

TCEQ DOCKET NO. 2008-0495-WR

2008 JUL -8 PM 4: 15

APPLICATION BY HCR CHEROKEE	§	BEFORE THE CHIEF CLERKS OFFICE
TREE FARM, LP FOR A WATER USE	§	
PERMIT IN CHEROKEE COUNTY,	§	TEXAS COMMISSION ON
TEXAS.	§	
	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to a hearing request on the HRC Cherokee Tree Farm, LP (Cherokee) Application No. 12047 for a water use permit in Cherokee County, Texas. The Executive Director recommends that the Commission grant the application and approve the draft permit. The Executive Director further recommends that the Commission deny the hearing requests of all persons and groups that have submitted hearing requests on this application.

1. BACKGROUND

The Application

In accordance with Texas Water Code § 11.121, except as provided in Sections 11.142, 11.1421, and 11.1422 of this code, 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. The proposed Water Use Permit No. 12047 would authorize the owner to construct and maintain two dams and reservoirs impounding a combined total of 3849.5 acre-feet of water and having a combined surface area of 385 surface area acres for in-place recreational purposes on Flat Creek, tributary of the Neches River, Neches River Basin, in Cherokee County, Texas. South Lake will have a surface area of 287.8 acres and impound 2,869 acre-feet of water. North Lake will have a surface area of 97.1 acres and impound 980.5 acre-feet of water. Under the draft permit, Applicant is required to insure that the operating level of the reservoirs are maintained by an alternate source and maintain suitable outlets in good working condition to pass all inflows of State Water downstream that the Applicant is not allowed to divert. The Applicant has identified groundwater from the Queen City and Carrizo Aquifers as the alternate source of water for this project. This Application will be considered under Texas Water Code section 11.121.

Procedural History

The application was received on May 10, 2006, and additional information was received on June 28, 2006. The application was determined to be administratively complete and filed with the Office of the Chief Clerk on August 9, 2006. Notice was subsequently mailed to the water right holders of record in the Neches River Basin on September 14, 2006. 30 TEX. ADMIN. CODE § 295.153. Notice of the application was published on September 27, 2006. The comment period for the application ended on October 27, 2006. One timely request for a contested case hearing

was received from Adrian F. Van Dellen. Six untimely hearing requests were received from the following persons: Janice Bezanson, Executive Director of the Texas Conservation Alliance; Guyla Bryan; Annette Dawson; Eugene M. Decker, III; Barbara Richert; and Mary C. Decker, Co-Chair of the Friends of the Neches River.

2. RESPONSE TO HEARING REQUESTS

Legal Authority

The application is subject to the procedures for evaluating hearing requests on applications declared administratively complete on or after September 1, 1999 in 30 Texas Administrative Code, Chapter 55, Subchapter G (Sections 55.250-55.256).

Title 30, Sections 55.251 (b) and (c) of the Texas Administrative Code specify that a hearing request must:

- (1) be in writing and be filed with the Office of the Chief Clerk during the public comment period;
- (2) give the name, address, and daytime telephone number of the person who files the request;
- (3) 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; and
- (4) request a contested case hearing.

A hearing request must comply with requirement (1) above and must "substantially comply" with requirements (2) through (4). 30 TEX. ADMIN. CODE § 55.251(c).

A request for a contested case hearing must be granted if the request is made by an affected person and the request:

- (A) complies with the requirements of 30 TEX. ADMIN. CODE § 55.251;
- (B) is timely filed; and
- (C) is pursuant to a right to hearing authorized by law.

30 TEX. ADMIN. CODE § 55.255(b)(2).

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 the general public does not constitute a justiciable interest. 30 TEX. ADMIN. CODE § 55.256(a).

To determine whether a person is an affected person, all relevant factors must be considered, including but 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) the likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) the likely impact of the regulated activity on the 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.

30 TEX. ADMIN. CODE § 55.256(c).

Hearing Requests

Six hearing requests were received by the Office of the Chief Clerk after the end of the comment period for this application. Annette Dawson submitted an undated hearing request which was received by the Office of the Chief Clerk on April 8, 2008. Guyla Bryan submitted an undated hearing request which was received by the Office of the Chief Clerk on April 11, 2008. Janice Bezanson, Executive Director of the Texas Conservation Alliance submitted a hearing request dated April 24, 2008 which was received by the Office of the Chief Clerk on April 28, 2008. Barbara Richert submitted a hearing request dated April 28, 2008 which was received by the Office of the Chief Clerk on April 28, 2008. Eugene M. Decker, III submitted a hearing request dated April 28, 2008 which was received by the Office of the Chief Clerk on April 29, 2008. Mary C. Decker, Co-Chair of the Friends of the Neches River submitted a hearing request dated April 28, 2008 which was stamped received by the Office of the Chief Clerk on April 30, 2008. Further, none of these Protestants identified their location relative to the activity subject to the application, any personally justiciable interest, how they would be affected either individually or as a group, or how they would be affected in a manner not common to members of the general public. Most importantly, because the above listed hearing requests were received after the end of the public comment period, they should be processed in accordance with 30 TEX. ADMIN. CODE § 55.251(F)(1) or be denied because the requests do not comply with 30 TEX. ADMIN. CODE § 55.251 (b) and (c).

Adrian F. Van Dellen submitted a timely hearing request dated October 22, 2006. Although Mr. Van Dellen's hearing request was filed in writing with the Office of the Chief Clerk before the end of the public comment/hearing request period; provided the protestant's name, address, and telephone number; and included a specific request for a contested case hearing, it does not meet all of the requirements in 30 TEX. ADMIN. CODE § 55.251. For example, the request does not provide 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. More specifically, the request fails to specify the location of his work activity and distance relative to the portion of the Neches River potentially affected by the application. Mr. Van Dellen indicates that he will be adversely affected by the approval of the application because it will undermine and depreciate his livelihood. The requester states that he photographs the riverine habitat, bottomland hardwoods, wildlife and guides recreational users on this segment of the river. The request indicates that his "work and business is primarily on the Upper Neches River." However, there is no segment of the Neches River that has been designated as such, making it difficult to locate the portion of the river he is referencing. Furthermore, the hearing request does not point out any specific distance or range from the Protestant's work area relative to the subject area. Because the Neches River is over 400 miles¹ long and there is not a segment of the Neches River that has been designated as the "Upper Neches River", there is no way to locate Mr. Van Dellen's work or recreational area relative to the activity that is the subject of the application.

In addition, Protestant indicates that he resides downstream relative to the proposed activity. The location of his home has been marked on the map provided with this brief. The residence appears to be located on or near B.A.Steinhagen Lake, more than 100 miles from the proposed activity. With regard to the activity in relation to his residence, the requestor has not stated why he believes he will be affected by the activity in a manner not common to members of the general public.

Although recreational and occupational use has been considered as a basis for affected person status, without a clear indication where the work or recreational activity occurs, one can not conduct the analysis for a determination of who is an "affected person" under 30 TEX. ADMIN. CODE § 55.256. Therefore, no further analysis of this hearing request is provided.

Conclusion on Hearing Requests

For the reasons stated above, the Executive Director recommends that Adrian F. Van Dellen's hearing request be denied and that other hearing requests be processed in accordance with 30 TEX. ADMIN. CODE§ 55.251(F)(1) or be denied because the requests do not comply with 30 TEX. ADMIN. CODE§ 55.251 (b) and (c).

Length of Contested Case Hearing

If the Commission decides to grant a hearing request and refer the application to SOAH, the Executive Director recommends that the hearing be no more than six months.

¹ *Handbook of Texas Online*, s.v.,"<http://www.tshaonline.org/handbook/online/articles/NN/rnn4.html> (accessed July 2, 2008).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th of July 2008, a true and correct copy of the foregoing document was delivered via facsimile, hand delivery, interagency mail, or by deposit in the U.S. Mail to all persons on the attached mailing list.



Erin Selvera

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