

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Jon Niermann, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 13, 2016

Bridget C. Bohac, Chief Clerk
Office of the Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC-105 Austin,
Texas 78711-3087

Re: City of Pearland; Water Rights Permit No. 13071; Docket No. 2016-0160-WR

Dear Ms. Bohac:

Attached for filing please find an original and seven copies of the Executive Director's Response to Hearing Requests in the above referenced matter. Please feel free to contact me at linda.horng@tceq.texas.gov or (512) 239-0676 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Horng".

Linda Horng
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

TCEQ DOCKET NO. 2016-0160-WR

**APPLICATION BY CITY OF
PEARLAND
PERMIT NO. 13071**

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§**

**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) respectfully submits this response to hearing requests filed in the application by the City of Pearland for new Water Use Permit No. 13071. Two hearing requests were filed by the City of Houston (City) and National Wildlife Federation (NWF).

The Executive Director respectfully recommends that the Commission deny the hearing requests.

Staff has prepared a map showing the location of the water rights of the hearing requestor located in the San Jacinto River Basin. Staff's map is attached as Attachment A.

I. BACKGROUND

The City of Pearland filed an application for a water use permit to divert and use not to exceed 280 acre-feet (AF) per year of historically discharged surface water and groundwater-based return flows from the Far Northwest Wastewater Treatment Facility, Texas Pollutant Discharge Elimination System Permit No. WQ0010134008, approximately 60% of which are surface water based, for storage in five off-channel reservoirs for recreational purposes and for subsequent diversion for agricultural purposes in Brazoria County. Applicant also seeks authorization to use the bed and banks of an unnamed tributary of Clear Creek and Clear Creek, tributary of the San Jacinto River, San Jacinto-Brazos Coastal Basin, to convey the return flows to the diversion point for diversion at a maximum rate of 1.546 cfs (694 gpm) for agricultural purposes to irrigate 280 acres out of a 583 acre tract of land in Brazoria County.

II. PROCEDURAL HISTORY

The Commission received this application on August 1, 2013. The application was declared administratively complete on March 7, 2014. Notice of the application was mailed by the Commission's Chief Clerk on August 20, 2015 to water right holders of record in the San Jacinto-Brazos Coastal Basin. The notice of application was published in the *Houston Chronicle* on September 10, 2015.

The hearing request period for this application closed on October 12, 2015. Two hearing requests for a contested case hearing were timely received.

III. LEGAL AUTHORITY

Pursuant to 30 Texas Administrative Code Section 55.251(b), the following may request a contested case hearing on water rights applications: 1) the Commission; 2) the Executive Director; 3) the applicant; and 4) affected persons when authorized by law. Affected persons are authorized to submit hearing requests for water rights applications under Texas Water Code Section 11.132(a). The Commission, on the request of any affected person shall hold a hearing on a water rights application. The procedures for determining whether a hearing requestor is an affected person and whether the hearing request is valid are set forth in 30 Texas Administrative Code Sections 55.250-55.256, which apply to water rights applications such as this one that were declared administratively complete after September 1, 1999.

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." 30 Tex. Admin. Code § 55.256(a). An interest "common to members of the general public does not qualify as a personal justiciable interest." 30 Tex. Admin. Code § 55.256(a).

Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 Tex. Admin. Code § 55.256(b).

To determine whether a hearing requestor is an affected person, all relevant factors must be considered. 30 Tex. Admin. Code § 55.256(c). These factors include but are not limited to the following:

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;
5. the likely impact of the regulated activity on the 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.

30 Tex. Admin. Code § 55.256(c).

A hearing request by a group or an association, must meet the requirements set forth in 30 Texas Administrative Code Section 55.252(a). The three requirements are: 1) at least one member of the group or association would have standing to request a hearing in his or her own right; 2) the interests the group or association seeks to protect are germane to the group's purpose; and 3) neither the claim

asserted nor the relief sought would require the presence of the individual members. 30 Tex. Admin. Code § 55.252(a).

In addition, the hearing request must substantially comply with the four requirements set forth in 30 Texas Administrative Code Section 55.251(c):

1. Give the name, address, and daytime telephone number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
2. 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;
3. Request a contested case hearing; and
4. Provide any other information specified in the public notice of application.

The request for a contested case hearing must be filed with the Commission's Chief Clerk during the public comment period. 30 Tex. Admin. Code § 55.251(d).

The Commission must grant a request for a contested case hearing made by an affected person if the request complies with the requirements of 30 Texas Administrative Code Section 55.251; is timely filed with the Chief Clerk; and is pursuant to a right to hearing authorized by law. 30 Tex. Admin. Code § 55.255(b)(2).

IV. HEARING REQUEST AND RECOMMENDATION

Two hearing requests were timely filed. The hearing requestors substantially complied with the procedural requirements of Section 55.251. However, they did not show that they were affected persons.

City of Houston

The City of Houston alleges that the proposed permit may directly injure or impact the City's water rights. The City owns water rights in a different basin than the application permit basin. The City is concerned about fresh water inflows to Galveston Bay and its estuaries, which contribute to the economic well-being and quality of life for the City of Houston.

The Executive Director recommends that the City of Houston's hearing request be denied because it failed to establish how it is an affected person. The City's water rights would not be impaired by the application because the City's water rights are outside the permit application basin. Additionally, the City's hearing request did not demonstrate how the City's concern for Galveston Bay and its estuaries is

distinguishable from an interest common to the general public.

National Wildlife Federation

National Wildlife Federation is a non-profit organization dedicated to protecting the ecosystems that are most critical to wildlife in America. NWF alleges that the application has the potential to reduce flows in Clear Creek and freshwater inflow into Clear Lake. NWF alleges that the instream flow criteria proposed in the draft permit are inadequate to prevent harm to the aquatic ecosystem of Clear Creek and other important biologic communities of Clear Lake and Galveston Bay. NWF expresses concern for oysters, marine, and avian species.

The Executive Director recommends that NWF's hearing request be denied because it failed to establish that one or more members of the group or association would otherwise have standing to request a hearing in their own right. NWF states generally that it has many members with property downstream of the City of Pearland's requested diversion point along Clear Creek, Clear Lake, and Galveston Bay, who are concerned about those fish and wildlife resources specifically. NWF did not identify a member of NWF with their location and distance relative to the proposed diversion.

V. CONCLUSION

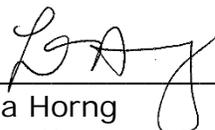
The Executive Director respectfully recommends that the Commission deny the hearing requests of the City of Houston and National Wildlife Federation.

Respectfully submitted,

TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY

Richard A. Hyde, P.E.
Executive Director

Robert Martinez, Director
Environmental Law Division

By  _____
Linda Horng
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CERTIFICATE OF SERVICE

I certify that on May 13, 2016, the original and seven copies of the "Executive Director's Response to Hearing Requests" for City of Pearland's application for Water Rights Permit No. 13071, were filed with the TCEQ's Office of the Chief Clerk and a complete copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, electronic submittal, or by deposit in the U.S. Mail.

By  _____
Linda Horng, Staff Attorney
Environmental Law Division
SBN: 24078690

**MAILING LIST
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DOCKET NO. 2016-0160-WR;
WRPERM 13071**

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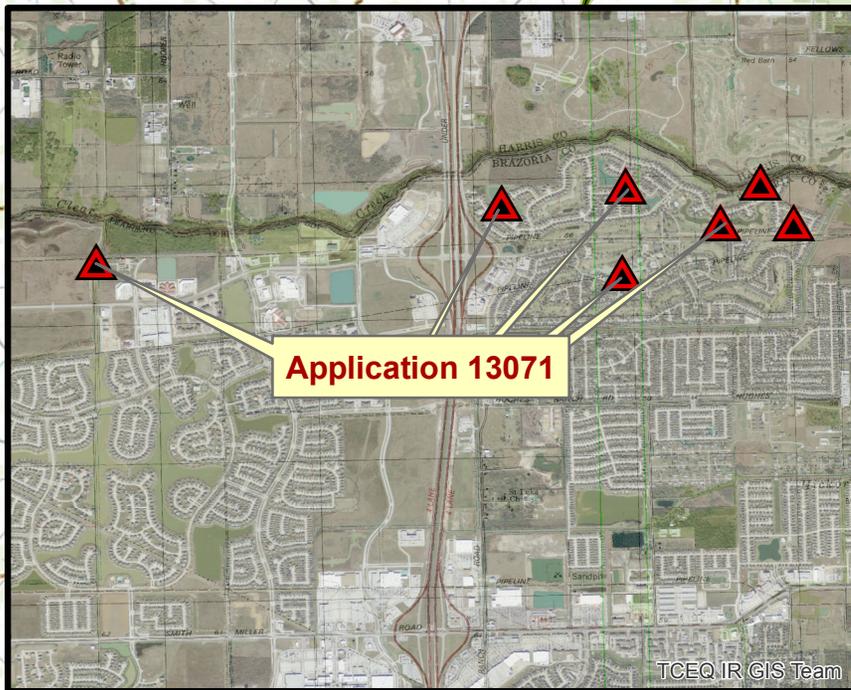
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ATTACHMENT A



City of Pearland
 Application No. 13071

Protestants with Water Rights
 City of Houston

Protestants without Water Rights
 National Wildlife Federation

