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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 1, 2023

Laurie Gharis, 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 Lubbock (Applicant)**
TCEQ Docket No. 2023-0617-WR

Dear Ms. Gharis:

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 cursive script that reads "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2023-0617-WR

APPLICATION BY CITY OF LUBBOCK FOR WATER RIGHTS PERMIT NO. WRPERM 5921 § **BEFORE THE TEXAS COMMISSION ON 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 hearing requests of Justin Damron, Michael Damron, Garza County, Janes Gravel, Kent County, John Long, John and Marianne Loveless, and Clark Wood. OPIC further recommends the Commission deny the hearing requests of Lisa Carmony and the Garza/Kent Brazos River Landowners' Coalition.

In support of its recommendation, OPIC respectfully submits the following:

I. INTRODUCTION

The City of Lubbock ("Applicant" or "City") has applied for a Water Use Permit to construct two dams and reservoirs on the North Fork Double Mountain Fork Brazos River, to divert and use water from those reservoirs, and to use the bed and banks of the North Fork Double Mountain Fork Brazos River,

including certain specified tributaries, for the conveyance of water sought for diversion for municipal, industrial, and agricultural purposes in Lubbock and Lynn Counties.

Applicant seeks to divert and use water impounded in these reservoirs in an amount not to exceed 50,000 acre-feet of water per year, collectively, from the perimeter of the reservoir created by Dam No. 7 at a maximum diversion rate of 7.20 cubic feet per second (cfs) (3,230 gallons per minute (gpm)) and from the perimeter of the reservoir created by Dam No. 8 at a maximum diversion rate of 44.56 cfs (20,000 gpm). Water requested by the application is based upon a recognition of rights related to: i) Applicant's claim to developed water-based stormwater discharges from its storm sewer system to the North Fork Double Mountain Fork Brazos River and its tributaries; ii) unappropriated state water; iii) future surface water-based return flows and developed water-based return flows resulting from the Applicant's use of groundwater and its use of other developed waters, excluding return flows previously sought pursuant to concurrent Application Nos. 12-3705B and 3985A; and iv) any and all wastewater return flows that are discharged upstream of the proposed reservoirs by third parties for the uses stated above.

The application and partial fees were received on October 17, 2005. Additional information and fees were received on January 31, March 24, and April 13, 2006. The application was declared administratively complete and

filed with the Office of the Chief Clerk on April 17, 2006.

The TCEQ Executive Director (ED) has completed the technical review of the application and prepared a draft amendment. On July 7, 2006, the TCEQ Chief Clerk mailed notice to all water rights holders of record in the Brazos River Basin.¹ Applicant published its Notice of an Application for a Water Use Permit on July 28, 2006, in the *Lubbock Avalanche Journal*. The deadline to request a contested case hearing was August 28, 2006, thirty days after publication of the notice.² As discussed below, the Commission received requests from eighteen individuals, groups, or governmental entities for a contested case hearing, seven of whom subsequently withdrew their requests.

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.³ In addition, the request must identify the

¹ 30 TEX. ADMIN. CODE (TAC) § 295.151.

² 30 TEX. ADMIN. CODE (TAC) § 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 filed with the chief clerk within the time period specified in the notice. The chief clerk shall accept a hearing request...that is filed after the deadline but the chief clerk shall not process it.

³ 30 TAC §§ 55.251 *et seq.* and 30 TAC § 295.171.

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."⁴

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.⁵

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.⁶

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

⁴ 30 TAC § 55.251(c)(2).

⁵ 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).

⁶ 30 TAC § 55.256(c).

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.⁷ In addition, governmental entities with authority under state law over issues contemplated by the application may be considered affected persons.⁸

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.⁹ The Commission may also refer an application to the State Office of Administrative Hearings (SOAH) if the Commission determines that a hearing would be in the public interest.¹⁰

B. Requirements for a Water Use Permit

No person may appropriate any state water or begin construction of any work designed for the storage, taking, or diversion of water without first obtaining a permit from the commission to make the appropriation.¹¹ The commission shall approve the application and issue the permit as applied for in whole or part if it determines that: (1) there is unappropriated water in the source of supply; (2) the applicant has met the requirements of this section; (3)

⁷ 30 TAC § 55.252(a).

⁸ 30 TAC § 55.256(b).

⁹ 30 TAC § 55.255(b)1

¹⁰ 30 TAC § 55.255(c).

¹¹ Tex. Water Code § 11.121.

the water is to be used for a beneficial purpose; (4) the proposed use is not detrimental to the public welfare or to the welfare of the locality; and (5) the proposed use will not impair existing water rights.¹²

Anyone proposing to use the bed and banks of any flowing natural stream within the state for the purpose of conveying stored water from a place of permitted storage to a place of permitted use must first comply with the Texas Water Code, §11.042, and the rules of the commission.¹³ The owner or controller of stored water shall not permit the same to overflow the banks of any stream, nor shall he or she interfere with those having a lawful right to the use of that rate of flow of the stream which would prevail in the absence of the water in transit. The rate of flow shall be determined by the ED, and all interested parties will be notified of the rate. Water, when released for downstream use, must be of a quality that will not affect adversely or harmfully the quality of water in the stream or in storage below.¹⁴

III. DISCUSSION

A. Withdrawn Requests

Timely hearing requests were received from William Carmony; the Brazos River Authority, by attorney Doug Caroom; Terry Crofoot, through attorney Kerry Haliburton; Lynn Forest by attorney Kerry Haliburton; and Dow Chemical Company, by attorneys Steve Morton and Carlos Moreno. Each of these

¹² Tex. Water Code § 11.134(b).

¹³ 30 TAC §297.91.

¹⁴ 30 TAC §297.93.

requests was subsequently withdrawn. OPIC therefore did not consider these requests for referral to a contested case hearing.

B. Governmental Entity Requests

1. Garza County

A timely hearing request was submitted by James P. Allison on behalf of Garza County. The request expresses concerns that the proposed authorization will negatively impact county roads and transportation infrastructure, value of taxable property, economic development, and Brazos River water flows within the county.

The ED has prepared a map in this case confirming that Garza County lies downstream and in close proximity to the proposed reservoir and diversion points. The county is presumably responsible for public safety, maintenance of roads and bridges, providing emergency services, protecting wildlife, and conserving and protecting water resources within its jurisdiction. Ultimately, the proposed reservoir could impact county property, services, water resources, and wildlife. OPIC therefore finds that Garza County is a governmental entity that would be affected under 30 TAC § 55.256(b) and (c)(6) and recommends that the Commission grant its request.

2. Kent County

A timely hearing request was submitted by James P. Allison on behalf of Kent County. The request expresses concerns that the proposed authorization will negatively impact county roads and transportation infrastructure, value of

taxable property, economic development, and Brazos River water flows within the county.

The ED has prepared a map in this case confirming that Kent County lies downstream and in close proximity to the proposed reservoir and diversion points. The county is presumably responsible for public safety, maintenance of roads and bridges, providing emergency services, protecting wildlife, and conserving and protecting water resources within its jurisdiction. Ultimately, the proposed reservoir could impact county property, services, water resources, and wildlife. OPIC therefore finds that Kent County is a governmental entity that would be affected under 30 TAC § 55.256(b) and (c)(6) and recommends that the Commission grant its request.

C. Group and Individual Requests

3. John Long, Michael Damron, and Justin Damron

A timely hearing request was submitted by attorney Kerry Haliburton on behalf of John Long, Michael Damron, and Justin Damron. The request states that each of these individuals has historically used water from the river for domestic and livestock uses, and each of them continues to have the right to do so. The request raises the concern that the proposed permit would negatively impact the ability of these users to utilize flows and will result in flooding of their property.

The ED has prepared a map in this case demonstrating that these requestors are located along the Brazos River downstream of the proposed

reservoir and diversion points. Due to the location of their property, their domestic and livestock uses of the river, and the concerns raised, these requestors have demonstrated a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. OPIC therefore finds that John Long, Michael Damron, and Justin Damron are affected persons.

4. John and Marianne Loveless

A timely hearing request was submitted by John and Marianne Loveless. The request states that land to be inundated from the proposed dam is used by the requestors for pastureland. Additionally, the requestors raise the concern that the proposed diversions by the Applicant could potentially impact their ability to use water for domestic and livestock purposes in their ranching operations.

The ED has prepared a map in this case demonstrating that these requestors are located along the Brazos River downstream of the proposed reservoir and diversion points. Due to the location of their property, their domestic and livestock uses of the river, and the concerns raised, the requestors have demonstrated a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. OPIC therefore finds that John and Marianne Loveless are affected persons.

5. Clark Wood

A timely hearing request was submitted by attorney George Nelson on behalf of Clark Wood. The request states that Mr. Wood holds water right 3709, and permits 2376 and 2376A. The request raises the concern that the proposed permit would negatively impact these authorizations.

The ED has prepared a map in this case confirming Mr. Wood's water right and permit locations downstream of the proposed reservoir and diversion points. Mr. Wood has an inherent interest in protecting his water authorizations that constitutes a personal justiciable legal interest not common to that of the general public. Therefore, OPIC finds that Clark Wood is an affected person.

6. Janes Gravel

A timely hearing request was submitted by attorney Paul Terrill on behalf of Janes Gravel Co. Janes Gravel holds Certificate of Adjudication 12-3710 authorizing the annual diversion of 450 acre-feet from the North Fork of the Double Mountain Fork of the Brazos River. The request raises concerns that the proposed authorization will substantially reduce the amount of water available to Janes Gravel under its Certificate of Adjudication, negatively impact its priority, and impair its ability to conduct operations.

The ED has prepared a map in this case confirming Janes Gravel's water right lies downstream of the proposed reservoir and diversion points. Janes Gravel has inherent interests in protecting both its water authorization and

continuity of operations that constitute personal justiciable legal and economic interests not common to that of the general public. Therefore, OPIC finds that Janes Gravel is an affected person.

7. Lisa Carmony

A timely hearing request was submitted by William and Lisa Carmony. The request raises the concern that the proposed project will prohibit access to their home. A withdrawal was subsequently submitted by William Carmony, but did not indicate that Lisa Carmony was likewise withdrawing her request. In an abundance of caution, OPIC evaluates Mrs. Carmony's request below in the absence of a definitive indication that her hearing request was also intended to be withdrawn.

The ED has prepared a map in this case demonstrating that this requestor does not hold a water right and is not a domestic and livestock user of flows in the Brazos. Further, the requestor is not located within or near the footprint of the proposed reservoir. For these reasons, OPIC cannot find that the requestor has demonstrated a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public. Therefore, OPIC finds that Lisa Carmony is not an affected person and recommends her hearing request be denied.

8. Garza/Kent Brazos River Landowners' Coalition

A timely hearing request was submitted by attorney James P. Allison on behalf of the Garza/Kent Brazos River Landowners' Coalition. The request

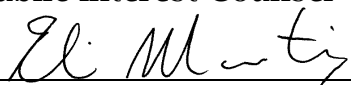
states that the group consists of persons who own property on or near the Brazos River in Garza and Kent County, and raises the concern that the proposed activity will affect Brazos River water flows near their property. The request does not specify the purpose of the group in accordance with 30 TAC § 55.252.(a)(2), nor does it identify one or more members of the group who would otherwise have standing to request a hearing in their own right as required by 30 TAC § 55.252.(a)(1). For these reasons, OPIC cannot find that the Garza/Kent Brazos River Landowners' Coalition is affected, and must recommend that the Commission deny their request.

IV. CONCLUSION

OPIC recommends granting the hearing requests of Justin Damron, Michael Damron, Garza County, Janes Gravel, Kent County, John Long, John and Marianne Loveless, and Clark Wood. OPIC further recommends the Commission deny the hearing requests of Lisa Carmony and the Garza/Kent Brazos River Landowners' Coalition.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2023, the original of the Office of Public Interest Counsel's Response to Hearing Requests was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, and/or by deposit in the U.S. Mail.



Eli Martinez

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REQUESTER(S):

See attached list.

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