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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 1, 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: **CITY OF DALLAS**
TCEQ DOCKET NO. 2016-0049-WR

Dear Ms. Bohac:

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

Sincerely,


Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2016-0049-WR

APPLICATION BY THE CITY OF	§	BEFORE THE
DALLAS TO AMEND	§	TEXAS COMMISSION ON
CERTIFICATE OF	§	ENVIRONMENTAL QUALITY
ADJUDICATION NO. 08-2462	§	

THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUESTS

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) and files this Response to Hearing Requests in the above-referenced matter. OPIC recommends granting the requests for a contested case hearing filed by: the Texas Parks and Wildlife Department (TPWD), the City of Houston (Houston), the North Texas Municipal Water District (the District), and the Trinity Water Association (TWA). Although OPIC cannot currently recommend approval of the request submitted by the National Wildlife Federation (NWF), if the requested information is submitted by August 15, 2016, OPIC may also recommend granting their hearing request.

In support of its recommendation OPIC respectfully submits the following:

I. INTRODUCTION

The City of Dallas (the City or Applicant) holds Certificate of Adjudication No. 08-2462, which authorizes the City to maintain an existing dam and reservoir (Lake Ray Hubbard) on the East Fork Trinity River, tributary of the Trinity River, Trinity River Basin, in Dallas, Kaufman, Rockwall, and Collin Counties, and to impound therein 490,000 acre-feet of water. Applicant is

also authorized to divert and use not to exceed 89,700 acre-feet of water per year at a maximum combined diversion rate of 619 cfs (277,807 gpm) from the perimeter of Lake Ray Hubbard and other points for municipal, industrial, agricultural (irrigation), mining, domestic, recreation, instream, livestock, and hydroelectric power generation purposes. Under the Certificate, the City may use the bed and banks of Lake Ray Hubbard to store, divert and use not to exceed 150,000 acre-feet of return-flows per year for the purposes authorized.

Applicant seeks to amend Certificate of Adjudication No. 08-2462 to increase diversion and use of water from Lake Ray Hubbard by 119,600 acre-feet of water per year, from 89,700 acre-feet of water per year to 209,300 acre-feet of water per year, from the perimeter of Lake Ray Hubbard and other points authorized for diversion for the authorized multiple purposes, being municipal, industrial, agricultural (irrigation), mining, domestic, recreation, instream, livestock, and hydroelectric power generation. The request for the additional diversion of 119,600 acre-feet of water per year includes 49,600 acre-feet of additional firm water and 70,000 acre-feet of water per year that is available on a less than firm basis.

The application states that the request for an additional appropriation of water is based on adjustment of the naturalized flows in the Trinity WAM to reflect "the increase in runoff that would have occurred over the historical period had today's level of development been there." The application further indicates that since "the initial water rights permit for Lake Ray Hubbard was based on pre-development conditions, the reservoir is currently permitted for significantly less than its full water supply potential based on 2004 and ultimate watershed conditions." Applicant also seeks to increase the authorized maximum combined diversion rate from Lake Ray Hubbard by 836 cfs (375,197 gpm), from 619 cfs (277,807 gpm) to 1,455 cfs (653,004 gpm). No increase

in storage is requested.

The City's application and partial fees were received on July 11, 2007, and additional information and fees were received on April 11, and April 30, 2008. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on June 6, 2008. On October 3, 2008, the TCEQ Chief Clerk mailed notice to all navigation districts in the basin as well as all holders of certified filings, permits and claims of water rights. Applicant published notice of the application on October 23, 2008. The deadline to request a contested case hearing was November 24, 2008, thirty days after publication of the notice.¹

II. REQUIREMENTS OF APPLICABLE LAW

A. Requirements to Obtain Affected Person Status

This application was declared administratively complete after September 1, 1999, and is subject to Chapter 55, Subchapter G, sections 55.250 - 55.256. According to these rules, an "affected person" must submit a timely contested case hearing request in writing and in compliance with Commission requirements for making a request.² In addition, the request must identify the person's personal justiciable interest affected by the application, including a brief, specific explanation regarding "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

¹ 30 TAC Section 295.171: A request for contested case hearing on an application for a water use permit or amendment made by the applicant, the executive director, or an affected person who objects to the application must be made in writing, must comply with the requirements of Chapter 55, Subchapter G, of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment), and specifically §55.251 of this title (relating to Requests for Contested Case Hearing, Public Comment), and must be submitted to the commission within 30 days after the publication of the notice of application. The commission may extend the time allowed for submitting a request for contested case hearing.

² 30 TEX. ADMIN. CODE ("TAC") §§ 55.251 *et seq.* and 30 TAC § 295.171.

affected by the activity in a manner not common to the members of the general public.”³

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” in a manner not common to members of the general public.⁴ Relevant factors considered in determining a person’s affected person status include:

- (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 the 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.⁵

A contested case hearing should be granted if an affected person’s hearing request meets all requirements of applicable law. A request for hearing shall be granted if the request is made by the applicant or the executive director.⁶ The Commission may also refer an application to the State Office of Administrative Hearings if the Commission determines that a hearing would be in the public interest.⁷

A group or association may request a contested case hearing only if the group or

³ 30 TAC § 55.251(c)(2).

⁴ 30 TAC § 55.256(a). “This 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.” *United Copper v. TNRCC*, 17 S.W.3d 797, 803 (Tex.App. - Austin 2000).

⁵ 30 TAC § 55.256(c).

⁶ 30 TAC § 55.255(b)1

⁷ 30 TAC § 55.255(c).

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.⁸

B. Requirements for a Water Use Permit

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.” 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;

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

III. DISCUSSION

A. Determination of Affected Persons

- a. Texas Parks and Wildlife

⁸ 30 TAC § 55.252(a).

On November 24, 2008, Colette Barron Bradsbury, on behalf of Texas Parks and Wildlife (TPWD), submitted a hearing request in this matter. Under Texas Water Code §11.147, the TCEQ, in making a final decision on any application to store, take or divert water, shall consider all information, evidence and testimony presented by TPWD. The request indicates that TPWD's statutory obligation and ability to protect fish and wildlife resources of the state may be affected by the actions proposed under the City's application and the use of an applicant-modified water availability model and its potential to over-allocate water to the detriment of fish, wildlife, and other water rights holders.

Although the Texas legislature enacted laws prohibiting a state agency—except a river authority—from filing a request for a contested case hearing or request for reconsideration or from being considered an affected person or named a party, these rules and regulation only apply to permit applications received by the commission on or after September 1, 2011.⁹ As stated, this application was received by the Commission on July 11, 2007. Because TPWD has a statutory interest over the concerns it raises,¹⁰ OPIC recommends that TPWD be considered an affected person and that the Commission grant its request for a contested case hearing.

b. National Wildlife Federation

On November 24, 2008, Myron Hess, on behalf of the National Wildlife Federation (NWF), submitted a hearing request in this matter. NWF indicates that it is a national, non-profit organization dedicated to protecting the ecosystems that are most critical to native wildlife in

⁹ See 30 TAC §§55.103, 55.201, 55.203, 55.256, and 80.109.

¹⁰ 30 TAC §55.256(c)(6).

America. NWF's members are dedicated to protecting fish and wildlife resources and the right of people to use and enjoy those resources.

NWF is concerned that the proposed permit could significantly reduce flows into the Trinity River downstream of the reservoir and into Galveston Bay. These reductions in flow could impact water quality and adversely affect fish and wildlife resources. Further, NWF expresses doubt that applicants should be able to modify natural flow assumptions through water availability model modifications. Any such modification should be legally and technically vetted.

While OPIC finds that the interests NWF seeks to protect are germane to the organization's purpose, its hearing request did not identify one or more members of the group or association who would otherwise have standing to request a hearing in their own right as required by 30 TAC §55.252(a)(1). At this time, OPIC therefore cannot recommend that the Commission grant NWF's hearing request. However, 30 TAC §55.252(b) authorizes OPIC to request an explanation of how a group or association meets the requirements of subsection §55.252(a). If NWF provides such an explanation by the reply deadline of August 15, 2016, OPIC may reconsider its recommendation.

c. The City of Houston

The Chief Clerk received a timely request from Edmond McCarthy, Jr., on behalf of the City of Houston (Houston) for a contested case hearing on October 31, 2008. Houston states in its hearing request that it relies upon the Trinity 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 Trinity River Basin, including Certificate of Adjudication Nos.

08-4261 and 08-4277.

Houston is concerned that the proposed permit may negatively impact its water rights, and therefore the health, safety, and well-being of the people and environment reliant on the Trinity River Basin. The Commission may grant an application only when the proposed use will not impair existing water rights.¹¹ The City of Houston states that it holds multiple water rights on the Trinity River Basin that may be impacted by the proposed permit. Additionally, the Executive Director (ED) created a map in this matter which indicates that Houston's water rights are indeed located along the Trinity River downstream of the proposed diversions. As an existing water rights holder, Houston has a personal justiciable interests under Texas Water Code §11.134(b)(3)(B). OPIC therefore recommends that Houston be determined an affected person and that the Commission grant its request for a contested case hearing.

d. North Texas Municipal Water District

The Chief Clerk received a timely request from Martin Rochelle on behalf of the North Texas Municipal Water District (the District) for a contested case hearing on November 10, 2008. The District states that it relies upon water supplies in the Trinity River Basin for its municipal water supplies to meet the needs of its members and customers. The District is owner of Certificate of Adjudication No. 08-2410, which contains a special condition restricting diversions to times when Lake Hubbard is spilling. Therefore the application has the potential to impact the extent to which the District is able to utilize its water rights.

The map produced by the ED in this matter demonstrates that Certificate of Adjudication No. 08-2410 authorizes diversions very near downstream of the diversions under the proposed

¹¹ TWC § 11.134(b)(3)(B).

permit. As an existing water rights holder, the District has a personal justiciable interest under Texas Water Code §11.134(b)(3)(B). OPIC therefore recommends that the North Texas Municipal Water District be determined an affected person and that the Commission grants its request for a contested case hearing.

e. Trinity River Association

The Chief Clerk received a timely request from Fred Werkenthin on behalf of the Trinity River Authority (TRA) for a contested case hearing on November 6, 2008. TRA states that it relies upon water supplies in the Trinity River Basin to provide water and wastewater service to millions of Texans who live and work along the river. TRA is owner of Certificate of Adjudication No. 08-4248, located downstream of the diversion points identified in the application. Therefore the proposed permit has the potential to impact the extent to which the TRA is able to utilize its water rights.

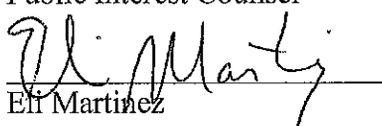
The map produced by the ED in this matter demonstrates that Certificate of Adjudication No. 08-4248 authorizes diversions downstream of the diversions under the proposed permit. As an existing water rights holder, the TRA has a personal justiciable interests under Texas Water Code §11.134(b)(3)(B). OPIC therefore recommends that the Trinity River Authority be determined an affected person and that the Commission grant its request for a contested case hearing.

IV. CONCLUSION

OPIC respectfully recommends that the Commission grant the hearing requests of the

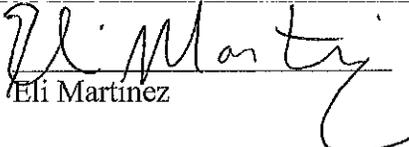
following requesters: the Texas Parks and Wildlife Department (TPWD), the City of Houston (Houston), the North Texas Municipal Water District (the District), and the Trinity Water Association (TWA). Although OPIC cannot currently recommend approval of the request submitted by the National Wildlife Federation (NWF), if the requested information is submitted by August 15, 2016, OPIC may also recommend granting their hearing request. Based on the foregoing, OPIC respectfully requests that the Commission refer this matter to SOAH for a contested case hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2016, the original and seven true and correct copies of the Office of the Public Counsel's Response to Hearing Requests 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.


Eli Martinez

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