

II. PROCEDURAL HISTORY

On June 14, 2012, the County filed its application for a new permit, Water Use Permit No. 12871 (the "Application"), to authorize the County to maintain two existing off-channel impoundments (Reservoirs A and B) and one existing on-channel impoundment (Reservoir C), and to divert and use up to 350 acre-feet of water per year for irrigation purposes pursuant to a water supply contract entered into with the Brazos River Authority ("BRA"). The Executive Director of TCEQ (the "ED") declared the Application administratively complete on September 9, 2012.

After completing his technical review of the Application, the ED issued a draft permit and prepared a Notice of an Application for a Water Use Permit, (the "Notice") which was mailed by the TCEQ Office of the Chief Clerk (the "Chief Clerk's Office") and published by the County in the *Glen Rose Reporter* on February 12, 2013. The Application, technical memoranda, and Executive Director's draft permit were available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Bldg. F, Austin, TX 78753.

Two comments were timely filed; one by Mr. Jim Boots and the other Mr. James Moore. A timely hearing request was filed by the Requestor. On December 31 2015, the County received notice that the above-referenced matter would be considered by the Commissioners at its February 3, 2016 agenda.

The County submits this Response to the request made to the TCEQ for a contested case hearing on the Application, pursuant to Title 30, Section 55.254 of the Texas Administrative Code. Specifically, by this Response, the County requests that the Commission deny the sole hearing request submitted in this matter.

III. DETERMINATION OF AFFECTED PERSONS

Under TCEQ rules 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, when authorized by law.”² 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. An interest common to members of the general public does not qualify as a personal justiciable interest.”³ 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.⁴ 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 proposed change. The person must describe briefly, but specifically, how and why he or she will be affected by the activity in a manner not common to the general public.⁵

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.⁶

The Texas Supreme Court also incorporated an important judicial and constitutional component into the analysis of the concept of “affected person.” The Court stated:

² 30 Tex. Admin. Code § 55.251(a) (2014).

³ *Id.* § 55.103.

⁴ *Id.* § 55.251(c)(2).

⁵ *Id.*

⁶ 30 Tex. Admin. Code § 55.256(c) (2014).

As a matter of statutory interpretation, the court of appeals concluded that section 5.115's affected-person definition embodies the constitutional principles of standing. *See* 346 S.W.3d at 801 (observing that the "cornerstone" of the definition "denotes the constitutionally minimal requirements for litigants to have standing to challenge governmental actions in court"). The court explained that those principles required the City to establish a concrete and particularized injury in fact, not common to the general public, that is: (1) *actual or imminent*; (2) fairly traceable to the issuance of the permit as proposed; and (3) likely to be redressed by a favorable decision on its complaint.⁷

IV. EVALUATION OF COMMENTS AND HEARING REQUESTS

The Requestor has not identified any interest which is protected by the law under which the application will be considered or which is likely to be redressed by a favorable decision. The Requestor has not alleged that he has any water right, much less one which would be impacted by a decision granting the Permit. In fact, the Requestor has not identified any water right or vested riparian right that he is concerned will be affected by the Application, if approved. Although the Requestor claims to own lakefront property, ownership of lakefront property does not establish a riparian water right.⁸

The Requestor has failed to allege any impacts which qualify him as an affected person. His request first identifies his general concern with Lake Granbury's beauty, and its ability to attract residents and visitors for swimming, fishing, boating, and other recreational activities. These concerns are common to the general public.

The Requestor also expresses concerns regarding scenic views, reduced lake levels, and access to the lake. Although couched as concerns related to his lakefront property, these too are concerns are common to the general public. Further, even if these were not concerns common to

⁷ *City of Waco*, 413 S.W.3d at 417 (emphasis added).

⁸ *See Cummins v. Travis Cty. Water Control & Improvement Dist. No. 17*, 175 S.W.3d 34, 45 (Tex. App.—Austin 2005, pet. denied).

the general public, these concerns are not protected by the law under which the application is being considered, and are therefore outside of the jurisdiction of the TCEQ. Finally, even if these issues were not common to the general public and were protected by the law under which the application will be considered, the impact of a decision granting the Application for 350 acre-feet of water per year would have a negligible impact on views, lake levels, and access, and so are neither actual nor imminent; are not fairly traceable to the issuance of the permit as proposed; and are not likely to be redressed by a decision in his favor.

The Requestor further alleges that the permit would diminish his property values. Property values are not protected by the law under which the application will be considered.

Because the Requestor does not identify any interest that would qualify him as an affected person under the criteria specified in Title 30, Section 55.256 of the Texas Administrative Code, or under the general constitutional principles of standing, we respectfully request denial.

V. CONCLUSION

Because the Requestor failed to demonstrate any personal justiciable interest that will be affected by the Commission's approval of the Application, the Commission should find that the Requestor is not an affected person. The County therefore respectfully requests that the Commission deny all hearing requests, approve the County's Application, and issue Water Use Permit No. 12817 as proposed by the Executive Director. The County further requests that the Commission grant the County all other relief to which it is entitled by law.

Respectfully submitted,

**LLOYD GOSSELINK ROCHELLE &
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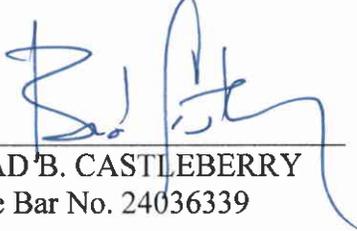
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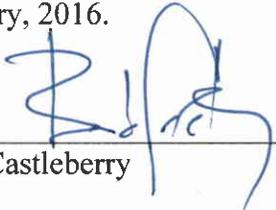
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response to Requests for Contested Case Hearing was sent by hand delivery, United States Postal Service, or electronic mail to the individuals identified below on this, the 11th day of January, 2016.



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