the proposed reservoir on water quality, instream uses, and freshwater inflows. In its hearing request, TPWD notes that the area proposed to be inundated by the reservoir has been identified as a valuable conservation area with significant variety of wildlife. Specifically, TPWD is concerned about the impact on fish and wildlife caused by construction of the reservoir.

TPWD is a governmental entity that would be affected under 30 TAC § 55.256(b) and (c)(6). It is responsible for protecting the state's fish and wildlife resources and has a statutory right to be a party to a contested case hearing for permits to store, take, or diver water. Ultimately, the proposed reservoir project could impact fish and wildlife resources along Bois D'Arc Creek. Therefore OPIC finds TPWD is affected.

¹³ Tex. Water Code § 54.012.

C. Individuals Requesting a Hearing

The Chief Clerk received several timely requests from individuals and households for a contested case hearing. OPIC acknowledges that in the intervening seven years since these requests were submitted, the affected person status of certain requesters may have changed. With this in mind, OPIC conditions its analysis on the assumption that the facts presented in the individual requests in 2007 remain the same today. Counsel for the District has informed OPIC that it will be submitting an affidavit with its response containing a list of properties affected by the proposed dam and reservoir that the District has acquired from several requesters or their successors in interest. For these specific cases were a requester had sold all their potentially affected property to the District, OPIC would find that the individual was no longer an affected person.

i. Affected Individuals

OPIC finds the following individuals and private entities affected: Monika Blaine; R.P. Crawford; John Gregory Hall; Rebecca and Ronnie Knight; Glenn Lee; Lem Locke; Joseph, John, and Wes Reed; Cathy Ryser; Charles Ryser; William Sebastian; Dorothy L. and John Rex Withcer; Harold Dean Witcher, Jr.; Charles Michael Yarbrough; and John Edward Yarbrough.

Monika Blaine lives on County Road 2730 in Fannin County in the immediate vicinity of the proposed reservoir. She is concerned with losing her property, should this draft permit be approved. Due to the location of her property and her concerns, she has shown that she has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore OPIC finds she is affected.

R.P. Crawford states that his family farm has a water rights permit from TCEQ to

divert 320 acre-feet of water per year from Bois D'Arc Creek for irrigation downstream from the proposed dam and reservoir. He is concerned about the effect of the proposed project on the sufficiency of downstream flows and his water right. Due to the location of his property, his water right, and his concerns, he has shown that he has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore OPIC finds he is affected.

John Gregory Hall owns 570 acres in the Caney Creek watershed in Fannin County. He is concerned that the proposed reservoir will negatively impact the environment and wildlife on his property by disrupting wildlife migration corridors. Additionally he is an active volunteer at the U.S. Forest Service's Caddo National Grasslands and concerned about the effect of the proposed dam and reservoir on old growth hardwood timber immediately adjacent to the Caddo National Grasslands. Due to the location of his property and his concerns, he has shown that he has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore OPIC finds he is affected.

Rebecca and Ronnie Knight own property on Bois d'Arc Creek on which they raise dairy heifers, grow hay, and graze the land. They state that the shallowest part of the reservoir will inundate their property and are concerned with the impact of the proposed project on their use and enjoyment of the land. They believe the proposed reservoir will effectively put them out of business. Rebecca and Ronnie Knight, because of the location of their property and the issues raised, have shown that they have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore OPIC finds they are affected.

Glenn Lee lives in Honey Grove and is concerned about the effect of the proposed reservoir on his water rates, water quality, and standard of living. Additionally, he states that he is concerned about the interbasin transfer of water out of Fannin County. Due to the location of his property and his concerns, he has shown that he has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore OPIC finds he is affected.

Lem Locke states that he owns land that would be inundated by the proposed reservoir. He is concerned with losing productive agricultural land, should this draft permit be approved. Due to the location of his property and his concerns, he has shown that he has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore OPIC finds he is affected.

Joseph, John, and Wes Reed are landowners and run a cow/calf operation on approximately 1,500 acres on the south side of Bois d'Arc Creek. They state that if the proposed reservoir were constructed it would disrupt their present agricultural operation and destroy the hardwood forest habitat they have labored to protect. Their hearing request includes a copy of a study documenting the physical characteristics and conservation value of their ranch. Joseph, John, and Wes Reed, because of the location of their property and the issues raised, have shown that they have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore OPIC finds they are affected.

Cathy Ryser lives on County Road 2765 in Fannin County in the immediate vicinity of the proposed reservoir. She is concerned with losing her property, should this draft permit be approved. Due to the location of her property and her concerns, she

has shown that she has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore OPIC finds she is affected.

Charles Ryser lives on County Road 2765 in Fannin County in the immediate vicinity of the proposed reservoir. He states that he has the most fertile agricultural land in the county and is concerned with the effect of the proposed reservoir on the property, should this draft permit be approved. Due to the location of his property and his concerns, he has shown that he has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore OPIC finds he is affected.

William Sebastian lives in Fannin County and is concerned about the effect of the proposed reservoir on tax revenue in the county. Specifically, he believes the loss of country tax revenue from land lost to the reservoir will have to be made up by other residents of the county, such as himself. He is also concerned about the negative effect of the reservoir on wildlife habitat. Due to the location of his property and his concerns, he has shown that he has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore OPIC finds he is affected.

Dorothy L. and John Rex Withcer, trustees of the Witcher Family Texas Property Trust, own land in Fannin County that will be inundated by the proposed reservoir. Although the ranch location is unspecified, it appears to be within the basin and within the area that may be directly impacted by construction of the reservoir. Due to the location of their property and their concerns, they have shown that they have a personal

justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore OPIC finds they are affected.

Harold Dean Witcher, Jr. owns approximately 485 acres in the immediate vicinity of the proposed reservoir. He is concerned that he will lose his home if the proposed reservoir is constructed. Additionally, he is concerned about the control of water resources in Northeast Texas, the lack of conservation efforts by the customers of the District, and the potential impact of the reservoir on the water quality, wildlife, and ecosystems of Bois d'Arc Creek. Due to the location of his property and his concerns, he has shown that he has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore OPIC finds he is affected.

Charles Michael Yarbrough lives on County Road 2765 in Fannin County in the immediate vicinity of the proposed reservoir. He is concerned that he will lose his most productive agricultural property and be put out of business if the proposed reservoir is constructed. In addition to his concerns about his property and livelihood, he is also concerned about the proposed reservoir's impact on wildlife habitat, flooding, and Fannin County's economy. Due to the location of his property and his concerns, he has shown that he has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore OPIC finds he is affected.

John Edward Yarbrough lives on County Road 2765 in Fannin County in the immediate vicinity of the proposed reservoir. He is concerned that he will lose his most productive agricultural property and be put out of business if the proposed reservoir is constructed. In addition to his concerns about his property and livelihood, he is also

concerned about the proposed reservoir's impact on wildlife habitat, flooding, and Fannin County's economy. Due to the location of his property and his concerns, he has shown that he has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore OPIC finds he is affected.

ii. Individuals and Private Entities not affected

Lela Foreman, Larry D. Franklin, Mabel Holmes, Chad Knight, Dustin Knight, Renea Knight, Maeta Lee, Gordon Locke, Cathy J. Melson; Ruby F. Odom; Carlos A. Pardo, Donna Ryser, Nathan Ryser, John W. Welch, and Charles E. Yarbrough have requested a hearing. Their hearing requests do not include enough information for OPIC to determine whether they would be affected. The hearing request submitted by Lela Foreman states that she has a family farm however the request does not state where it is or what interest she possesses that would cause her to be affected in a manner separate from the general public. Larry D. Franklin, Mabel Holmes, Chad Knight, Dustin Knight, Renea Knight, Maeta Lee, Gordon Locke, Cathy J. Melson, Ruby F. Odom, Carlos A. Pardo, Donna Ryser, Nathan Ryser, John W. Welch, and Charles E. Yarbrough do not state how they would be impacted by the application or what interests they possesses that would cause them to be affected in a manner separate from the general public. Therefore OPIC cannot recommend these individuals be found affected.

IV. CONCLUSION

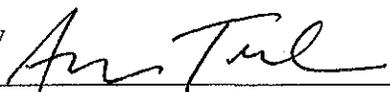
For the reasons set forth above, OPIC also recommends that the Commission refer this matter to the State Office of Administrative Hearings. Further, OPIC respectfully recommends that the Commission grant the contested case hearing requests

of the following groups, individuals, and governmental entities: Citizens to Save Bois d'Arc Creek; Bois d'Arc Municipal Utility District; Texas Parks & Wildlife Department; Monika Blaine; R.P. Crawford; John Gregory Hall; Rebecca and Ronnie Knight; Glenn Lee; Lem Locke; Joseph, John, and Wes Reed; Cathy Ryser; Charles Ryser; William Sebastian; Dorothy L. and John Rex Withcer; Harold Dean Witcher, Jr.; Charles Michael Yarbrough; and John Edward Yarbrough.

OPIC also recommends denial of the remaining requests, but may reconsider its position, based on any timely filed replies.

Respectfully submitted,

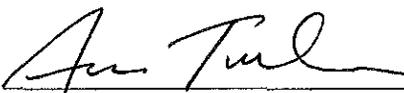
Vic McWherter
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By 

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2014, the original and seven true and correct copies of the *Office of Public Interest Counsel's Response to Requests 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.


Aaron B. Tucker

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TCEQ DOCKET NO. 2014-0913-WR

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