TCEQ DOCKET NO. 2014-1658-WR

APPLICATION BY GUADALUPE-	§	**BEFORE THE**
BLANCO RIVER AUTHORITY	§	**TEXAS COMMISSION ON**
PERMIT NO. 12378	§	**ENVIRONMENTAL QUALITY**

NATIONAL WILDLIFE FEDERATION'S REPLY TO EXECUTIVE DIRECTOR'S AND OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO HEARING REQUESTS

National Wildlife Federation (NWF) respectfully submits its reply to the Texas Commission on Environmental Quality Executive Director's (ED's) response to hearing requests and that of the Office of Public Interest Counsel (OPIC), both filed on January 12, 2015, for Permit Application No. 12378 (the Application).

Because applicant, Guadalupe-Blanco River Authority (GBRA), did not file a response, and OPIC recommended that NWF's hearing request be granted, this Reply will focus on the failure of the ED's analysis to acknowledge the clear economic interest of the member identified by NWF in support of its hearing request. Recognizing that interest, the Office of the Public Interest Counsel recommends the granting of NWF's request. Despite the fact that the identified member operates a business—catching and selling seafood harvested in San Antonio Bay—directly dependent on adequate freshwater inflows to the bay, the Executive Director recommends that NWF's hearing request be denied because the building in Seadrift from which the seafood is sold is not located immediately adjacent to the bay but several blocks away. That result is illogical and not supported by law or fact.

NWF followed all applicable procedural requirements in timely filing a hearing request and no party contests that. The *sole* issue raised by the ED in its opposition to the granting of NWF's hearing request is its assertion that NWF is not an affected person because the seafood

business of the identified member, referring to the retail outlet, is not directly adjacent to the bay. The ED's argument is inconsistent with TCEQ rules, agency precedent, and Texas case law.

Pursuant to TCEQ rules[1], an affected person is defined as someone "who has a justiciable interest related to a legal right, duty, privilege, power, *or economic* interest affected by the application." (Emphasis added.) Because NWF seeks associational standing, in accordance with TCEQ rules, NWF identified a member, Wesley Blevins, pursuant to 30 Tex. Admin. Code §55.252 with individual standing.[2] NWF meets all of the requirements for a group to request a contested case hearing. The ED argues that NWF should not be granted a hearing request because Mr. Blevins does not have standing individually. Wesley Blevins is the owner of a business – Chunky Monkeys Seafood Market– located in Seadrift, Texas that will be directly impacted if the Application is granted. The ED's argument that Mr. Blevins is not an affected person is based upon the physical location of the retail outlet component of his business.

The ED contends that because the listed business address is 621 S. Main Street, Seadrift, TX 77983, "which is located blocks away from San Antonio Bay rather than on San Antonio Bay"[3] that Mr. Blevins "does not have a sufficient property interest on the bay to establish standing on behalf of NWF."[4] NWF's assertion of the affected interest of Mr. Blevins, and by extension NWF, as stated in the hearing request, is that "Mr. Blevins catches and sells shrimp and other organisms from the bay. Mr. Blevins is concerned about adverse impacts on his business and personal

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[1] 30 Tex. Admin. Code §55.256

[2] 30 Tex. Admin. Code §55.252(a):
"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."

[3] ED's Response to Hearing Requests at Page 7 of 10.

[4] Id.

interests and on fish and wildlife resources as a result of the requested permit."[5] That assertion is more than adequate to comply with applicable requirements.

NWF was not basing its assertion of status as an affected person on the location of the real property underlying Mr. Blevins' retail outlet. However, given the reality that the success of the business which includes the property depends on conditions in the bay affected by freshwater inflows, that would be an adequate basis. In fact, Mr. Blevins conducts many aspects of his business from leased stalls along the bay and from his boat operating on the bay. For purposes of standing, a business that relies on catching and selling seafood from San Antonio Bay would meet the definition of an affected person even if the seafood were sold in Austin, much less a couple of blocks from the bay. The adverse effect on the business primarily relates to the organisms caught and sold, not on the location of the store. The location of a retail outlet immediately adjacent to San Antonio Bay is not required to establish affected person status.

However, the ED focuses its argument solely on the location of the retail outlet component of that business and erroneously relies upon *Save Our Springs Alliance v. City of Dripping Springs*, 304 S.W.3d 871 (Tex. App. – Austin 2010, pet. denied) in contending that NWF lacks standing because Mr. Blevins' primary retail outlet for his business does not directly abut the bay. The decision in *Save Our Springs Alliance* is not controlling in this matter because it does not address standing requirements for TCEQ hearings. That case involved a challenge, pursuant to the Declaratory Judgments Act, to various development agreements alleging violations of the Texas Constitution and the Texas Open Meetings Act. In addition, it acknowledges that property ownership is not the sole basis for establishing standing even in that context. The Court's opinion recognizes two alternate bases for standing: "SOS Alliance has alleged neither an environmental

[5] NWF Hearing Request to Appl. No. 12378, GBRA at 2.

interest provided for or protected by statute (as is present in the federal cases cited by SOS Alliance) nor a property interest subject to the recreational or environmental harm (as is present in state cases cited by SOS Alliance)."[6] Thus, as that opinion makes clear, standing for an environmental organization can be supported either based on an environmental interest protected by statute that is at issue or based on a property interest subject to environmental harm. NWF has satisfied both of those bases for establishing affected person status. There was no allegation of a business interest in that case so the economic interest issue was not addressed and no Water Code statutes or TCEQ rules related to contested case hearings were applicable.

Unlike the question currently before the Commission, there was no permitting process at issue in the SOS Alliance case, and there were no applicable statutory provisions expressly protecting environmental interests. Indeed, the Court of Appeals expressly distinguished the result in that case from other situations involving environmental statutes and subject to judicial review pursuant to statute. The court distinguished the availability of review for the San Marcos River Foundation in *City of San Marcos v. Texas Commission on Environmental Quality*, 128 S.W.3d 264 (Tex. App.—Austin 2004, pet. denied), because of the existence of a statutory provision, Tex. Water Code Ann. § 5.351, authorizing judicial review for persons affected.[7] Thus, *Save Our Springs Alliance* is not authority for limiting standing in cases before the Commission, such as this one, to which Section 5.351 applies.

Even if *Save Our Springs Alliance* did serve as controlling authority, NWF has alleged an environmental interest "provided for or protected by statute."[8] NWF bases its request for hearing on provisions of the Texas Water Code including Sections 11.147 and 11.150, which

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[6] *Save Our Springs Alliance v. City of Dripping Springs*, 304 S.W.3d 871, 882 (Tex. App. – Austin 2010, pet. denied).
[7] *Save Our Springs Alliance* at FN 7.
[8] Id. at 882.

unquestionably are applicable to this application and expressly provide protections for environmental interests, including "beneficial inflow to any affected bay and estuary system," "existing instream uses," and "water quality." Similarly, Section 11.132 expressly provides for notice and a hearing upon the request of any affected person.

As established in NWF's hearing request, Mr. Blevins has interests in this matter beyond that of the general public because his livelihood is directly linked to the health of San Antonio Bay. He owns a business that involves operating his boat on the bay to harvest seafood that he sells, along with other seafood that he buys dockside, from his store and that will be directly affected if the Application is granted. His reliance on that business for his livelihood more than sufficiently distinguishes his interests from those of the general public.

The Commission has previously recognized interests other than ownership of real property adjoining a water body as establishing standing in water rights proceedings. For example, the Commission granted the hearing request of the Town of Flower Mound on the Lake Ralph Hall application filed by the Upper Trinity Regional Water District. Although the Town of Flower Mound is a long way from the Sulphur River where the proposed reservoir would be located, the Commission recognized that, as a customer of the District, Flower Mound's interests were affected without regard to ownership of real property adjoining the Sulphur River.

The ED's response does not acknowledge Mr. Blevins's economic interest even though economic interests are expressly recognized by Section 55.256 of the Commission's rules as a basis for standing. The ED appears to acknowledge that Mr. Blevins "catches and sells shrimp and other organisms from San Antonio Bay"[9] to maintain his business. His livelihood is very evidently directly related to the health of the Bay, and would be directly affected were this Application

[9] ED's Response to Hearing Requests at Page 7 of 10.

granted. He has standing in his own right and NWF has associational standing through his membership.

ACCORDINGLY, NWF asks that the Commission grant its hearing request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature below, I certify that on January 26, 2015, a true and correct copy of the foregoing *National Wildlife Federation's Reply to Executive Director's and Office of Public Interest Counsel's Response to Hearing Requests* was delivered via electronic mail or U.S. Mail to all persons on the attached mailing list.

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