

Bryan W. Shaw, Ph.D., P.E., *Chairman*
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Jon Niermann, *Commissioner*
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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 11, 2016

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: SOMERVELL COUNTY
TCEQ DOCKET NO. 2015-1118-WR**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink that reads "Aaron Tucker".

Aaron Tucker, Attorney
Assistant Public Interest Counsel

cc: ~~Mailing List~~

Enclosure

TCEQ DOCKET NO. 2015-1118-WR

**IN THE MATTER OF THE
APPLICATION OF SOMERVELL
COUNTY FOR WATER USE
PERMIT NO. 12871**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUEST 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 Request for Hearing in the above-referenced matter.

I. INTRODUCTION

Somervell County has applied for a Water Use permit pursuant to Texas Water Code §§ 11.121, .042 and 30 Texas Administrative Code § 295.151, *et seq.* Pursuant to an *Interruptible Water Availability Agreement* with the Brazos River Authority for 350 acre-feet of water per year from Lake Granbury, Applicant seeks a Water Use Permit to maintain an existing on-channel dam and reservoir (Reservoir C) with a maximum capacity of 4.5 acre-feet of water on Squaw Creek, tributary of the Paluxy River, tributary of the Brazos River, Brazos River Basin for recreation purposes and two off-channel reservoirs (Reservoirs A & B) with a combined maximum capacity of 32 acre-feet in Somervell County. Luminant has a contract with Brazos River Authority for 43,000 acre-feet per year from Lake Granbury. Somerville County’s 350 acre-feet of water will be added to this amount and will be pumped using Luminant’s existing pipeline from Lake Granbury to Squaw Creek Reservoir where it will be released at the dam outlet as part of the normal operational spills and releases of Luminant’s contract water.

Applicant also seeks authorization to use the bed and banks of Squaw Creek to convey 350 acre-feet of contract water released from Squaw Creek Reservoir approximately 3.6 miles downstream for diversion from a point on Reservoir C at a maximum rate of 0.89 cfs (400 gpm) for storage in Reservoirs A & B and subsequent diversion and use for agricultural purposes to irrigate 160.74 acres out of 200 acres in Somervell County, Texas.

Reservoir A is located 2.9 miles north-northeast of the City of Glen Rose with a center point on the dam being located at Latitude 32.256968°N and Longitude 97.723200 °W in the Milam County School Land Survey, Abstract No. A-136, in Somervell County, Texas in zip code 76043.

Reservoir B is located 2.8 miles northeast of the City of Glen Rose with a center point on the dam being located at Latitude 32.256307°N and Longitude 97.722692°W in the Milam County School Land Survey, Abstract No. A-136, in Somervell County, Texas in zip code 76043.

Reservoir C is located 2.8 miles north-northeast of the City of Glen Rose with a center point on the dam being located at Latitude 32.256652°N and Longitude 97.723801 °W in the Milam County School Land Survey, Abstract No. A-136, bearing N 20.75°W, 3,800 feet from the southeast corner of Milam County Land Survey, Survey, Abstract No. A-136, in Somervell County, Texas in zip code 76043.

The proposed discharge point for the contract water will be released at the dam outlet of Squaw Creek Reservoir into Squaw Creek at a point being Latitude 32.291462° N, Longitude 97.763642° W.

The proposed diversion point will be located at a point on Reservoir C approximately one mile east of the nearby city of Glen Rose, Texas at Latitude 32.257135° N, Longitude

97.723231° W, also bearing N 72.5° E, 14,400 feet from the northwest corner of the Milam County Land School Survey, Abstract No. A-136, in Somervell County, Texas.

The application and partial fees were received on June 14, 2012. Additional information and fees were received on August 14 and 31, 2012. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on September 19, 2012.

Notice of the application was mailed on November 13, 2013. Notice was published in the *Glen Rose Reporter* on December 12, 2013. The deadline to request a contested case hearing was January 13, 2014, 30 days after the last date of publication.¹

One individual, Joe Williams, requested a contested case hearing before the deadline and has not withdrawn his request. OPIC recommends that the Commission grant the hearing request submitted by Joe Williams.

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;

¹ 30 TAC § 295.171; 30 TAC § 295.151(b)(10); 30 TAC § 55.251(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 September 19, 2012. 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).² Under those provisions, a contested case hearing may be requested by the Commission, the ED, the applicant, and affected persons.³ A hearing requestor must make their request as specified in the notice of the application.⁴ The hearing request must be submitted to the commission within 30 days after the publication of the notice of application.⁵

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 plain language the requestor's location and distance relative to the activity that is the subject of the application and

² 30 TAC § 55.250.

³ 30 TAC § 55.251(a).

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

⁵ 30 TAC § 295.171.

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.”⁶

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.”⁷ 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.⁸

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.⁹

III. HEARING REQUEST

The Chief Clerk received one timely request from Joe Williams of Hood County for a contested case hearing. Mr. Williams is a lakefront property owner on Lake Granbury, the source of the proposed water diversion. Mr. Williams objects to pumping water from Lake Granbury in

⁶ 30 TAC § 55.251(b), (c).

⁷ 30 TAC § 55.256(a).

⁸ 30 TAC § 55.256(c).

⁹ 30 TAC § 55.255(b).

order to irrigate Somervell County's golf course. According to the hearing request, his lakefront property offers scenic views of Lake Granbury and easy access to the lake itself. Mr. Williams states that for years he has repeatedly used the lake for recreational purposes, including boating and fishing. He is concerned that any further reduction in lake levels threatens his ability to use Lake Granbury for these recreational purposes and also threatens to diminish the value of his lakefront property.

Texas courts have long recognized that property ownership along an affected water resource alone is sufficient to distinguish an owner's injury from that of the public at large in order to confer standing.¹⁰ "An injury need not affect 'vested' property rights to confer standing; the harm may be economic, recreational, or environmental."¹¹ For instance, in *Texas Rivers Protection Association*, the Third Court of Appeals found that the potential harm to the riverfront owner's recreational and aesthetic interest in the river, among other things, was sufficient to confer standing in a challenge to a water diversion permit.¹² Most directly, the Third Court of Appeals in *Lake Medina Conservation Society* recognized an "ownership interest in lakefront property" holding that "the impact of lower lake levels on owners of waterfront property . . . constitutes a sufficiently particularized injury to distinguish the members' injury from that of the public at large."¹³ In *Lake Medina Conservation Society*, the members of a lake conservation organization challenged the amendment of a certificate of adjudication arguing that it would lower the water level of Lake Medina and adversely affect the member's recreational use of the lake. Due to the location of his property and his concerns, Mr. Williams has shown that he has a

¹⁰ See *Tex. Rivers Prot. Ass'n v. Tex. Natural Res. Conservation Comm'n*, 910 S.W.2d 147, 151-52 (Tex. App.—Austin 1995, writ denied) (citing *Hooks v. Tex. Dep't. of Water Res.*, 611 S.W.2d 417, 419 (Texas 1981)).

¹¹ *Tex. Rivers Prot. Ass'n*, 910 S.W.2d at 151-52 (citing *City of Bells v. Greater Texoma Util. Auth.*, 790 S.W.2d 6, 11 (Tex. App.—Dallas 1990, writ denied)).

¹² *Tex. Rivers Prot. Ass'n*, 910 S.W.2d at 151-52.

¹³ *Lake Medina Conservation Soc'y v. Tex. Natural Res. Conservation Comm'n* (980 S.W.2d 511, 513-515 (Tex. App.—Austin 1998, pet. denied)).

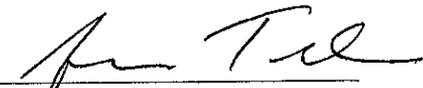
personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore OPIC finds he is affected.

IV. CONCLUSION

For the reasons set forth above, OPIC respectfully recommends that the Commission refer this matter to the State Office of Administrative Hearings and grant the contested case hearing request of Joe Williams.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2016, 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.



Aaron B. Tucker

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TCEQ DOCKET NO. 2015-1118-WR**

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