

Jon Niermann, *Chairman*
Bobby Janecka, *Commissioner*
Catarina R. Gonzales, *Commissioner*
Kelly Keel, *Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 12, 2024

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: **IN THE MATTER OF THE PETITION FOR CREATION OF HAYS
COMMONS MUNICIPAL UTILITY DISTRICT
TCEQ DOCKET NO. 2023-1588-DIS**

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 "Josiah Mercer".

Josiah T. Mercer, Attorney
Assistant Public Interest Counsel

A handwritten signature in cursive script that reads "Pranjali".

Pranjali M. Mehta, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-1588-DIS

PETITION FOR THE CREATION OF HAYS COMMONS MUNICIPAL UTILITY DISTRICT	§ § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUESTS

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the Commission) files this Response to Hearing Requests in the above-entitled matter.

I. Introduction

A. Summary of Position

TCEQ Chief Clerk's office received fifty-four requests for a contested case hearing in this matter from fifty individuals, one government entity, and three groups. For the reasons discussed herein, OPIC respectfully recommends that the Commission grant the hearing requests of: The City of Hays, Save our Springs, Karen Aboussie, Erin Andrews, James Barnett, Hannah Belden, Molly Blake, Daniela Bradsher, Philip Brisky, Jim & Elizabeth Camp, Juanita Cooper, Jack Givens, Mike Givens, Roy & Carol Gordon, Frances Hargrove, James Jackson, Chris Knight, Stacey Knight, William Knight, Adrilyn Lamb, Tina Latham, Theresa Clements-Lemman, Tom Lemman, Jenny Lindsey, David Marcoux, Erika Marcoux, Glenda Matthews, John McGimsey, Linda & Gerald McKnight, Katie Moccia, Matthew Moccia, Carol Pennington, Ramon Raun-Byberg, Barbara Reeves, Doyle Shultz, Darlene & Michael Starr, Ted Thayer, Lydia & Antonio Valdez, Michael

Warnken, Royce Warnken, Keith Whittington, Courtney Williamson, Dee Wright, Aaron Yarbrough, and Frank Ybarra—and refer this matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing. OPIC recommends denial of all other hearing requests.

B. Background

Hays Commons Land Investments, LP (Petitioner) filed a petition (the Petition or Application) for the creation of Hays Commons Municipal Utility District (the District) pursuant to Article XVI, Section 59 of the Texas Constitution; Chapters 49 and 54 of the Texas Water Code (TWC); Title 30 of the Texas Administrative Code (TAC), Chapter 293; and the procedural rules of the TCEQ. The Application was declared administratively complete on June 29, 2023. On August 11, 2023, the Hays County Clerk posted the notice on the bulletin board used for posting legal notices in Hays County. On August 17, 2023, and again on August 24, 2023, the Notice of District Petition was published in the *San Marcos Daily Record*. According to the notice, the proposed District would contain approximately 290 acres and would be wholly located within the extraterritorial jurisdiction (ETJ) of the City of Hays, located in Hays County. The comment and contested case hearing request periods ended on September 25, 2023.

II. Applicable Law

A municipal utility district (MUD or a district) may be created under and subject to the authority, conditions, and restrictions of Article XVI, Section 59, of

the Texas Constitution.¹ Chapters 49 and 54 of the TWC and the Commission's administrative rules found at Title 30, Chapter 293, of the TAC govern petitions to create a MUD. A district shall be created for the following purposes:

- (1) the control, storage, preservation, and distribution of its storm water and floodwater, the water of its rivers and streams for irrigation, power, and all other useful purposes;
- (2) the reclamation and irrigation of its arid, semiarid, and other land needing irrigation;
- (3) the reclamation and drainage of its overflowed land and other land needing drainage;
- (4) the conservation and development of its forests, water, and hydroelectric power;
- (5) the navigation of its inland and coastal water;
- (6) the control, abatement, and change of any shortage or harmful excess of water;
- (7) the protection, preservation, and restoration of the purity and sanitary condition of water within the state; and
- (8) the preservation of all natural resources of the state.²

To create a MUD under TWC § 54.014, a petition requesting creation must be filed with the Commission. The petition shall be signed by a majority in value of the holders of title of the land within the proposed district, as indicated by the tax rolls of the central appraisal district. The petition, among other things, shall: (1) describe the boundaries of the proposed district by metes and bounds or by lot and block number; (2) state the general nature of the work proposed to be done, the necessity for the work, and the cost of the project as then estimated by those filing the petition; and (3) include a name of the district which shall be generally descriptive of the locale of the district.³

If the entire district is proposed to be located outside corporate limits of a

¹ TWC § 54.011.

² TWC § 54.012.

³ TWC § 54.015. *See also* 30 TAC § 293.11(a) and (d).

municipality, the commissioners court of the county in which the district is to be located may review the petition for creation and other evidence and information relating to the proposed district that the commissioners consider necessary.⁴ If the commissioners court votes to make a recommendation to the Commission, the commissioners court shall submit to the Commission, at least 10 days before the date set for the hearing on the petition, a written opinion stating whether or not the county would recommend the creation of the proposed district and stating any findings, conclusions, and other information that the commissioners court thinks would assist the Commission in making a final determination on the petition.⁵ Under TWC § 54.0161(c), the Commission shall consider the written opinion submitted by the county commissioners.

Under TWC § 54.021(a), the Commission shall grant the petition if it conforms to the requirements of § 54.015 and the project is feasible, practicable, necessary, and further—would be a benefit to the land to be included in the district. In determining if the project is feasible, practicable, necessary, and beneficial to the land included in the district, the Commission shall consider:

- (1) the availability of comparable service from other systems, including but not limited to water districts, municipalities, and regional authorities;
- (2) the reasonableness of projected construction costs, tax rates, and water and sewer rates; and
- (3) whether or not the district and its system and subsequent development within the district will have an unreasonable effect on the following:
 - (A) land elevation;
 - (B) subsidence;
 - (C) groundwater level within the region;

⁴ TWC § 54.0161(a).

⁵ TWC § 54.0161(b).

- (D) recharge capability of a groundwater source;
- (E) natural run-off rates and drainage;
- (F) water quality; and
- (G) total tax assessments on all land located within a district.⁶

If the Commission finds that not all of the land proposed to be included in the district will be benefited by the creation of the district, it shall exclude all land not benefited and redefine the proposed district's boundaries accordingly.⁷ If the petition does not conform to the requirements of TWC § 54.015 or the project is not feasible, practicable, necessary, or a benefit to the land in the district, the Commission shall deny the petition.⁸ According to TWC § 54.024, the rights, powers, privileges, authority, and functions of a district shall be subject to the continuing right of supervision by the Commission.

In accordance with TWC § 49.011(b) and 54.018, the applicant must publish notice of the petition to create a district once a week for two consecutive weeks in a newspaper regularly published or circulated in the county where the district is proposed to be located not later than the 30th day before the date of the Commission's decision on the application. Additionally, the applicant must post notice of the petition on the bulletin board used for posting legal notices in each county in which all or part of the proposed district is to be located.⁹ The Commission shall hold a public hearing if requested by the Commission, Executive Director (ED), or an "affected person" under the factors in 30 TAC,

⁶ TWC § 54.021(b).

⁷ TWC § 54.021(c).

⁸ TWC § 54.021(d).

⁹ 30 TAC § 293.12(b)(2).

Chapter 55.¹⁰ Affected persons must file their hearing requests during the 30 days following the final notice publication date.¹¹

A hearing requestor must make the request in writing within the time period specified in the notice and identify the requestor's personal justiciable interest affected by the application, specifically explaining 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."¹²

According to 30 TAC § 55.256(a), 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. An interest common to members of the general public does not qualify as a personal justiciable interest." Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons.¹³ Relevant factors to be considered in determining whether a person is affected 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;

¹⁰ TWC § 49.011(c). *See also* 30 TAC § 55.250 (applying rules governing contested case hearings to applications declared administratively complete after September 1, 1999).

¹¹ TWC § 49.011(c); 30 TAC § 293.12(c).

¹² 30 TAC § 55.251(b)-(d).

¹³ 30 TAC § 55.256(b).

- (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.¹⁴

According to 30 TAC § 55.252(a), a group or association may request a contested case hearing if:

- (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 member in the case.

The ED, OPIC, or the applicant may request that a group or association provide an explanation of how they meet the requirements of § 55.252(a).¹⁵

The Commission shall grant a request for a contested case hearing if: (1) the request is made by the applicant or the ED; or (2) the request is made by an affected person, complies with the requirements of § 55.251, is timely filed with the chief clerk, and is made pursuant to a right to hearing authorized by law.¹⁶

III. Discussion

The City of Hays

The City of Hays (the City) submitted a timely hearing request and comments in this matter. In its request, the City states that the proposed District would be located entirely within the City's ETJ. This fact is confirmed by the map prepared by ED staff. The City expresses concerns about the effect of the District on the City and its ETJ—particularly the effect of the District on water quality

¹⁴ 30 TAC § 55.256(c).

¹⁵ 30 TAC § 55.252(b).

¹⁶ 30 TAC § 55.255(b).

and quantity at City-owned water supply wells, one of which is 60 feet from the District. These concerns are relevant to the Commission’s final determination on the Application. The City also questions whether the Petitioner has met the statutory requirements of TWC § 54.016 related to the City’s consent of district creation and whether creation would be a benefit to the parts of their ETJ to be included in the District as required under § 54.021(a).

Additionally, under 30 TAC § 55.256(b), governmental entities with authority under state law over issues contemplated by the Application may be considered affected persons. A relevant factor for determining whether governmental entities qualify as affected persons is their statutory authority over or interest in the issues relevant to the Application.¹⁷ Further, the City has statutory authority to protect public health and safety and regulate development within its ETJ.¹⁸ The City’s concerns about area water quality and quantity are relevant to the Commission’s final determination on the Application. Based on the City’s interests in and statutory authority over water quality and quantity, and the District’s location within its ETJ—OPIC finds that the City of Hays has demonstrated it qualifies as an affected person in this matter.

Save our Springs

The Commission received a timely hearing request and comments from Save our Springs (SOS), a nonprofit organization that works to “protect the Edwards Aquifer, its springs and contributing streams, and the natural and

¹⁷ 30 TAC § 55.256(c)(6).

¹⁸ Tex. Loc. Gov’t Code 42.001, 212.044.

cultural heritage of the Hill Country region and its watersheds.” They are particularly concerned about the District’s effect on water quality, water quantity, wildlife, and aesthetics within the Edwards Aquifer and its contributing streams and springs. They even worry that the proposed District will directly impact water quality at Barton Springs. Given that the District would straddle Little Bear Creek and would be above the Edwards Aquifer Recharge Zone (EARZ), the interests SOS seeks to protect in this matter are germane to their purpose.¹⁹ Additionally—neither the claim asserted, nor the relief requested requires participation of individual members of SOS.²⁰

In their comments, SOS identifies Jim Camp—by name and address—as a member who would otherwise have standing to request a hearing in his own right. Mr. Camp owns property within one mile of the proposed District and depends on groundwater from the Edwards and Trinity Aquifers. Mr. Camp enjoys the benefits of living near Little Bear Creek, and SOS claims the District could affect his economic, property, and personal health and safety interests. Given Mr. Camp’s proximity, his interests are not common to members of the general public, and are protected by the law under which this Application will be considered.²¹ Additionally, these are concerns that have a reasonable relationship with the regulated activity.²² Therefore, Mr. Camp would have standing to request a hearing in his own right.²³ Consequently, SOS has met all the requirements of

¹⁹ 30 TAC § 55.252(a)(2).

²⁰ 30 TAC § 55.252(a)(3).

²¹ See 30 TAC § 55.256(a). See also 30 TAC § 55.256(c)(1) and TWC § 54.021(b)(3).

²² See 30 TAC § 55.256(c)(3).

²³ See the analysis of Mr. Camp’s individual request in a later section.

30 TAC § 55.252(a) for group standing and OPIC therefore finds that they qualify as an affected person.

Individual requestors located within one-half of a mile of the proposed District

The Commission received timely hearing requests from the following individuals who reside within one-half of a mile of the proposed District: Doyle Shultz (0.02 miles), Ted Thayer (0.02 miles), Lydia Bryan-Valdez & Antonio Sanchez Valdez (0.02 miles), Tom Lemman (0.07 miles), Theresa Clements-Lemman (0.07 miles), Keith Whittington (0.11 miles), Katie Moccia (0.14 miles), Matthew Moccia (0.14 miles), Royce Warnken (0.14 miles), Michael Warnken (0.14 miles), Molly Blake (0.19 miles), Darlene & Michael Starr (0.19 miles), Linda & Gerald McKnight (0.2 miles), Tina Latham (0.25 miles), James Barnett (0.31 miles), John McGimsey (0.35 miles), Roy & Carol Gordon (0.36 miles), Karen Aboussie (0.38 miles), Frances Hargrove (0.39 miles), Jenny Lindsey (0.4 miles), Ramon Raun-Byberg (0.4 miles), Philip Brisky (0.41 miles), James Jackson (0.42 miles), Courtney Williamson (0.43 miles), Stacey Knight (0.44 miles), William Knight (0.44 miles), and Chris Knight (0.44 miles).²⁴

To be granted a contested case hearing, the requestors must show that they qualify as “affected persons”—which are those who have personal justiciable interests related to a legal right, duty, privilege, power, or economic interest affected by the Application—and must distinguish those interests from interests common to the general public.²⁵ All of these requestors share concerns

²⁴ Alonna Beatty (0.49 miles) resides within this area. Her request is discussed in a later section.

²⁵ See 30 TAC § 55.256(a).

about the effect the District could have on the local aquifer—both in water supply and water quality. Many claim to get their water from personal or community wells that are located very close to the proposed district.

When deciding on a petition for creation of a district, TWC § 54.021(b)(3) requires the Commission to consider whether the district and its system and subsequent development within the district will have an unreasonable effect on groundwater levels, groundwater sources' recharge capability, and water quality. These concerns are therefore interests which are protected by the law under which this Application is considered.²⁶ Further, as these requestors' properties are near the proposed District, a reasonable relationship exists between the interests expressed in their comments and the applicant's regulated activity—a relevant factor under 30 TAC § 55.256(c)(3).

These requestors' proximity—in combination with their stated interests—demonstrates that they are likely to be affected in a way not common to members of the general public. Therefore, OPIC concludes that the requestors listed above have demonstrated that they possess a personal justiciable interest in this matter and qualify as affected persons.

Other individual requestors located within one mile of the proposed District

The Commission received timely hearing requests from the following individuals who are located farther than one-half of a mile but less than one mile from the proposed District: Aaron Yarbrough (0.51 miles), Hannah Belden (0.53 miles), Carol Pennington (0.59 miles), Erin Andrews (0.78 miles), Daniela Bradsher

²⁶ See 30 TAC § 55.256(c)(1). See also TWC § 54.021(b)(3).

(0.88 miles), Erika Marcoux (0.88 miles), David Marcoux (0.88 miles), Juanita Cooper (0.88 miles), Jim & Elizabeth Camp (0.89 miles), Frank Ybarra (0.89 miles), Dee Wright (0.92 miles), Barbara Reeves (0.93 miles), Glenda Matthews (0.95 miles), Mike Givens (0.98 miles), Jack Givens (0.98 miles), and Adrilyn Lamb (0.98 miles).²⁷

To be granted a contested case hearing, the requestors must show that they qualify as “affected persons”—which are those who have personal justiciable interests related to a legal right, duty, privilege, power, or economic interest affected by the Application—and must distinguish those interests from interests common to the general public.²⁸ All of these requestors share concerns about the effect the District could have on the local aquifer—both in water supply and water quality. Many claim to get their water from personal or community wells that are located very close to the proposed district. These are all interests which are protected by the law under which this Application is considered.²⁹ Further, as these requestors’ properties are near the proposed District, a reasonable relationship exists between the interests expressed in their comments and the applicant’s regulated activity—a relevant factor under 30 TAC § 55.256(c)(3). OPIC notes that there are no specific distance limitations applicable to whom may be considered an affected person for purposes of this Application.³⁰

²⁷ David Derrick (0.76 miles) resides within this area. His request is discussed in a later section.

²⁸ See 30 TAC § 55.256(a).

²⁹ See 30 TAC § 55.256(c)(1). See also TWC § 54.021(b)(3).

³⁰ See 30 TAC § 55.256(c)(3).

These requestors' proximity—in combination with their stated interests—demonstrates that they are likely to be affected in a way not common to members of the general public. Therefore, OPIC concludes that the requestors listed above have demonstrated that they possess a personal justiciable interest in this matter and qualify as affected persons.

Greater Edwards Aquifer Alliance

The Greater Edwards Aquifer Alliance (GEAA) submitted a timely hearing request and comments in this matter. GEAA is a nonprofit organization that advocates for the protection of the Edward's Aquifer. They are concerned that the District could negatively affect water supply and water quality from the local aquifers. They are particularly concerned about the affect the District could have on local water wells.

However—in their comments, GEAA fails to identify an individual member of their organization who would have standing in their own right. They claim that they have “multiple members who would be adversely affected by the proposed application,” but they do not provide the name or address of any of these members. Therefore, OPIC find that GEAA has not met the requirements of 30 TAC § 55.252(a)(1). Pursuant to § 55.252(b), OPIC requests that GEAA provide an explanation identifying one or more members that would otherwise have standing to request a hearing in their own right. Absent this information, OPIC cannot find that GEAA qualifies as an affected person.

Save Barton Creek Association

The Save Barton Creek Association (SBCA) submitted a timely hearing

request and comments in this matter. SBCA is a nonprofit organization that works to protect streams throughout Central Texas. They are concerned that the District could negatively affect water supply and water quality from the local aquifers and streams. They are particularly concerned about the affect the District could have on Little Bear Creek and the EARZ.

However—in their comments, SBCA fails to identify an individual member of their organization who would have standing in their own right. They claim that they have “multiple members who live next to Hays Common and who would be harmed by its construction,” but they do not provide the name or address of any of these members. Therefore, OPIC finds that SBCA has not met the requirements of 30 TAC § 55.252(a)(1). Pursuant to § 55.252(b), OPIC requests that SBCA provide an explanation identifying one or more members that would otherwise have standing to request a hearing in their own right. Absent this information, OPIC cannot find that SBCA qualifies as an affected person.

Individual requestors located further than one mile from the District

The Commission received timely requests from four other individuals: Amber Thompson (1.35 miles), Kody Schouten (1.5 miles), Brandon Morales (2.11 miles), and Lindsey Schouten (2.35 miles). They raise concerns regarding water supply and water quality. These requestors are located at distances greater than one mile from the proposed District. OPIC notes that there are no specific distance limitations applicable to whom may be considered an affected person for purposes of this Application.³¹ However—though their concerns are protected

³¹ See 30 TAC § 55.256(c)(3).

by the law under which the Application will be considered—at distances over one mile, OPIC finds that these requestors have not established a reasonable relationship between their claimed interests and the regulated activity.³² Given these requestors’ distances from the proposed District and regulated Activity—OPIC cannot find that these requestors are affected persons.

Individual requestors that failed to raise issues in their comments

The Commission also received timely hearing requests from Alonna Beatty, David Derrick, and Jacqueline Powers. However, these requestors do not raise any specific, personal concerns in their requests. Their hearing requests and comments consist solely of requests for a hearing and general concerns and contain no information about how the requestors would be personally affected by the Facility. Because they raise no specific concerns in their comments, these requestors fail to assert a personal justiciable interest, and OPIC cannot find that they qualify as affected persons.

IV. Conclusion

For the reasons set forth above, OPIC finds that the following qualify as affected persons: The City of Hays, Save our Springs, Karen Aboussie, Erin Andrews, James Barnett, Hannah Belden, Molly Blake, Daniela Bradsher, Philip Brisky, Jim & Elizabeth Camp, Juanita Cooper, Jack Givens, Mike Givens, Roy & Carol Gordon, Frances Hargrove, James Jackson, Chris Knight, Stacey Knight, William Knight, Adrilyn Lamb, Tina Latham, Theresa Clements-Lemman, Tom Lemman, Jenny Lindsey, David Marcoux, Erika Marcoux, Glenda Matthews, John

³² *Id.*

McGimsey, Linda & Gerald McKnight, Katie Moccia, Matthew Moccia, Carol Pennington, Ramon Raun-Byberg, Barbara Reeves, Doyle Shultz, Darlene & Michael Starr, Ted Thayer, Lydia & Antonio Valdez, Michael Warnken, Royce Warnken, Keith Whittington, Courtney Williamson, Dee Wright, Aaron Yarbrough, and Frank Ybarra. OPIC therefore respectfully recommends that the Commission grant these hearing requests, deny all other hearing requests, and refer the matter to SOAH for a contested case hearing.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By: Josiah Mercer


Josiah T. Mercer
Assistant Public Interest Counsel
State Bar No. 24131506
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-0579

By: Pranjal

Pranjal Mehta
Assistant Public Interest Counsel
State Bar No. 24080488
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-0574

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2024, the original of the Office of Public Interest Counsel's Response to Requests for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via electronic mail, and/or by deposit in the U.S. Mail.



Josiah T. Mercer

**MAILING LIST
HAYS COMMONS MUD
TCEQ DOCKET NO. 2023-1588-DIS**

FOR THE APPLICANT
via electronic mail:

David Tuckfield
The AL Law Group
12400 State Highway 71, Suite 350-150
Austin, Texas 78738
david@allawgp.com

Daniel Ryan, P.E., Vice President
LJA Engineering, Inc.
7500 Rialto Boulevard
Building II, Suite 100
Austin, Texas 78735
dryan@lja.com

FOR THE EXECUTIVE DIRECTOR
via electronic mail:

Kayla Murray, Staff Attorney
Texas Commission on Environmental
Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606
kayla.murray@tceq.texas.gov

James Walker, Technical Staff
Texas Commission on Environmental
Quality
Water Supply Division MC-152
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-2532 Fax: 512/239-2214
james.walker@tceq.texas.gov

Ryan Vise, Director
Texas Commission on Environmental
Quality
External Relations Division
Public Education Program MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678
pep@tceq.texas.gov

FOR ALTERNATIVE DISPUTE
RESOLUTION

via electronic mail:

Kyle Lucas, Attorney
Texas Commission on Environmental
Quality
Alternative Dispute Resolution MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0687 Fax: 512/239-4015
kyle.lucas@tceq.texas.gov

FOR THE CHIEF CLERK

via eFiling:

Docket Clerk
Texas Commission on Environmental
Quality
Office of Chief Clerk MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311
<https://www14.tceq.texas.gov/epic/eFiling/>

REQUESTER(S):

See attached list.

REQUESTER(S)

Karen Aboussie
2402 Chaparral Park Rd
Manchaca, TX 78652-4113

Dr. Erin Andrews
1101 Live Oak Dr Manchaca,
TX 78652-4000

James C Barnett Iii
2107 Chaparral Park Rd
Manchaca, TX 78652-3108

Alonna Michelle Beatty
903 Bluebird Dr
Manchaca, TX 78652-4155

Hannah Belden
3615 Copperplace Dr
Manchaca, TX 78652-3100

Molly Blake
12622 Live Oak Ln
Buda, TX 78610-9322

Daniela Bradsher
3513 Cattleman Dr Manchaca,
TX 78652-3112

Philip Brisky
2200 Chaparral Park Rd
Manchaca, TX 78652-4109

ANTONIO SANCHEZ VALDEZ & LYDIA BRYA
546 Country Ln
Buda, TX 78610-9398

Elizabeth & Jim Camp
3803 Cattleman Dr
Manchaca, TX 78652-3042

Theresa Clements-Lemman
12600 Live Oak Ln
Buda, TX 78610-9315

Juanita Cooper
3405 Cattleman Dr
Manchaca, TX 78652-3110

David Derrick
2706 Robin Rd
Manchaca, TX 78652-4173

ADRILYN LAMB & MIKE GIVENS
13403 Ramrod Dr
Manchaca, TX 78652

Jack Givens
13403 Ramrod Dr
Manchaca, TX 78652-3039

Carol & Roy Gordon
920 Hawk Dr
Manchaca, TX 78652-4177

Frances Hargrove
2505 Cardinal Dr
Manchaca, TX 78652-4129

James J Jackson
910 Dove Dr
Manchaca, TX 78652-4142

Joshua D Katz
Bickerstaff Heath Delgado Acosta Llp
3711 S Mopac Expy
Bldg 1, Ste 300
Austin, TX 78746-8013

Chris W Knight
2208 Chaparral Park Rd
Manchaca, TX 78652-4109

Stacey Knight
2208 Chaparral Park Rd
Manchaca, TX 78652-4109

William L Knight
Pentecost Sprinkler
2208 Chaparral Park Rd
Manchaca, TX 78652-4109

Adrielyn Lamb
13403 Ramrod Dr
Manchaca, TX 78652-3039

Tina Latham
811 Dove Dr
Manchaca, TX 78652-4141

Tom E Lemman
12600 Live Oak Ln
Buda, TX 78610-9315

Jenny Lindsey
901 Mockingbird Dr
Manchaca, TX 78652-4151

David & Erika Marcoux
3807 Cattleman Dr
Manchaca, TX 78652

David Marcoux
3807 Cattleman Dr
Manchaca, TX 78652-3042

Erika Marcoux
3807 Cattleman Dr
Manchaca, TX 78652-3042

Glenda Matthews
3415 Bliss Spillar Rd Manchaca,
TX 78652-3121

John T Mcgimsey
913 Hawk Dr
Manchaca, TX 78652-4178

Gerald & Linda Mcknight 12628
Red Bud Trl
Buda, TX 78610-9325

Katie Moccia
42 Country Oaks Dr
Buda, TX 78610-9338

Matthew Moccia
42 Country Oaks Dr
Buda, TX 78610-9338

Brandon Morales
112 Shannons Way
Buda, TX 78610-3204

Annalisa Peace
Greater Edwards Aquifer Alliance
1809 Blanco Rd
San Antonio, TX 78212-2616

Annalisa Peace
Greater Edwards Aquifer Alliance
Po Box 15618
San Antonio, TX 78212-8818

Carol Pennington
1005 Bluebird Dr
Manchaca, TX 78652-4157

Ramon Raun-Byberg
901 Mockingbird Dr
Manchaca, TX 78652-4151

Barbara Reeves
3411 Bliss Spillar Rd
Manchaca, TX 78652-3121

Victoria Rose
Save Our Springs Alliance
4701 W Gate Blvd
Ste D401
Austin, TX 78745-1479

Mr Kody Schouten
804 Laurel Cv
Buda, TX 78610-2874

Lindsey Schouten
102 Amandas Way
Buda, TX 78610-2897

Mr Doyle Shultz Iii
530 Country Ln
Buda, TX 78610-9314

Mr Michael & Mrs Darlene Starr
2301 Sparrow Dr
Manchaca, TX 78652-4180

Ted M Thayer
534 Country Ln
Buda, TX 78610-9314

Amber Thompson
200 Bermuda Ln
Buda, TX 78610-2880

Royce N Warnken
12620 Red Bud Trl
Buda, TX 78610-9325

Mr Michael Stephen Warnken
12624 Red Bud Trl
Buda, TX 78610-9325

Keith L Whittington
Lynx Property Services.Com
13511 Carpenter Ln
Manchaca, TX 78652-3142

Mrs Courtney Shea Williamson
912 Dove Dr
Manchaca, TX 78652-4142

Dee Wright
1530 Little Bear Rd
Buda, TX 78610-3004

Aaron Yarbrough
12608 Crystal Creek Dr Buda,
TX 78610-2560

Frank Lee Ybarra
3407 Bliss Spillar Rd
Manchaca, TX 78652-3120

Brian Zabcik
Save Barton Creek Association
15241 State Highway 53
Unit 670
Temple, TX 76501-3489