

TCEQ DOCKET NO. 2023-0617-WR

APPLICATION BY	§	BEFORE THE TEXAS
THE CITY OF LUBBOCK FOR	§	COMMISSION ON
WATER USE PERMIT NO. 5921	§	ENVIRONMENTAL QUALITY
	§	

RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING

TO THE HONORABLE COMMISSIONERS:

The City of Lubbock (the “City” or the “Applicant”) submits this response to requests made to the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”) for a contested case hearing on the above-referenced application and would respectfully show the TCEQ Commissioners the following:

I. BACKGROUND

The City applied to TCEQ for a water use permit to construct and maintain a proposed dam and reservoir known as Jim Bertam Lake 7 (“Lake 7”) with a maximum storage capacity of 20,708 acre-feet of water and an approximate surface area of 801 acres on the North Fork Double Mountain Fork Brazos River in the Brazos River Basin (the “Application”). Lake 7 will be located in Lubbock and Lynn Counties, Texas. The Application requests authorization to divert and use not to exceed 50,000 acre-feet of water per year from Lake 7 at a maximum diversion rate of 138.12 cubic feet per second (62,016 gallons per minute) for municipal, industrial, and agricultural purposes. Applicant requests authorization to use the water within its service area in Lubbock and Lynn Counties in the Brazos River Basin. Applicant also seeks authorization to use the bed and banks of the North Fork Double Mountain Fork Brazos River, Brazos River Basin to convey up to 40,030 acre-feet of water per year to support storage in and diversions from Lake 7. Additionally, Applicant seeks authorization to use water authorized under Water Permit Nos. 3985, as amended and 3705, as amended to support storage in and diversion from Lake 7.

II. PROCEDURAL HISTORY

On October 17, 2005, the City filed the Application with TCEQ. The Application was declared administratively complete and filed with the Office of the Chief Clerk (the “Chief Clerk”) on April 17, 2006. Mailed notice was issued on July 7, 2006, and notice of the application was published in the *Lubbock Avalanche Journal* on July 28, 2006. The comment and hearing request period ended on August 28, 2006. A number of hearing requests were filed, as discussed below.

The City provided additional information on the Application to TCEQ on several occasions during the administrative and technical review of the Application. This

additional information included, among other things, technical memoranda related to the proposed dam locations, elevation-area-capacity curve, estimates of future return flows, and an amendment to the Application to remove the proposed Lake 8 and associated dam. The City submitted an accounting plan for the Application to TCEQ on August 15, 2016, which was revised several times. The final accounting plan was submitted to TCEQ on February 2, 2021. The Executive Director completed technical review and prepared a draft permit on November 15, 2021. On May 11, 2023, TCEQ staff filed draft Water Use Permit 5921 (the “Draft Permit”) with the Chief Clerk along with a request for a docket number.

On August 18, 2023, TCEQ staff requested consideration of the Application at the Commissioners’ Agenda Meeting, and the City subsequently received notice that the Application will be considered at the Commissioners’ Agenda Meeting scheduled for September 27, 2023. The City submits this response to requests made to TCEQ for a contested case hearing on the Application pursuant to Title 30, Section 55.254 of the Texas Administrative Code.

III. DETERMINATION OF AFFECTED PERSONS

Under TCEQ’s rules, only the TCEQ Commissioners, the TCEQ Executive Director, the Applicant, and/or affected persons may request a contested case hearing.¹ 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.”² “An interest common to members of the general public does not qualify as a personal justiciable interest.”³ Accordingly, a request for a contested case hearing must include a brief, but specific, description of the requestor’s location and distance relative to the activity that is the subject of the Application.⁴ In addition, the requestor must do more than provide a conclusory statement in the request that he or she will be harmed by the proposed change. The requestor must describe how and why he or she will be affected by the change proposed in the Application.⁵ Persons claiming to be affected persons must also submit their hearing requests in writing to the Chief Clerk within the period specified in the notice. Thus, all timely hearing requests must have been received by the Chief Clerk by August 28, 2006.

When determining whether an individual or entity is an affected person, all relevant factors are considered by the Commission, including: “(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

¹ 30 Tex. Admin. Code § 55.251(a).

² *Id.* § 55.256(a).

³ *Id.*

⁴ *Id.* § 55.251(c)(2).

⁵ *Id.*

natural resource by the person; (6) whether the requestor timely submitted comments on the application that were not withdrawn; and (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.”⁶

The Legislature has given TCEQ the authority to follow and consider only limited procedures and criteria in reviewing a water rights application.⁷ For instance, TCEQ has jurisdiction to consider “public interest” and “public welfare” in water rights permitting.⁸ But “where the Legislature intends for the TCEQ . . . to evaluate a particular factor in considering the public interest, it says so.”⁹ An individual whose purportedly affected interests do not relate to issues governed by Chapter 11 of the Texas Water Code cannot be an affected person as a matter of law.

When determining whether a group or association has affected entity status, all of the following requirements must be met in addition to the requirements discussed above: (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.¹⁰

Under TCEQ rules, a person who filed a hearing request may submit a reply to the following responses no later than nine days before the TCEQ Commissioners’ Agenda Meeting to consider the hearing requests.¹¹ Section 55.254(f) provides that such reply may contain additional information responsive to the information contained in the correspondence issued by the Chief Clerk pursuant to Section 55.254(d). Thus, a reasonable interpretation of Section 55.254(f) in the context of Section 55.251(d) is that subsection (f) provides requestors with the opportunity to round-out, or clarify, the information originally contained in their timely filed requests. Subsection (d) precludes the requestors from incorporating newly articulated impacts attributable to the Application into their hearing requests.

IV. EVALUATION OF HEARING REQUESTS FOR WATER USE PERMIT NO. 5921

A. Withdrawn Hearing Requests.

The following hearing requestors have formally withdrawn their hearing requests from consideration by TCEQ:

⁶ *Id.* § 55.256(c).

⁷ Tex. Water Code §§ 11.132, 11.134.

⁸ *Id.* §§ 5.276, 11.134(b).

⁹ *R.R. Comm’n of Texas v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 629 (Tex. 2011).

¹⁰ 30 Tex. Admin. Code § 55.252(a).

¹¹ *Id.* § 55.254(f).

1. Brazos River Authority¹²
2. Dow Chemical Company
3. William and Lisa Carmony¹³
4. Amber Forrest Davis (on behalf of Lynn Forrest)
5. Terry Crofoot

Accordingly, the City will not address the substantive contents of these withdrawn requests in this response.

B. Individual Hearing Requestors Not Withdrawn.

1. Clark Wood

George H. Nelson, on behalf of Clark Wood, submitted one request for a contested case hearing. It was received by the Chief Clerk on August 21, 2006.

In the request, Mr. Wood raised general concerns regarding impacts to his water right, Certificate of Adjudication No. 12-3709. Mr. Wood fails to recognize that the authorization to divert and use state water in the Draft Permit, if granted, would be subject to superior and senior water rights, like Mr. Wood's water right. Consequently, the City would be required to comply with the terms of its permit so as to not impact Mr. Wood's water right. Further, it is unclear whether his concerns are related to Lake 7 or Lake 8, which is no longer requested in the Application. He also attached his hearing request for a separate application by the City, which is not relevant to the Application. For these reasons, Mr. Wood's request should be denied.

2. Janes Gravel Company

Paul M. Terrill, on behalf of Janes Gravel Company ("JGC") submitted one request for a contested case hearing. It was received by the Chief Clerk on August 21, 2006.

In its request, JGC described its concerns about the potential economic impacts the Application may have on its business. JGC also claims that the Application could impact its water rights; however, JGC fails to recognize that its water rights will be protected under the Draft Permit as the City's water right for Lake 7 would be junior to any rights held by JGC. JGC does not provide any basis to support its claim that the Application could reduce the water available or interfere with use of its water right. Because this request does not identify a personal justiciable interest affected by the Application, this requestor is not an affected person based on the relevant factors for determining affected person status, including those enumerated in Title 30, Section 55.256 of the Texas Administrative Code.

¹² The Brazos River Authority ("BRA") conditionally withdrew its hearing request on June 17, 2009. The City is currently working with BRA to submit an unconditional withdrawal of its hearing request.

¹³ Although only William Carmony submitted a withdrawal of hearing request, it is the City's understanding that such withdrawal also applied to Lisa Carmony.

Therefore, JGC's hearing request should not be granted.

3. John and Marianne Loveless

John and Marianne Loveless (the "Lovelesses") submitted one request for a contested case hearing. It was received by the Chief Clerk on August 23, 2006.

The Lovelesses' request raised concerns related to Lake 8 and the associated dam, which is no longer part of the requests made in the Application. Their concerns are not relevant to Lake 7 and the associated dam, or the Application. In the request, the Lovelesses shared general concerns that their property could be inundated by Lake 8. The City is not requesting authorization for Lake 8, and the Lovelesses' property will not be inundated. The Lovelesses are not located within the footprint of Lake 7. The Lovelesses also noted that they are concerned regarding the consideration of impacts to people, crops, and wildlife.

TCEQ does not have jurisdiction to adjudicate disputes between parties to a water rights permitting hearing relating to inundation of private property. The Legislature has expressly recognized that remedies and damages arising from overflow of water onto private property from an impoundment must be brought before courts of law or equity.¹⁴ Thus, the issue of property inundation raised in the request falls outside the scope of TCEQ's review of the Application and is otherwise beyond the jurisdiction of the agency to adjudicate. Moreover, the Application will not inundate any property owned by the Lovelesses.

The Lovelesses have not identified any water right or vested riparian right that they own and that they are concerned will be affected by the requests made in the Application, if granted. Moreover, none of the issues identified in the Lovelesses' hearing request reflect any anticipated impacts to what would qualify as personal justiciable interest.

Although the Lovelesses stated concerns regarding potential impacts to wildlife, the Lovelesses failed to describe in their hearing request how and why they believe they will be affected in a manner not common to the members of the general public. Because the Lovelesses' request does not identify any personal justiciable interest affected by the Application, the Lovelesses are not affected persons using relevant factors for determining affected person status, including those enumerated in Title 30, Section 55.256 of the Texas Administrative Code.

Therefore, the hearing request submitted by the Lovelesses should not be granted.

¹⁴ Tex. Water Code § 11.086.

4. John O. Long, Michael Damron, and Justin Damron

Kerry Haliburton, on behalf of John O. Long, Michael Damron, and Justin Damron (the “Protestants”) submitted one request for a contested case hearing.¹⁵ It was received by the Chief Clerk on August 24, 2006.

The Protestants’ request raised concerns related to the no longer proposed Lake 8 and associated dam. None of their concerns are relevant to Lake 7 and its associated dam. In their request, the Protestants raise concerns regarding Lake 8’s impacts to water availability, flooding, and domestic and livestock use. The Protestants are also not located within the footprint of Lake 7.

Protestants have not provided evidence of any water right or vested riparian right that they own and that they are concerned will be affected by the requests made in the Application, if granted. They also failed to include an adequate property description relative to the Application. Further, Protestants failed to describe in their hearing request how and why they believe they will be affected in a manner not common to the members of the general public. Because their request fails to identify any personal justiciable interest affected by the Application, the Protestants are not affected persons using relevant factors for determining affected person status, including those enumerated in Title 30, Section 55.256 of the Texas Administrative Code.

Therefore, John O. Long’s, Michael Damron’s, and Justin Damron’s request for a contested case hearing should not be granted.

C. Organizational/Governmental Entity Hearing Requestor Not Withdrawn.

1. Garza County, Kent County, and Garza/Kent Brazos River Landowners Coalition

James P. Allison, on behalf of Garza County, Kent County, and Garza/Kent Brazos River Landowners Coalition, submitted one contested case hearing request. It was received by the Chief Clerk on August 28, 2006.

a. Garza County and Kent County, (collectively, the “Counties”)

In the request, the Counties expressed concerns about the impact of the Application on the Counties’ tax base, roads, and transportation infrastructure. The Counties also raised concerns regarding Brazos River water flows. The Application is not located within Garza County or Kent County.

To determine that a government entity is an affected person, the entity must have statutory authority or interest in the issues relevant to the Application. Under Title 30,

¹⁵ This request was also submitted on behalf of Terry Crofoot and Lynn Forrest who withdrew their hearing requests as noted above.

Section 55.256 of the Texas Administrative Code, a governmental entity, including local governments, may be considered affected persons only when the entity has authority under state law over issues contemplated by the application. The Application was filed, and is being considered by TCEQ, under Chapter 11 of the Texas Water Code and Chapters 295 and 297 of TCEQ rules. No provision of state statutory law relevant to the Application relates to the interests or jurisdiction of the Counties.

The Counties derive their authority from Article 9 of the Texas Constitution. The provisions of the Texas Constitution do not give the Counties jurisdiction over, or are relevant, to applications for the use of state water. The Counties failed to establish authority over issues contemplated by the Application and raised concerns that are not related to interests protected under the law the Application is being considered. In addition, the Application does not fall within Garza County or Kent County. Therefore, the Counties cannot be considered affected persons under the applicable TCEQ rules.

In addition, the acquisition, relocation, or impacts to the Counties' property, specifically County roads, is not an interest that falls within the jurisdiction of TCEQ. Under the applicable law, TCEQ regulates the construction of dams, the impoundment and storage of water in on-channel reservoirs, and the diversion, transfer, and beneficial use of state water. Any inundation of real or personal property of entities is remedied through judicial courts. Thus, the Counties' general concerns related to inundation and private property are not an interest within TCEQ's jurisdiction and cannot be the basis for denial of the Application. To the extent the County has interests related to the requests made in the Application, those interests do not fall within the scope of TCEQ's review of the Application and are not otherwise within the jurisdiction of TCEQ to adjudicate.

Further, the Counties have not asserted that they have any ownership or other interest in state surface water resources in the Brazos River Basin. The concerns expressed by the Counties do not demonstrate a personal justiciable interest that is distinguishable from interests common to members of the general public.

b. Garza/Kent Brazos River Landowners Coalition (the "Coalition")

In the request, the Coalition expressed concerns about the Application's potential impacts to the flows of the Brazos River, ranching, and "other economic activities." For the Coalition to have associational standing to request a contested case hearing, Section 55.252(a) requires it to be comprised of members that otherwise have standing on their own right to request such a hearing. The Coalition failed to identify in its hearing request any member of the Coalition that has standing on his/her own right to request a hearing on the Application.

Because it has not been demonstrated that any member of the Coalition would otherwise have standing to request a hearing on the Application on his/her own right, the organization has no standing under Title 30, Section 55.252(a)(1) of the Texas Administrative Code to request a hearing.

The Coalition must also demonstrate the requisite standing to make its hearing request and that neither the claim it asserts, nor the relief it requests, requires the participation of individual members in the case to satisfy TCEQ's hearing request requirements. However, the Coalition has made no such demonstration. Because the Coalition is unable to demonstrate that neither the claim it asserts, nor the relief it seeks, requires the participation of any individual members it may have, it has no standing under Title 30, Section 55.252(a)(3) of the Texas Administrative Code to request a hearing on the Application. The request failed to provide any explanation regarding how or why the organization takes the position the Application affects its or its members' interests in a manner not common to members of the general public.

The Coalition's request does not include any statement or an explanation of why it believes it will be impacted by the Application in a manner distinct from interests common to members of the general public. The Coalition raised a generic concern regarding the Application affecting Brazos River flows, but such concern is common to members of the general public. The issues identified by the Coalition do not reflect any anticipated impact to a personal judiciable interest. Instead, as the Coalition has described them, its concerns are related exclusively to interests common to members of the general public.

Further, the Coalition has not identified any water right or vested riparian right that it is concerned may be affected by the requests made in the Application, if approved. Because this request does not identify any personal judiciable interest affected by the Application, the Coalition is not an affected association using relevant factors for determining affected association and affected person status, including those enumerated in Title 30, Sections 55.252 and 55.256 of the Texas Administrative Code. Notwithstanding the technical shortcomings of the request, the Coalition's concern regarding "other economic activities" is not within the scope of TCEQ's review of the Application.

Finally, neither the Counties nor the Coalition state whether their concerns are related to Lake 7 or Lake 8, and such concerns are not relevant if related to the no longer requested Lake 8. Accordingly, Garza County's, Kent County's, and Garza/Kent Brazos River Landowners Coalition's hearing request should be denied.

V. CONCLUSION

Following a careful and thorough review of all hearing requests received by the Chief Clerk, the City believes that the responses provided above recommend the correct course of action for TCEQ to take with respect to each hearing request identified pursuant to state statutes and regulations. For the foregoing reasons, the City respectfully recommends that TCEQ denies the hearing requests submitted on the Application.

Respectfully submitted,

**LLOYD GOSSELINK ROCHELLE &
TOWNSEND, P.C.**

816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5800 (telephone)
(512) 874-3955 (facsimile)

By: _____



SARA THORNTON
State Bar No. 24066192
JESSIE SPEARS
State Bar No. 24121839

**ATTORNEYS FOR APPLICANT
CITY OF LUBBOCK, TEXAS**

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response to Requests for Contested Case Hearing was sent by hand delivery, United States Postal Service (“USPS”), or electronic mail to the individuals identified below on this, the 31st day of August 2023.



Sara Thornton

FOR THE EXECUTIVE DIRECTOR:

Ruth Takeda, Staff Attorney
Texas Commission on Environmental
Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
ruth.takeda@tceq.texas.gov

Sarah Henderson, Technical Staff
Texas Commission on Environmental
Quality
Water Availability Division, MC-160
P.O. Box 13087
Austin, Texas 78711
Tel: (512) 239-2535
sarah.henderson@tceq.texas.gov

Ryan Vise, Deputy Director
Texas Commission on Environmental
Quality
External Relations Division
Public Education Program, MC-108
P.O. Box 13087
Austin, Texas 78711
Tel: (512) 239-4000
pep@tceq.texas.gov

REQUESTORS/INTERESTED PERSONS

VIA USPS, CERTIFIED MAIL RRR:

See attached list.

FOR ALTERNATIVE DISPUTE RESOLUTION:

Kyle Lucas
Texas Commission on Environmental
Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087 Austin, Texas 78711
Tel: (512) 239-0687
kyle.lucas@tceq.texas.gov

FOR THE CHIEF CLERK:

Docket Clerk
Texas Commission on Environmental
Quality
Office of Chief Clerk, MC-105
P.O. Box 13087 Austin, Texas 78711
Tel: (512) 239-3300
<https://www14.tceq.texas.gov/epic/eFiling/>

FOR PUBLIC INTEREST COUNSEL:

Garrett T. Arthur
Texas Commission on Environmental
Quality
Public Interest Counsel, MC-103
P.O. Box 13087 Austin, Texas 78711
Garrett.arthur@tceq.texas.gov

ALLISON , JAMES P
ALLISON BASS & MAGEE LLP
402 W 12TH ST
AUSTIN TX 78701-1817

CARMONY , LISA & WILLIAM R
11609 PRIVATE ROAD 3530
SLATON TX 79364-7961

CARMONY , WILLIAM R
11609 PRIVATE ROAD 3530
SLATON TX 79364-7961

CARROOM , DOUGLAS G
BICKERSTAFF HEATH DELGADO ACOSTA LLP
BLDG 1 STE 300
3711 S MOPAC EXPY
AUSTIN TX 78746-8013

CLANCY , LYN E
LCRA
H429
PO BOX 220
AUSTIN TX 78767-0220

CROFOOT , TERRY
PO BOX 53188
LUBBOCK TX 79453-3188

FORREST DAVIS , AMBER
12019 E COUNTY ROAD 7300
SLATON TX 79364-7959

GRAF , DON
PO BOX 6170
LUBBOCK TX 79493-6170

HALIBURTON , KERRY ATTORNEY
NAMAN HOWELL SMITH & LEE
PO BOX 1470
WACO TX 76703-1470

LIGON , KATHLEEN
TEXAS WATER DEVELOPMENT BOARD
PO BOX 13231
AUSTIN TX 78711-3231

LOVELESS , JOHN & MARIANNE
7106 32ND ST
LUBBOCK TX 79407-2706

MCCLENDON, MICHAEL
BRAZOS RIVER AUTHORITY
4600 COBB DR
WACO TX 76710

MORENO, MR CARLOS J
THE DOW CHEMICAL COMPANY
APB BLDG 4A016
322 HIGHWAY 322 E
LAKE JACKSON TX 77566-5044

MORTON , STEVE
MOLTZ MORTON O'TOOLE LLC
2801 VIA FORTUNA STE 350 AUSTIN
TX 78746-7596

MORTON, STEVE
MOLTZ MORTON O'TOOLE LLC
5113 SOUTHWEST PKWY STE 120
AUSTIN TX 78735-8969

NELSON, GEORGE H
1501 AVENUE K
LUBBOCK TX 79401-5039

TERRILL III, PAUL M
TERRILL & WALDROP
810 W 10TH ST
AUSTIN TX 78701-2005