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APPLICATION OF HRC CHEROKEE  
TREE FARM, LP TO THE TEXAS  
COMMISSION ON ENVIRONMENTAL  
QUALITY FOR PROPOSED WATER  
USE PERMIT NO. 12047

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BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**HRC CHEROKEE TREE FARM, LP'S RESPONSE TO HEARING REQUESTS**

COMES NOW, HRC Cherokee Tree Farm, LP ("Applicant") and pursuant to 30 Texas Administrative Code ("TAC"), Chapter 55, Subchapter G (Sections 55.250-55.256) submits this Response to Hearing Requests to the Texas Commission on Environmental Quality ("Commission") to challenge the standing of each party filing a hearing request on Application No. 12047 for a Water Use Permit (the "Application") on the grounds that the requests for hearing (1) do not meet applicable statutory and regulatory requirements and/or (2) were not timely filed. In support of this Response, Applicant respectfully submits the following:

**I. Summary of Facts**

Applicant filed the Application to construct and maintain two reservoirs on Flat Creek for recreational purposes. In response to the Application, Commission staff proposed the attached Water Use Permit No. 12047 (the "Proposed Permit"), which "does not allow [Applicant] to impound state water" and requires Applicant to "pass all inflows of State water downstream."<sup>1</sup> In fact, to ensure all flows of State water are passed downstream, the Proposed Permit requires Applicant to "maintain suitable outlets" in the reservoirs and augment with groundwater to "compensate for net use of State water."<sup>2</sup>

The public comment period for the Application expired October 27, 2006, and only Dr. Adrian Van Dellen's ("Requestor") request for contested case hearing was submitted before the

<sup>1</sup> Proposed Permit, Paragraph 5.A.

<sup>2</sup> Id. Paragraph 5.B.

deadline.<sup>3</sup> Although Requestor alleged that his work and business on the Upper Neches River would be affected by reduced flow, Requestor did not claim a vested water right and failed to specify his actual location and distance relative to the dams as required by 30 TAC § 55.251(c)(2). However, the information provided in Requestor's request shows his address is more than 100 miles downstream of the proposed dams. Although Applicant was able to verify Requestor's address was correct through several attempts to contact Requestor, Applicant's efforts to meet with Requestor either individually or through voluntary mediation were completely ignored.<sup>4</sup>

## II. Argument

A contested case hearing may be requested by an "affected person" who timely files a request that satisfies all regulatory requirements.<sup>5</sup> To have standing as an "affected person," Requestor must "identify [his] personal justiciable interest *affected* by the application, including a brief, but specific, written statement explaining...how and why Requestor believes he or she will be affected by the activity."<sup>6</sup> Although Applicant acknowledges that Requestor does not have to "prove that he will *prevail* in a contested-case hearing,"<sup>7</sup> the language of the TAC plainly requires Requestor to make a showing that he is affected in a manner different from the public at

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<sup>3</sup> Other requests received between April 8, 2008, and April 30, 2008, from Barbara Richert, Mary C. Decker, Eugene M. Decker, III, Annette Dawson, Guyla Bryan, and Janice Bezanson were filed over 17 months after the deadline passed. This Response does not analyze these untimely requests individually because the notice of public meeting from the Commission's Chief Clerk specified that only "timely filed hearing requests filed on the [A]pplication will be considered by the Commissioners...." See also 30 TEX. ADMIN. CODE §§ 55.251(b) and (d)-(f), 55.254(a) & 55.255(b) (2008) (providing that a request for contested case hearing must be filed timely to be granted by the Commission).

<sup>4</sup> Our understanding from former Commission staff person David Koinm is that several efforts by the Commission to reach Requestor regarding Alternative Dispute Resolution were likewise unsuccessful.

<sup>5</sup> 30 TEX. ADMIN. CODE § 55.251 (2008).

<sup>6</sup> 30 TEX. ADMIN. CODE § 55.251(c)(2) (2008) (emphasis added).

<sup>7</sup> *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 803 (Tex. App.—Austin, 2000, pet. dismissed w.o.j.). See also *Heat Energy Advanced Tech., Inc. v. W. Dallas Coalition for Env'tl. Justice*, 962 S.W.2d 288, 295 (Tex. App.—Austin 1998, pet. denied).

large.<sup>8</sup> In fact, the “relevant factors [that] shall be considered” by the Commission to determine whether a person is affected include:

1. whether the interest claimed is one protected by the law under which the [A]pplication 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 [Requestor]; and
5. *likely impact* of the regulated activity on use of the impacted natural resource by the [Requestor].<sup>9</sup>

Therefore, to be entitled to request a contested case hearing, Requestor must be able to show he is likely to be affected by the Proposed Permit.

Here, Requestor cannot show his alleged interest will be affected because the Proposed Permit does not allow Applicant to impound any State water. Assuming, without admitting, that Requestor can prove a justiciable interest not common to members of the general public,<sup>10</sup> the likely impact of the Proposed Permit on Requestor’s use of his property and the water is nil. The Proposed Permit “does not allow [Applicant] to impound State water.”<sup>11</sup> Moreover, the Proposed Permit specifically requires Applicant to “provide and maintain suitable outlets in good working condition” and “pass all inflows of State water downstream.”<sup>12</sup> Thus, the basis of Requestor’s hearing request, i.e. Requestor's alleged interest in the flow of Neches River water, cannot be affected by the Proposed Permit as all flows of State water are required by the

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<sup>8</sup> 30 TEX. ADMIN. CODE §§ 55.251(c)(2) & 55.256 (2008).

<sup>9</sup> Id. § 55.256(c) (emphasis added).

<sup>10</sup> Applicant reserves the right to object to Requestor's alleged justiciable interests.

<sup>11</sup> Proposed Permit, Paragraph 5.A.

<sup>12</sup> Id.

Proposed Permit to be passed downstream.<sup>13</sup> Furthermore, not only does the Proposed Permit not impact Requestor's use of the flow of the Neches River, but the Proposed Permit, combined with the remoteness of Requestor's property, also negates any impact of the proposed dams on Requestor's health, safety, and use of his property. Therefore, because the interests alleged in Requestor's request for contested case hearing are not and cannot be affected by the Proposed Permit, Requestor does not have standing to request a contested case under 30 TAC § 55.251(a).

### **III. Conclusion**

Texas' regulatory and statutory requirements provide that contested case hearings may only be requested by individual parties if they can show they are "affected persons,"<sup>14</sup> which requires a showing that the activity as proposed will affect justiciable interests of the requesting party. Because the Proposed Permit does not allow Applicant to impound State water and requires Applicant to pass all flows of State water downstream, Requestor's alleged interest in the flow of the Neches River cannot be affected. As such, Requestor is not an "affected person" and is not entitled to request a contested case hearing.

### **IV. Prayer**

Applicant prays that the Commission determine that Requestor is not an "affected person" under the applicable state and regulatory requirements, and thus, did not submit a valid hearing request. Applicant further prays that the Commission determine that all late filed hearing requests on the Application are not valid requests. Finally, Applicant prays that under its authority in 30 TAC § 55.255(a)(1), the Commission determine that no valid hearing requests were submitted for the Application and act on the Application by approving the Proposed Permit.

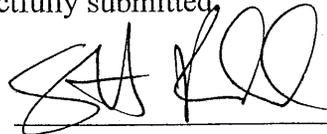
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<sup>13</sup> It should be noted that concerns related to possible violations of the Proposed Permit are not proper when analyzing whether a person may be "affected" by the proposed activity. *See Collins v. Tex. Natural Res. Conservation Comm'n*, 94 S.W.3d 876, 883 (Tex. App.—Austin 2002, no pet.).

<sup>14</sup> 30 TEX. ADMIN. CODE § 55.251(a) (2008).

Respectfully submitted,

By:



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**ATTORNEYS FOR HRC CHEROKEE  
TREE FARM, LP**

**CERTIFICATE OF SERVICE**

By my signature above, I hereby certify that, on this the 8<sup>th</sup> day of July, 2008, a true and correct copy of this document has been sent via Hand Delivery, First Class Mail or Facsimile to each of the person's listed on the attached Mailing List.

**MAILING LIST**  
**HCR CHEROKEE TREE FARM, LP**  
**DOCKET NO. 2008-0495-WR; WRPERM 12047**

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DRAFT 1/7/08

**PERMIT TO  
APPROPRIATE STATE WATER**

WATER USE PERMIT NO. 12047

TYPE: §11.121

Permittee: HRC Cherokee Tree Farm, LP

Address: 2100 McKinney Avenue  
Suite 700  
Dallas, Texas 75201-3411

Filed: August 9, 2006

Granted:

Purpose: In-Place Recreation

County: Cherokee

Watercourses: Flat Creek, Tributary of the  
Neches River

Watershed: Neches River Basin

WHEREAS, HRC Cherokee Tree Farm, LP, Applicant, seeks a Water Use Permit to construct and maintain two reservoirs on Flat Creek, tributary of the Neches River, Neches River Basin for recreation purposes in Cherokee County; and

WHEREAS, South Lake, located in the Thomas Timmons Original Survey, Abstract No. 50, will have a surface area of 287.8 acres and impound 2,869 acre-feet of water; Station 10+00 on the centerline of the dam is located at a point bearing S 63°W, 17,100 feet from the northeast corner of the Thomas Timmons Survey, also being at Latitude 32.063°N, Longitude 95.398°W, 23 miles north-northwest of the City of Rusk and 2.6 miles northeast of the Town of Cuney, in Cherokee County, and

WHEREAS, North Lake, located in the John Vaughn Original Survey, Abstract No. 53, will have a surface area of 97.1 acres and impound 980.5 acre-feet of water; Station 9+20 on the centerline of the dam is located at a point bearing S 38°E, 3,400 feet from the northeast corner of the Thomas Timmons Survey, also being at Latitude 32.082°N, Longitude 95.354°W, 23 miles north of the City of Rusk and 5 miles northeast of the Town of Cuney, in Cherokee County; and

WHEREAS, Applicant identified groundwater as the alternate source of water to maintain the operating level of the reservoirs and has installed four groundwater wells in the Queen City Aquifer and the Carrizo Aquifer with a combined output in excess of 3,060 acre-feet of water per year; and

WHEREAS, Ownership of the land to be inundated is evidenced by Special Warranty Deeds recorded in Volume 1666, pages 410-438 and Volume 1666, pages 439-524, in the official records of Cherokee County; and

WHEREAS, the Texas Commission on Environmental Quality finds that jurisdiction over the application is established; and

WHEREAS, the Executive Director recommends that special conditions be included in the permit; and

WHEREAS, the Commission has complied with the requirements of the Texas Water Code and Rules of the Texas Commission on Environmental Quality Commission in issuing this permit;

NOW, THEREFORE, Water Use Permit No. 12047 is issued to HRC Cherokee Tree Farm, LP, subject to the following terms and conditions:

1. IMPOUNDMENTS

A. Permittee is authorized to construct and maintain two reservoirs on Flat Creek, tributary of the Neches River, Neches River Basin in Cherokee County as follows:

1. South Lake, located in the Thomas Timmons Original Survey, Abstract No. 50, has a surface area of 287.8 acres and impounds 2,869 acre-feet of water. Station 10+00 on the centerline of the dam is located at a point bearing S 63°W, 17,100 feet from the northeast corner of the Thomas Timmons Survey, also being at Latitude 32.063°N, Longitude 95.398°W, 23 miles north-northwest of the City of Rusk and 2.6 miles northeast of the Town of Cuney, in Cherokee County.
2. North Lake, located in the John Vaughn Original Survey, Abstract No. 53, has a surface area of 97.1 acres and impounds 980.5 acre-feet of water. Station 9+20 on the centerline of the dam is located at a point bearing S38°E, 3,400 feet from the northeast corner of the Thomas Timmons Survey, also being at Latitude 32.082°N, Longitude 95.354°W, 23 miles north of the City of Rusk and 5 miles northeast of the Town of Cuney.

B. Ownership of the land inundated is evidenced by Special Warranty Deeds recorded in Volume 1666, pages 410-438 and Volume 1666, pages 439-524, in the official records of Cherokee County.

2. USE

A. Permittee is authorized to use the water impounded in North Lake and South Lake for in-place recreational purposes with no right of diversion.

3. PRIORITY

The time priority for the authorization granted herein is August 9, 2006.

4. TIME LIMITATIONS

- A. Construction of the proposed dams and reservoirs shall be in accordance with plans approved by the Executive Director. Construction of the dam without final approval of the construction plans is a violation of this authorization.
- B. Construction shall begin within two years of issuance of this permit and be completed within three years of the issuance of this permit, unless Permittee applies for and is subsequently granted an extension of time before the expiration of these time limitations.
- C. Failure to commence the proposed dams and reservoirs within the period stated above shall subject all rights to this permit to forfeiture, subject to notice and hearing. After beginning construction, failure to timely construct the proposed dams and reservoirs stated above shall subject this permit to cancellation in whole or in part, subject to notice and hearing.

5. SPECIAL CONDITIONS

- A. The permit does not allow Permittee to impound State water. Therefore, Permittee shall provide and maintain suitable outlets in good working condition in the reservoirs to pass all inflows of State water downstream. Upon termination of this permit, Permittee shall activate the outlets such that no is impounded in the reservoirs.
- B. Permittee shall maintain and operate an alternate source of water with sufficient production to compensate for net use of State water. Permittee has identified groundwater from the Queen City Aquifer and the Carrizo Aquifer as the alternate source of water for this project.
- C. This permit is issued contingent upon Permittee's maintenance of the alternate source of water identified in Item B above. In the event this source will not be used as the alternative source, Permittee shall immediately cease impoundment of water under this permit and either apply to amend this permit with documentation of the new alternative source of water, or voluntarily forfeit the permit. If Permittee does not amend or forfeit the permit, the Commission may begin proceedings to cancel this permit. The Commission shall be notified immediately by Permittee if the groundwater well(s) will not be used as the alternate source of water for this permit.
- D. Discharge of co-mingled surface water and groundwater from the reservoirs shall be of sufficient quality to meet the Surface Water Quality Standards for Segment No.

0604.

- F. Permittee shall follow and implement the mitigation plan when approved by the U.S. Army Corps of Engineers and TCEQ through Section 404/401 of the Clean Water Act.

This permit is issued subject to all superior and senior water rights in the Neches River Basin.

Permittee agrees to be bound by the terms, conditions, and provisions contained herein and such agreement is a condition precedent to the granting of this permit.

All other matters requested in the application which are not specifically granted by this permit are denied.

This permit is issued subject to the Rules of the Texas Commission on Environmental Quality and to the right of continuing supervision of State water resources exercised by the Commission.

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For the Commission

ISSUED: