

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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 29, 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: MONTGOMERY COUNTY MUNICIPAL UTILITY DISTRICT
NOS. 8 & 9
TCEQ DOCKET NO. 2016-0469-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,

A handwritten signature in black ink, appearing to read "Rudy Calderon".

Rudy Calderon, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2016-0469-WR

APPLICATION BY	§	BEFORE THE
MONTGOMERY COUNTY	§	
MUNICIPAL UTILITY DISTRICT	§	TEXAS COMMISSION ON
NOS. 8 & 9 FOR WATER RIGHTS	§	
PERMIT NO. 12510	§	ENVIRONMENTAL QUALITY

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 City of Houston (Houston) and the San Jacinto River Authority (SJRA). In support of its recommendation OPIC respectfully submits the following:

I. INTRODUCTION

Montgomery County Municipal Utility District Nos. 8 and 9 (Applicant) seek a Water Rights Permit to use the bed and banks of the West Fork San Jacinto River (Lake Conroe), tributary of the San Jacinto River, San Jacinto River Basin, to convey their present and future groundwater-based return flows. Applicant currently holds Texas Pollutant Discharge Elimination System Permit No WQ0011371001 which authorizes the Applicant to discharge up to 1,008.86 acre-feet of water per year (0.9 million gallons per day) into Lake Conroe on the West Fork San Jacinto, tributary of the San Jacinto River, San Jacinto River Basin. The application states that the water will be diverted, less carriage losses, from diversion points at or

application states that the water will be diverted, less carriage losses, from diversion points at or inland of the perimeter of Lake Conroe at a maximum combined diversion rate of 3.422 cubic feet per second (1,500 gallons per minute) for municipal, industrial, and agricultural purposes within the Districts' service areas in Montgomery County in the San Jacinto River Basin.

The application and partial fees were received on October 2, 2009, and additional information and fees were received on October 30, November 3, and December 14, 2009. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on April 12, 2010. On March 23, 2011, 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. The deadline to request a contested case hearing was April 28, 2011, 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

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.

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 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

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

the public interest.⁷

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.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.

⁷ 30 TAC § 55.255(c).

⁸ 30 TAC § 55.252(a).

III. DISCUSSION

A. Determination of Affected Persons

1. The City of Houston

The Chief Clerk received a timely request from Edmond McCarthy, Jr., on behalf of the Houston for a contested case hearing on April 27, 2011. Houston states in its hearing request that it holds multiple water rights in the San Jacinto River Basin, including joint ownership of Lake Conroe with SJRA, Certificate of Adjudication No. 10-4963 which it jointly holds with SJRA, and Permit Nos. 5807 and 5808. Houston also states that the Applicant has no agreements for easements, rights of way, or use of Lake Conroe or the water front properties owned by Houston and SJRA needed for applicant to construct, maintain, and/or operate the proposed diversion works and transmission or other facilities required to implement the proposed permit.

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 San Jacinto River Basin. The Commission may grant an application only when the proposed use will not impair existing water rights.⁹ The City of Houston states that it holds multiple water rights on the San Jacinto 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 San Jacinto River Basin downstream of the proposed diversions. As an existing water rights holder, Houston has 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.

⁹ TWC § 11.134(b)(3)(B).

2. San Jacinto River Authority

The Chief Clerk received a timely request from Martin Rochelle, on behalf of the San Jacinto River Authority (SJRA) for a contested case hearing on April 29, 2011. SJRA states in its hearing request that it holds multiple water rights in the San Jacinto River Basin, including joint ownership of Lake Conroe with Houston, and Certificate of Adjudication No. 10-4963 which it jointly holds with Houston.

In its hearing request, SJRA states that it relies upon water supplies in the San Jacinto River Basin to meet the municipal and industrial needs of its customers, holds and/or has contracts for other water rights in the San Jacinto River Basin, and is concerned about the impact on the economic health and wellbeing of SJRA and its customers by the proposed permit. The Commission may grant an application only when the proposed use will not impair existing water rights.¹⁰ The ED's map indicates that SJRA's water rights are indeed located along the San Jacinto River Basin downstream of the proposed diversions. As an existing water rights holder, SJRA has personal justiciable interests under Texas Water Code §11.134(b)(3)(B). OPIC therefore recommends that SJRA be determined an affected person and that the Commission grant its request for a contested case hearing.

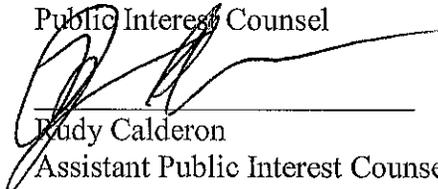
¹⁰ TWC § 11.134(b)(3)(B).

IV. CONCLUSION

OPIC respectfully recommends that the Commission grant the hearing requests of the City of Houston and the San Jacinto River Authority. OPIC respectfully requests that the Commission refer this matter to State Office of Administrative Hearings for a contested case hearing.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

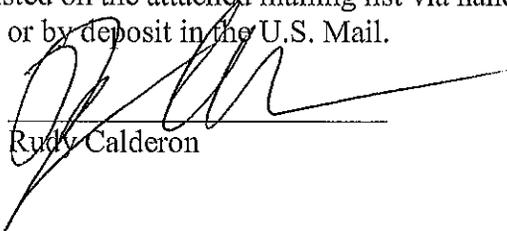


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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 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.



Rudy Calderon

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TCEQ DOCKET NO. 2016-0469-WR

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