

TCEQ DOCKET NO. 2023-0617-WR

APPLICATION NO. 5921 BY THE	§	BEFORE THE TEXAS
CITY OF LUBBOCK TO OBTAIN	§	
A WATER USE PERMIT IN	§	COMMISSION ON
LUBBOCK AND LYNN	§	
COUNTIES, TEXAS	§	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 the hearing requests filed regarding Application No. 5921 by the City of Lubbock (Applicant) to obtain a water use permit in Lubbock and Lynn Counties which includes authorization to construct and maintain a reservoir in the Brazos River Basin. Eleven timely hearing requests were received from:

1. Brazos River Authority - represented by Douglas G. Caroom, Esq.
2. William (Bill) R. Carmony and Lisa Carmony
3. Terry Crofoot - represented by Kerry L. Haliburton, Esq.
4. Justin Damron and Michael Damron - represented by Kerry L. Haliburton, Esq.
5. The Dow Chemical Company - represented by Steve Morton, Esq.
6. Lynn Forrest - represented by Kerry L. Haliburton, Esq.
7. Garza County, Kent County, and the Garza/Kent Brazos River Landowners’ Coalition - represented by James P. Allison, Esq.
8. John O. Long - represented by Kerry L. Haliburton, Esq.
9. John Loveless and Marianne Loveless
10. R.E. Janes Gravel Co. - represented by Paul M. Terrill III, Esq.
11. Clark Wood, Jr. - represented by George H. Nelson, Esq.

No untimely requests were received.

The Executive Director recommends granting the application and has prepared a draft permit, with special conditions and an accounting plan the Executive Director has reviewed and approved.

Staff has prepared a map, attached as Attachment A, showing the Applicant’s proposed water right location. The locations of all requestors are indicated on the map. Those requestors holding water rights are mapped according to the water right location.

I. BACKGROUND

The Applicant seeks authorization to construct a dam (proposed Dam 7) and maintain a reservoir (Jim Bertram Lake 7) with a capacity of 20,708 acre-feet of water on the North Fork Double Mountain Fork Brazos River, Brazos River Basin, in Lubbock County. The Applicant also seeks authorization to divert and use up to 50,000 acre-feet of water per year from the reservoir perimeter, at a diversion rate of 138.12 cubic feet per second (62,016 gallons per minute), for municipal, industrial, and agricultural purposes in Lubbock and Lynn Counties. The Applicant also seeks authorization to use

the bed and banks of the North Fork Double Mountain Fork Brazos River to convey up to 14,856 acre-feet of water per year discharged from the South Central Lubbock Drainage System; up to 8,934 acre-feet of water per year discharged from the South Lubbock Drainage System; and up to 16,240 acre-feet of return flows per year discharged from the Southeast Water Reclamation Plant as authorized under TPDES Permit No. WQ00010353002. Water conveyed via the requested bed and banks authorization will support storage in and diversions from the reservoir. The Applicant also seeks authorization to use water authorized under Water Use Permit Nos. 3985 and 3705, as amended, to support storage in and diversions from the reservoir.

II. PROCEDURAL HISTORY

The Commission received this application on October 17, 2005. The application was declared administratively complete on April 17, 2006. Notice of the application was mailed by the Commission's Chief Clerk on July 7, 2006, to water right holders of record in the Brazos River Basin. Notice of the application was published in The Lubbock Avalanche Journal on July 28, 2006. At that time, notice was provided prior to completion of technical review. Effective December 31, 2009, the applicable rule¹ was amended to require notice after completion of technical review. The hearing request period closed on August 28, 2006. The application was amended in 2008 but was not re-noticed because the requested amount of state water was reduced.

The application originally requested authorizations for two dams - proposed Dam 7 and Dam 8 - and their resulting reservoirs. By letter dated March 4, 2008, the Applicant withdrew a portion of the application relating to Dam 8 and its reservoir and indicated that it still requested authorizations for proposed Dam 7 and its reservoir.

By letter dated July 28, 2008, the Applicant amended its application to reduce the number of discharge points to three, including two storm drainage systems.

Technical review was completed on November 10, 2021, and included review of an accounting plan the Applicant submitted. The Executive Director found that the accounting plan was adequate to demonstrate compliance with the draft permit.

III. LEGAL AUTHORITY

Pursuant to 30 Tex. Admin. Code § 55.251(a), the following may request a contested case hearing on water rights applications: the Commission, the Executive Director, the applicant, and affected persons when authorized by law.

Affected persons are authorized to submit hearing requests for water rights applications under Tex. Water Code § 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 Tex. Admin. Code §§ 55.250-55.256, which apply to water rights applications such as this one that were declared administratively complete after September 1, 1999.

¹ 30 Tex. Admin. Code Sec. 295.151, *see also* 34 Tex. Reg. 9454.

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. *Id.*

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). *See* 30 Tex. Admin. Code § 55.103.

To determine whether a hearing requestor is an affected person, all relevant factors must be considered. 30 Tex. § 55.256(c). 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.

A hearing request by a group or association must meet the requirements set forth in 30 Tex. Admin. Code § 55.252(a). There are three requirements. First, at least one member of the group or association would have standing to request a hearing in his or her own right. Second, the interests that the group or association seeks to protect must be germane to its purpose. Third, neither the claim asserted nor the relief requested by the group or association requires participation of the individual member(s) in the case.

A hearing request must substantially comply with the four requirements set forth in 30 Tex. Admin. Code § 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 within the time period specified in the notice. 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 Tex. Admin. Code § 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 REQUESTS AND RECOMMENDATION

Eleven hearing requests, some from more than one individual joining together, were filed prior to the closing of the hearing request period on August 28, 2006. No untimely requests were received.

The following requests have been withdrawn and will not be discussed further: The Dow Chemical Company; William (Bill) Carmony; Terry Crofoot; Lynn Forrest.

The Executive Director recommends granting the following requests: Brazos River Authority; R.E. Janes Gravel; Clark Wood, Jr.; John O. Long. The Executive Director recommends denying all other requests.

REQUESTORS HOLDING PERMITS OR CERTIFICATES OF ADJUDICATION

1. Brazos River Authority (BRA) – represented by Douglas Caroom, Esq.

BRA states that it holds several water rights (Possum Kingdom Lake, Lake Granbury, Lake Whitney, Lake Aquila, Lake Proctor, Lake Belton, Lake Stillhouse Hollow, Lake Georgetown, Lake Granger, Lake Somerville, Lake Limestone, Lake Alan Henry, and proposed Allens Creek Reservoir) in the basin and that one or more of those rights may be impaired if the application is granted.

BRA has indicated that it will withdraw its hearing request contingent upon its review of the final draft permit prepared by the Executive Director to determine that the permit is consistent with the Interlocal Agreement between BRA and the Applicant effective May 14, 2009.

The request substantially complies with 30 Tex. Admin. Code § 55.251. BRA's identified water rights are located downstream of the Applicant's proposed Dam 7. The Executive Director recommends granting the request.

2. R.E. Janes Gravel (Janes Gravel) – represented by Paul Terrill, Esq.

Janes Gravel states that it holds water rights in the basin and indicates that if the application is granted, its water right will be impaired.

Janes Gravel holds Certificate of Adjudication No. 12-3710, which has a diversion point on the North Fork of the Double Mountain Fork.

The request substantially complies with 30 Tex. Admin. Code § 55.251. Janes

Gravel's identified water right is located downstream of the Applicant's proposed Dam 7. The Executive Director recommends granting the request.

3. Clark Wood, Jr. - represented by George Nelson, Esq.

Mr. Wood is an owner of Certificate of Adjudication No. 12-3709. The water rights referenced in the hearing request (2376 and 2376A, App. 2601 and 2601A, Claim Number 1640) relate to the same water right - Certificate of Adjudication No. 12-3709.

The request substantially complies with 30 Tex. Admin. Code § 55.251. Mr. Wood's water right is located downstream of the Applicant's proposed Dam 7. The Executive Director recommends granting the request.

REQUESTORS - PROPERTY OWNERS - GRANT

4. John O. Long - represented by Kerry L. Haliburton

Mr. Long states that he owns property located on each side of the Double Mountain Fork, between Lake Ransom Canyon and proposed dam number 8, approximately 1.5 miles from proposed dam number 8.

Mr. Long does not hold a water rights permit or certificate of adjudication, but his property is riparian to the watercourse and he indicates that historically he has used the water in the river for domestic and livestock use.

The Applicant no longer seeks authorization for Dam 8.

Domestic and livestock users can claim an interest protected in a water rights application. Though Dam 8 is no longer proposed and Mr. Long based his request on Dam 8, the Executive Director recommends that his request be granted based on his asserted domestic and livestock use downstream of proposed Dam 7.

5. Michael and Justin Damron - represented by Kerry L. Haliburton

The Damrons state that they own property on each side of the Double Mountain Fork, between Lake Ransom Canyon and proposed dam number 8, approximately one-half mile from proposed dam number 8.

The Damrons do not hold a water right but indicate that historically they have used the water in the river for domestic and livestock use.

The Applicant no longer seeks authorization for Dam 8.

Domestic and livestock users can claim an interest protected in a water rights application. Though Dam 8 is no longer proposed and the Damrons based their request on Dam 8, the Executive Director recommends that their request be granted because they assert domestic and livestock downstream of proposed Dam 7.

REQUESTORS - PROPERTY OWNERS - DENY

6. Lisa Carmony

Ms. Carmony filed a request on behalf of herself and William (Bill) Carmony. Mr. Carmony has withdrawn his request.

Ms. Carmony states she lives off County Road 7300, located in Yellow House Canyon. She is concerned about her home and access to it once the dam is built.

She does not hold a water right. The program map indicates that her property will not be inundated and is not riparian to the downstream watercourse.

The Executive Director recommends denying Ms. Carmony's request because she had not identified a personal justiciable interest in this application as amended.

7. John and Marianne Loveless

The Lovelesses state that their land will be partially lost to dam #8 and partially inundated by the reservoir.

The Lovelesses do not hold a water rights permit or certificate of adjudication. Though their property is riparian to the watercourse, they do not indicate that they have used water in the river for domestic or livestock use.

The Applicant no longer seeks authorization for Dam 8.

The Executive Director recommends that this request be denied because Dam 8 is no longer proposed and the requestors do not identify a personal justiciable interest in this application as amended.

GOVERNMENTAL ENTITY REQUESTORS/ GROUP OR ASSOCIATION REQUESTOR

8. Garza County, Kent County, and the Garza/Kent Brazos River Landowners Coalition (Joint Protestants) – represented by James Allison, Esq.

Joint Protestants state as follows:

Garza County and Kent County seek to protect the interest of their citizens and their respective counties as a whole. Both counties state that they are responsible for providing and protecting the water supply for their respective citizens; that they maintain county roads and transportation infrastructure which will be affected by the Applicant's project; that the Applicant's project will affect the value of taxable property for ad valorem property taxes; that they are responsible for economic development with county boundaries. They are concerned that the Applicant's project will affect Brazos River flows within their respective counties.

The Garza/Kent Brazos River Landowners Coalition is an association of property owners, many of whom own property adjacent to the Brazos River and who rely upon water from the Brazos River for their ranching and other economic activities. They are concerned that the Applicant's project will affect Brazos River flows by their properties.

None of the Joint Protestants indicate that they hold a water rights permit or certificate of adjudication.

Though the request substantially complies with the procedural requirements in 30 Tex. Admin. Code § 55.251, the Executive Director recommends that the Joint Protestants' requests be denied because the requests do not demonstrate that the Joint Protestants are affected persons.

First, when analyzed under 30 Tex. Admin. Code § 55.256(c)(6), the Executive Director concludes that neither County has established that it has statutory authority over or interest in state water permitting, nor has either County claimed interests protected by the law under which this application will be considered. The Executive Director recommends that their requests be denied.

Second, a hearing request by a group or association must meet the three requirements set forth in 30 Tex. Admin. Code § 55.252(a). The Garza/ Kent Brazos River Landowners Coalition's request does not meet those requirements because it failed to identify at least one member who would have standing to request a hearing in his or her own right; its purpose is not identified; and it is unclear what claim is asserted or what relief is requested, therefore whether participation of individual member(s) is required is also unclear. The Executive Director recommends that the Brazos River Landowners Coalition request be denied.

V. CONCLUSION

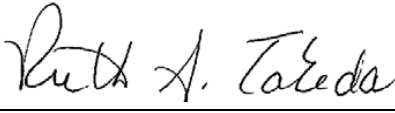
The Executive Director respectfully recommends that the Commission grant the hearing requests of Brazos River Authority; R.E. Janes Gravel; Clark Wood, Jr.; and John O. Long. The Executive Director recommends denying all other requests.

Respectfully submitted,

Kelly Keel Linden
Interim Executive Director

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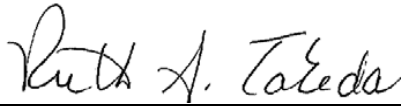
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CERTIFICATE OF SERVICE

I certify that on the 1st day of September 2023, the foregoing *Executive Director's Response to Hearing Requests* was filed electronically with the Chief Clerk of the Texas Commission on Environmental Quality in Austin, Texas, and that a true and correct copy was delivered as indicated to the persons on the attached Mailing List.



Ruth Ann Takeda, Staff Attorney
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TCEQ Docket No. 2023-0617-WR

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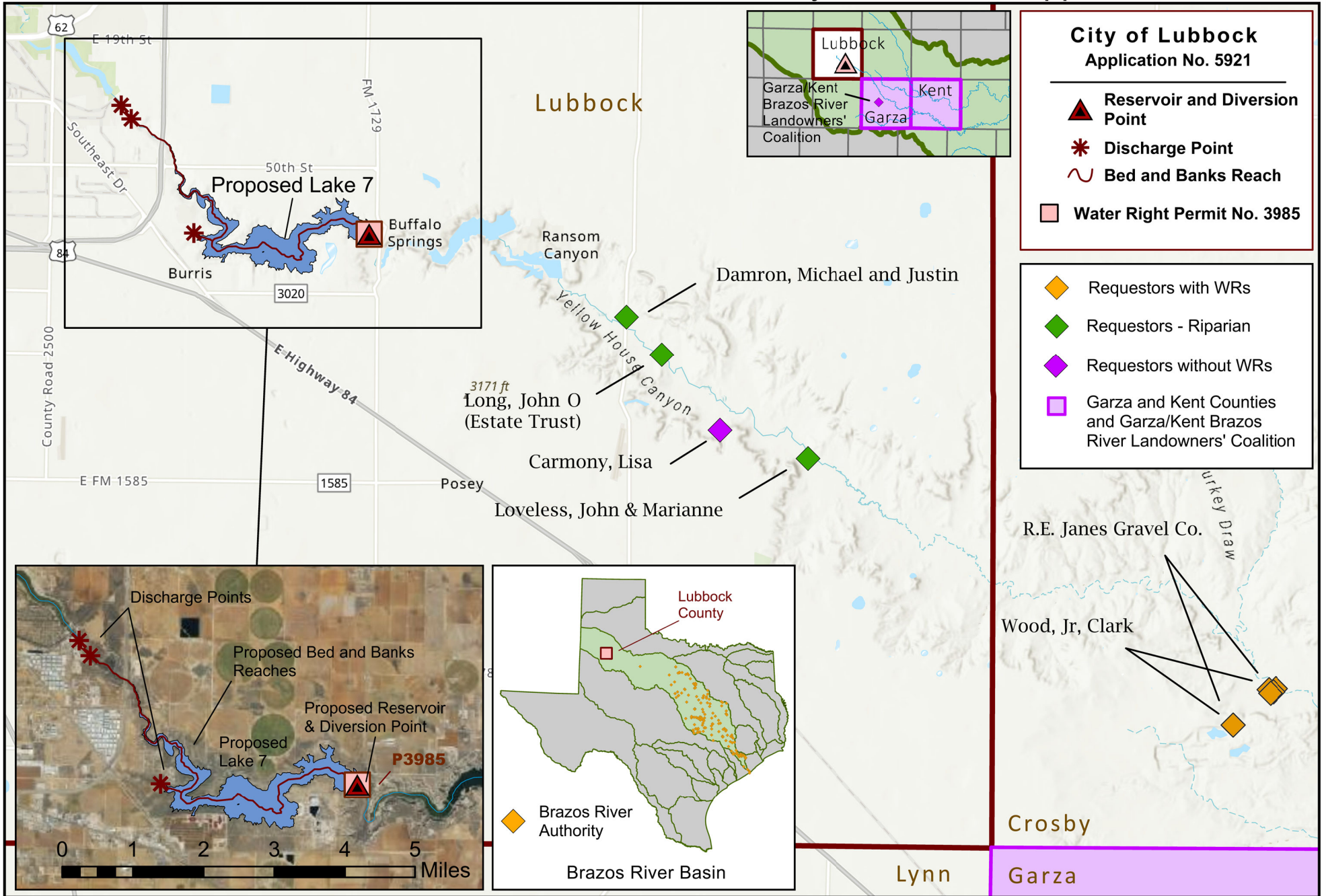
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Attachment A



This map was generated by the Water Availability Division of the Texas Commission on Environmental Quality. This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries. For more information concerning this map, contact the Water Availability Division at (512)239-4600.

