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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

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CHIEF CLERKS OFFICE

July 8, 2008

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

Re: **HCR CHEROKEE TREE FARM, LP**
TCEQ DOCKET NO. 2008-0495-WR

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Blas J. Coy, Jr.", written over a horizontal line.

Blas J. Coy, Jr.
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

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from the reservoirs shall meet the Surface Water Quality Standards for Segment No.

0604.

The Applicant published notice of its water rights application on September 27, 2006, in the *Jacksonville Daily Progress*. On October 22, 2006, Adrian F. Van Dellen, DVM ("Van Dellen") submitted a timely hearing request to the TCEQ stating that Van Dellen would be adversely affected by granting the application. Pursuant to the analysis provided below, OPIC recommends granting the request for a contested case hearing and referring this matter to the State Office of Administrative Hearings ("SOAH"). TCEQ also received several other recent hearing requests which are untimely, as discussed below.

II. APPLICABLE LAW

A. Requirements for Affected Person

This application was declared administratively complete on August 9, 2006. As the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Title 30, Chapter 55, Subchapter G, sections 55.250-55.256 of the Texas Administrative Code ("TAC"). Under those provisions, a hearing requestor must make their request in writing 30 days after the publication of the notice of the application and identify the requestor's personal justiciable interest affected by the application, specifically noting the "requestor's location and distance relative to the activity" 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.” 30 TAC §

55.251(b), (c); 30 TAC § 295.171.

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 TAC § 55.256(a). 30 TAC section 55.256(c) provides relevant factors that will be considered in determining whether a person is affected. 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.

30 TAC § 55.256(c). A group or association is deemed an affected person if one or more members has standing to request a hearing, the interest the group is seeking to protect is germane to the group’s purpose, and neither the claim nor relief requested requires an individual member of the group to participate in the case. 30 TAC § 55.205.

The Commission shall grant a request for a contested case hearing if (1) the request is made by an affected person, (2) the request is timely filed with the chief clerk, and (3) the request is made pursuant to a right to hearing authorized by law. 30 TAC §

55.255(b). A request for a contested case hearing is timely if it is filed with the chief clerk within thirty days after the last publication of the notice of application. 30 TAC § 55.251(d).

III. HEARING REQUESTS

A. Van Dellen

The October 22, 2006 hearing request states Van Dellen will be adversely affected by approval of the application. Specifically, Van Dellen states that the Van Dellen residence is downstream from the proposed activity. The request states that Van Dellen will be directly affected because Van Dellen's business is primarily on the Upper Neches River to which Flat Creek is a significant tributary stream. Van Dellen photographs the habitat, bottomland hardwoods, and wildlife; and guides recreational users on the Upper Neches River. Van Dellen is concerned that the draft permit will reduce the free-flow of water into the Upper Neches River, thereby negatively affecting Van Dellen.

Van Dellen is an affected person. Van Dellen's personal justiciable interest is related to the economic and recreational interest in his business. 30 TAC § 55.256(a). The interest Van Dellen claims in protecting the flows of the Neches River is one protected by the law under which the application is considered. 30 TAC § 55.256(c). A reasonable relationship exists between the interest claimed and the activity regulated; if the Applicant is allowed to construct and maintain the dams and reservoirs, the habitat and wildlife surrounding the Upper Neches River will suffer and Van Dellen's business will be affected. *Id.* There is a likely impact of the Applicant's proposed activity on Van Dellen's use of the Upper Neches River, which is another relevant factor to determine Van Dellen is an affected person. *Id.*

Van Dellen timely filed his request for a hearing on October 22, 2006, with the chief clerk. 30 TAC § 55.251(b). Van Dellen also substantially complied with the other requirements to request a hearing, including the identification of his personal justiciable interest not common to the general public. 30 TAC §55.251(c). Based on this showing, OPIC recommends that the Commission grant Van Dellen a hearing as an affected person.

B. Bezanson; Bryan; Dawson; Decker; Friends of the Neches River; Richert

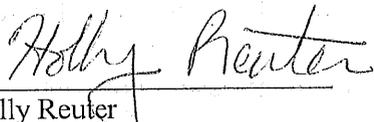
The following persons also submitted requests for a contested case hearing: Janice Bezanson; Guyla Bryan, Annette Dawson; Eugene M. Decker III; Barbara Richert (collectively as "Requestors"); and Friends of the Neches River ("Friends"). Requestors and Friends filed their requests in April of 2008. The requests are not timely because they were submitted more than thirty days after the notice of application was published in 2006. 30 TAC §§ 55.152(a), 55.251(b). OPIC recommends that the Commission deny the hearing requests submitted by Requestors and Friends because the requests are untimely and consequently invalid.

Furthermore, Requestors and Friends have not demonstrated that they are affected persons. Requestors have not identified personal justiciable interests, issues not common to the general public, or any of the relevant factors to consider whether Requestors are affected persons. 30 TAC § 55.256. Friends has not demonstrated that one or more of its members has standing to request a hearing. 30 TAC § 55.205. Therefore, Requestors and Friends would fail to qualify as affected persons even if their hearing requests were timely.

Requestors also did not state their location or distance relative to the location of the Applicant's proposed activity, which is another defect in their hearing requests. 30 TAC § 55.251.

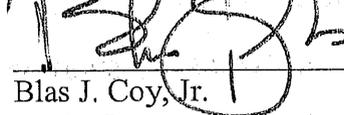
IV. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission grant the contested case hearing request of Van Dellen and refer this matter to SOAH for a contested case hearing to determine whether Van Dellen's existing water rights will be adversely impacted by the Applicant's proposed use. The Office of Public Interest Counsel respectfully recommends that the Commission deny the contested case hearing requests of Requestors and Friends.



Holly Reuter
University of Houston Law Center
Mickey Leland Intern
Office of Public Interest Counsel

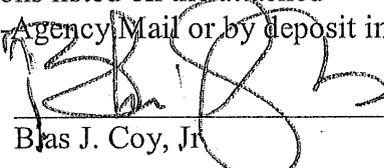
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2008, the original and eleven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.



Blas J. Coy, Jr.

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TCEQ DOCKET NO. 2008-0495-WR

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