

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
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 25, 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: BOASSO AMERICA CORPORATION
TCEQ DOCKET NO. 2015-1564-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 cursive script that reads "Aaron Tucker".

Aaron Tucker, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2015-1564-WR

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION OF BOASSA	§	
AMERICA CORPORATION	§	TEXAS COMMISSION ON
FOR WATER USE	§	
PERMIT NO. 12949	§	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. OPIC recommends granting the request for a contested case hearing filed by the City of Houston.

I. INTRODUCTION

Boasso America Corporation seeks authorization to divert and use not to exceed ten acre-feet of water per year from a point on Carpenters Bayou, tributary of Buffalo Bayou, tributary of the San Jacinto River, San Jacinto River Basin at a diversion rate of 0.1114 cfs (50 gpm) for industrial purposes (dust suppression) in Harris County.

The proposed diversion point will be located approximately 0.6 miles south of the nearby town of Channelview, Texas at Latitude 29.763242° N, Longitude 95.112925° W, also bearing S 51° E, 4,845 feet from the northwest corner of the William Harris and D Carpenter Survey, Abstract 28 in Harris County. The Applicant indicates the project is within ZIP Code 77530.

The application and partial fees were received on December 3, 2012. Additional information and fees were received on April 15, May 29, November 7, and December 13, 2013. The application

was declared administratively complete and filed with the Office of the Chief Clerk on January 2, 2014. Additional information was received May 28, 2014.

Notice of the application was mailed on July 15, 2014. Notice was published in the *Houston Chronicle* on July 31, 2014. The deadline to request a contested case hearing was September 2, 2014.¹

One governmental entity, the City of Houston, requested a contested case hearing before the deadline and has not withdrawn its request. OPIC recommends that the Commission grant the hearing request submitted by the City of Houston.

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.² 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;
 - (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

¹ 30 TEX. ADMIN. CODE (TAC) §§ 1.7, 55.251(d), 295.171.

² TEX. WATER CODE (TWC) § 11.121.

- (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 January 2, 2014. 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 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

³ 30 TAC § 55.250.

⁴ 30 TAC § 55.251(a).

⁵ 30 TAC § 55.251(c)(4).

⁶ 30 TAC § 295.171.

⁷ 30 TAC § 55.251(b), (c).

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

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.¹⁰

III. HEARING REQUEST

The Chief Clerk received one timely request from the City of Houston for a contested case hearing on August 1, 2014. The City of Houston states in its hearing request that it relies upon the San Jacinto River, as well as other water resources, to provide municipal water for its more than 3 million customers. Additionally, the City of Houston holds multiple water rights in the San Jacinto River Basin, including Lake Conroe (Certificate of Adjudication and

⁸ 30 TAC § 55.256(a).

⁹ 30 TAC § 55.256(c).

¹⁰ 30 TAC § 55.255(b).

Amendment Nos. 10-4963 and 10-4963A) and Lake Houston (Certificate of Adjudication No. 10-4965). The City of Houston is concerned that Boasso America Corporation's proposed permit may negatively impact its water rights, associated contracts, as well as the health, safety, and well-being of the people and environment reliant on the San Jacinto River Basin.

The Commission may grant an application only when the proposed use will not impair existing water rights.¹¹ Therefore, the City of Houston's interest in the potential adverse effects to its existing water rights is protected by the law under which the application will be considered.¹² Furthermore, a reasonable relationship exists between the interest claimed and the activity regulated, as the City of Houston states that it holds multiple water rights in the San Jacinto River Basin. These Certificates may be impacted by Boassa America Corporation's proposed permit.¹³ Similarly, Boassa America Corporation's proposed appropriation may affect water availability¹⁴ and, thereby, the regulated activity may impact the City of Houston's use of its own appropriations.¹⁵ OPIC therefore recommends that City of Houston be determined an affected person and that its hearing request be referred for a contested case hearing.

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 the City of Houston.

¹¹ TWC § 11.134(b)(3)(B).

¹² 30 TAC § 55.256(c)(1), (6).

¹³ 30 TAC § 55.256(c)(3); *see also United Copper v. Grissom*, 17 S.W.3d 797, 803 (Tex.App.-Austin 2000) (citing *Heat Energy Advanced Tech., Inc. v. W. Dallas Coal. for Envt'l Justice*, 962 S.W.2d 288 (Tex.App.-Austin 1998, pet. denied)) (stating that the affected person standard "does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will *potentially suffer harm* or have a justiciable interest that will be affected.") (emphasis added).

¹⁴ 30 TAC § 297.42.

¹⁵ 30 TAC § 55.256(c)(4), (5).

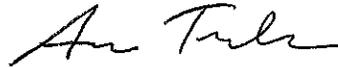
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 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. 2015-1564-WR

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