

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



*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

May 13, 2016

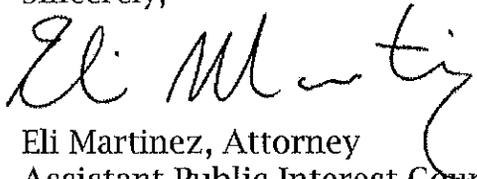
Bridget Bohac, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

**RE: CITY OF PEARLAND  
TCEQ DOCKET NO. 2016-0160-WR**

Dear Ms. Bohac:

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

Sincerely,

  
Eli Martinez, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2016-0160-WR**

**IN THE MATTER OF THE  
APPLICATION BY CITY OF  
PEARLAND FOR WATER RIGHTS  
PERMIT NO. 13071**

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**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO REQUESTS 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 Requests for Hearing in the above-referenced matter. OPIC recommends denying the requests for a contested case hearing filed by the National Wildlife Federation (NWF) and the City of Houston. If NWF or Houston files a reply with further relevant information, OPIC may reconsider its recommendation.

**I. INTRODUCTION**

The City of Pearland (Pearland or Applicant), seeks a Water Use Permit to divert and use not to exceed 280 acre-feet per year of historically discharged surface water and groundwater-based return flows from the Far Northwest Wastewater Treatment Facility permitted under TPDES Permit No. WQ0010134008. Applicant also seeks to use the bed and banks of an unnamed tributary of Clear Creek and Clear Creek, San Jacinto-Brazos Coastal Basin to convey return flows.

The return flows will be diverted from a point on Clear Creek at a maximum diversion rate of 1.546 cfs (694 gpm) for storage in off-channel recreation reservoirs and subsequent

diversion for agricultural purposes to irrigate 280 acres of land in Brazoria County, Texas. The Applicant estimates that a maximum of 60% of the return flows originate from surface water.

The application was received on August 1, 2013 and declared administratively complete on March 7, 2014. Notice of the application was mailed on August 20, 2015. Notice was published in the *Houston Chronicle* on September 10, 2015. The deadline to request a contested case hearing was October 12, 2015.<sup>1</sup>

Requests for a contested case hearing were filed by the City of Houston and NWF. OPIC recommends that the Commission deny both hearing requests.

## 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.<sup>2</sup> 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

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<sup>1</sup> 30 TEX. ADMIN. CODE (TAC) §§ 1.7, 55.251(d), 295.171.

<sup>2</sup> 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 March 7, 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).<sup>3</sup> Under those provisions, a contested case hearing may be requested by the Commission, the ED, the applicant, and affected persons.<sup>4</sup> A hearing requestor must make their request as specified in the notice of the application.<sup>5</sup> The hearing request must be submitted to the commission within 30 days after the publication of the notice of application.<sup>6</sup>

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.”<sup>7</sup>

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<sup>3</sup> 30 TAC § 55.250.

<sup>4</sup> 30 TAC § 55.251(a).

<sup>5</sup> 30 TAC § 55.251(c)(4).

<sup>6</sup> 30 TAC § 295.171.

<sup>7</sup> 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.”<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

A group or association may request a contested case hearing only if the group or 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.<sup>11</sup>

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<sup>8</sup> 30 TAC § 55.256(a).

<sup>9</sup> 30 TAC § 55.256(c).

<sup>10</sup> 30 TAC § 55.255(b).

<sup>11</sup> 30 TAC § 55.252(a).

### **III. HEARING REQUESTS**

#### **A. National Wildlife Federation**

The Chief Clerk received a timely request for a contested case hearing from NWF on October 12, 2015. The request states that NWF is a national, non-profit organization dedicated to protecting the ecosystems that are most critical to wildlife in America. NWF is concerned that the draft permit would allow unduly reduced flows in Clear Creek and freshwater inflow into Clear Lake that may damage its aquatic ecosystem and biological communities.

While OPIC finds that the interests NWF seeks to protect are germane to the organization's purpose, their hearing request did not identify one or more members of the group or association 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 May 27, 2016, OPIC may reconsider its recommendation.

#### **B. City of Houston**

The Chief Clerk received a timely request for a contested case hearing from the City of Houston (Houston or the City) on October 1, 2015. The request states that Houston relies upon the San Jacinto-Brazos Coastal Basin, as well as other water resources, to provide municipal water for its more than 3 million customers. Additionally, Houston holds multiple water rights in the San Jacinto River Basin, including Certificate of Adjudication Nos. 10-4965, 10-4963, 10-5807, 10-10-5808, 10-10-5826, 10-5827 and Permit No. 2925. The Coastal Basin provides fresh water inflows to Galveston Bay and its estuaries, which may impact the economic well-being

and quality of life of the City and its citizens. The request also notes that the sources of much of the City of Pearland's water originates from Houston pursuant to a long term supply contract. Once these waters are used beneficially by the City of Pearland for the contracted purposes, they are needed by Houston to maintain freshwater inflows into Galveston Bay and its estuary systems for ecological and economic reasons.

The Commission may grant an application only when the proposed use will not impair existing water rights.<sup>12</sup> The City of Houston states that it holds multiple water rights in the San Jacinto River Basin that may be impacted by the City of Pearland's proposed permit. However, the Executive Director has produced a map of the City of Houston's water rights in this case, demonstrating that the proposed diversion would take place downstream of all of Houston's water rights, and in a different basin and therefore would not impact availability with respect to those rights. OPIC concludes that a reasonable relationship therefore does not exist between the interest claimed and the activity regulated as required by 30 TAC § 55.256(c)(3) and that the City of Houston has not stated a personal justiciable interest.

If additional relevant facts are submitted by the reply deadline of May 27, 2016 establishing a reasonable relationship between the interest claimed and the activity regulated in light of the Executive Director's basin map, OPIC may reconsider its recommendation.

#### **IV. CONCLUSION**

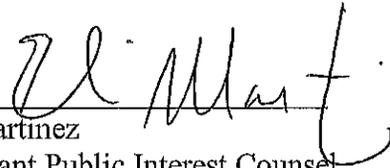
For the reasons set forth above, OPIC respectfully recommends that the Commission deny the contested case hearing requests of the City of Houston and National Wildlife Federation.

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<sup>12</sup> TWC § 11.134(b)(3)(B).

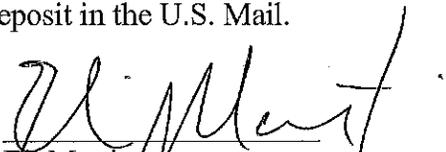
Respectfully submitted,

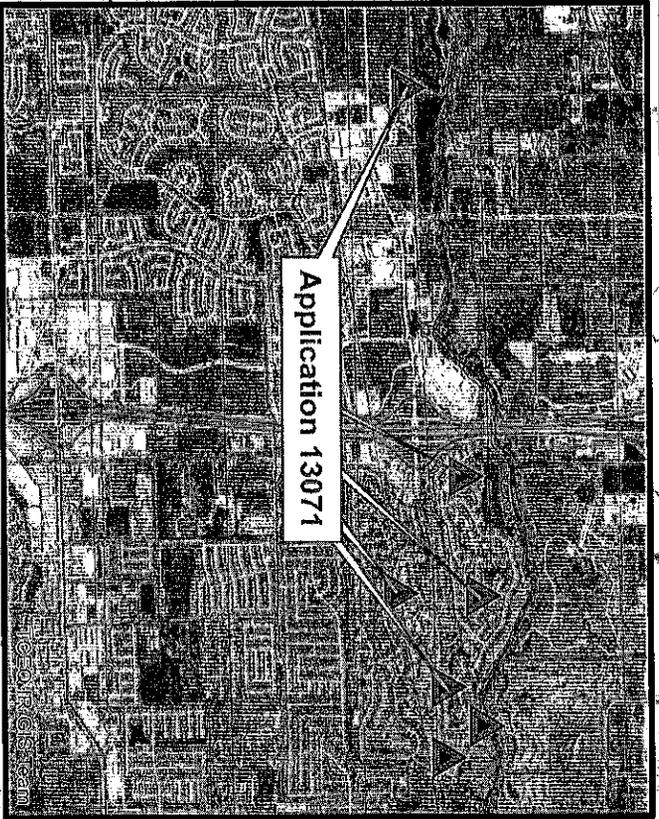
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**CERTIFICATE OF SERVICE**

I hereby certify that on May 13, 2016, the original and seven true and correct copies of the *Office of Public Interest Counsel's Response to Requests 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.

  
Eli Martinez



Application 13071

**City of Pearland**

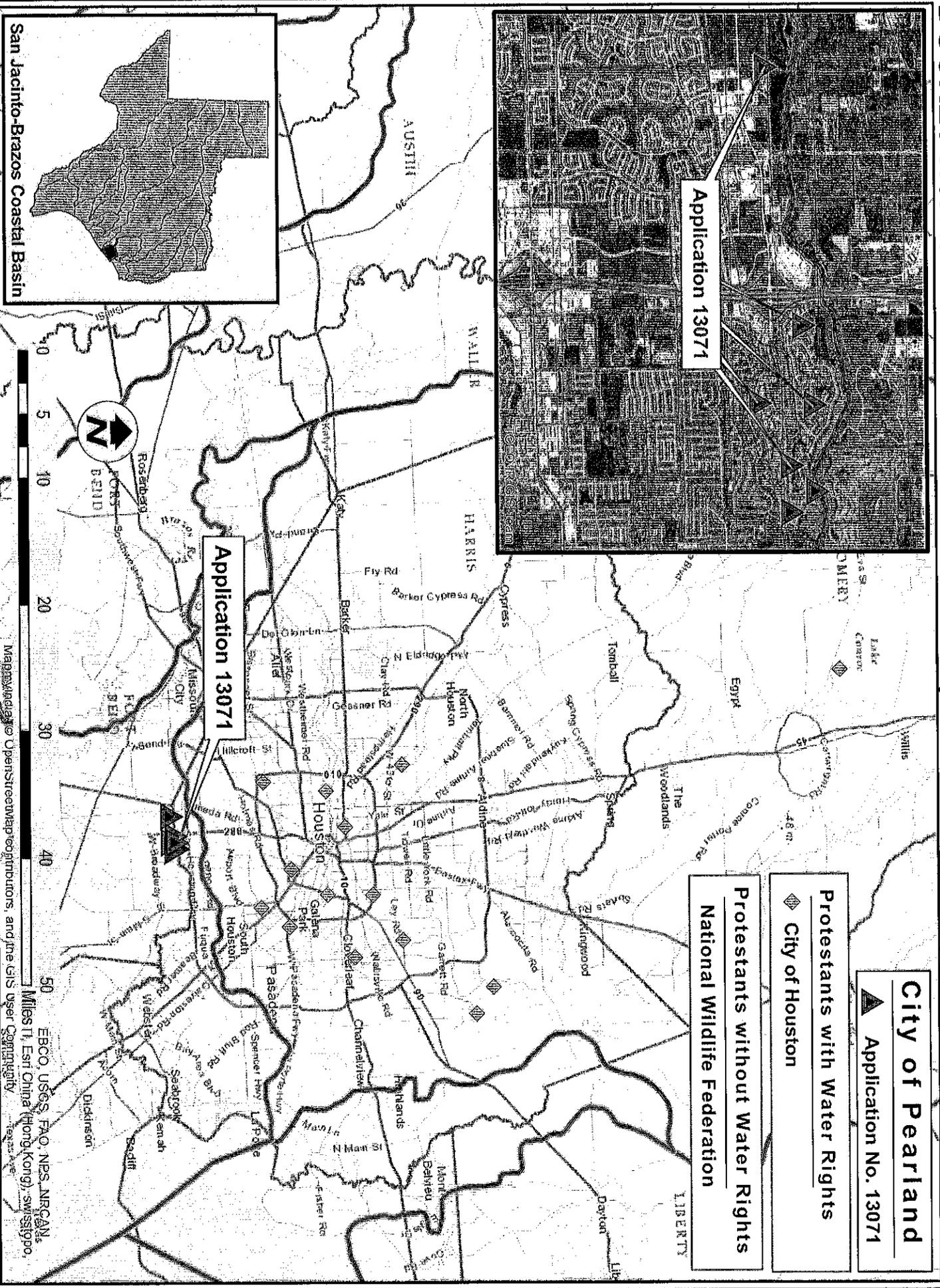
▲ Application No. 13071

◆ Protestants with Water Rights

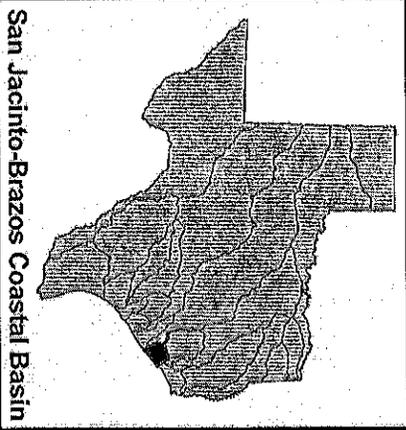
◆ City of Houston

◆ Protestants without Water Rights

◆ National Wildlife Federation



Application 13071



San Jacinto-Brazos Coastal Basin

EBCO, USGS, FAO, NPS, NRCAN, Millis IT, Esri, China (Hong Kong), Swisstopo, Mapbox, and OpenStreetMap contributors, and the GIS User Community

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TCEQ DOCKET NO. 2016-0160-WR**

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