

TCEQ DOCKET NO. 2011-2134-WR

APPLICATION BY	§	BEFORE THE
THE GOLF CLUB AT	§	
CIRCLE C, L.P.	§	TEXAS COMMISSION ON
FOR	§	
WATER USE PERMIT NO. 5852	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or commission) respectfully submits this response to the hearing requests filed in the application by The Golf Club at Circle C, L.P. (Applicant) for new Water Use Permit No. 5852. Three hearing requests were timely received from the following requesters: the City of Austin (City), the Lower Colorado River Authority (LCRA), and Ira Jon Yates. The Executive Director respectfully recommends that the commission grant the hearing requests and refer the matter to the State Office of Administrative Hearings for a contested case hearing.

I. Background

The Applicant has applied for an authorization to maintain five reservoirs (Reservoirs 1-5) with a combined storage capacity of 27.8 acre-feet of water on an unnamed tributary of Danz Creek and on Danz Creek within the Colorado River Basin. The application further requests an authorization to maintain an off-channel reservoir with a capacity of 50.6 acre-feet of water near Danz Creek and to divert and use not to exceed 262 acre-feet of state water. The water will be diverted pursuant to a contract with the Lower Colorado River Authority and will be used for agricultural purposes to irrigate 115 acres of land within the Colorado River Basin. The application also seeks a bed and banks authorization to convey groundwater in the unnamed tributary of Danz Creek, Danz Creek, and the four on-channel reservoirs and to maintain the reservoir levels with diffuse surface water discharged directly to and from the off-channel reservoir. Finally, the application seeks an in-place recreational use authorization for the reservoirs.

The draft permit authorizes the requested activities with certain special conditions added for the protection of water rights within the basin and the environment. The Executive Director recommends that the commission grant the hearing requests and refer the matter to the State Office of Administrative Hearings for a contested case hearing.

II. Procedural History

This application was received September 2, 2003. The application was declared administratively complete on April 19, 2005. Notice for the application was originally mailed by the Chief Clerk to downstream water rights holders in the Colorado River

basin on May 19, 2005. That notice was published on June 9, 2005. A public meeting for this application was held on November 29, 2005. Following the public meeting and comment period, the Applicant entered into settlement negotiations and mediation with interested parties. On October 17, 2008, the Applicant amended its application to add a diversion of state water which required additional notice. Notice was mailed to all water rights holders in the Colorado River basin on March 4, 2011. That notice was published on March 14, 2011. The hearing request period ended on April 13, 2011.

III. Legal Authority

The following may request a contested case hearing on water rights applications: the commission, the Executive Director, the Applicant, and affected persons when authorized by law. Affected persons are authorized to submit hearing requests for water rights permit applications by TEX. WATER CODE §11.132(a). The commission, on the request of any affected person, shall hold a public hearing on an application to amend a water right permit. Id. The application is subject to the procedures for determining whether a hearing requestor is an affected person and whether a document submitted on an application constitutes a valid request. Those procedures for applications declared administratively complete on or after September 1, 1999 are located at 30 TEX. ADMIN. CODE §§55.250-256.

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. Id. §55.256(a). An interest common to the general public does not constitute a justiciable interest. Id. Governmental entities, including local governments and public agencies, with authority under state law over issues contemplated by the application may be considered affected persons. Id. §55.256(b).

To determine whether a hearing requestor 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.

Id. §55.256(c).

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 strictly comply with requirement (1) above and must "substantially comply" with requirements (2) through (4). Id. §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:

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

Id. §55.255(b)(2).

A hearing request is considered timely if it is submitted to the Commission within 30 days after the publication of the notice of application if the commission has not extended the period for hearing requests. Id. §295.171.

IV. Hearing Requests and Recommendations

A total of three individual hearing requesters were identified by the Office of Public Assistance.¹ Below is an outline of each request and the Executive Director's respective recommendations.

City of Austin – The City of Austin, through its legal counsel, timely submitted a hearing request that complies or substantially complies with all technical requirements for hearing requests in 30 TEX. ADMIN. CODE §55.251. The request states that potential impacts to groundwater quality resulting from this permit could adversely affect economic and recreational resources managed by the City. The proposed activity would take place within the Edwards Aquifer Recharge Zone which contributes to groundwater

¹ The Office of Public Assistance is now known as the Small Business and Environmental Assistance Division.

and surface water resources used by the City.² The City has general authority under state law over, and interest in, issues relating to this application. Id. §55.256(b), (c)(6). Therefore, the request should be granted.

Lower Colorado River Authority – The Lower Colorado River Authority, through its legal counsel, timely submitted a hearing request that complies or substantially complies with all technical requirements for hearing requests in 30 TEX. ADMIN. CODE §55.251. The request states that LCRA owns multiple downstream water rights which may be entitled to inflows from Danz Creek. Additionally, LCRA has entered into or has indicated the intent to enter into a contract agreement for sale of water to be diverted under this permit. LCRA appears to have a justiciable interest that is not common to members of the general public. Id. §55.256(a). Accordingly, the request should be granted.

Ira Jon Yates – Ira Jon Yates timely submitted a hearing request on his own behalf that complies or substantially complies with all technical requirements for hearing requests in 30 TEX. ADMIN. CODE §55.251. The request states that Mr. Yates is the owner of property immediately downstream from the proposed activity. It further states that Mr. Yates has an agricultural operation on that property which is dependent on surface and groundwater resources which may be impacted by the proposed activity. Mr. Yates appears to have a justiciable interest that is not common to members of the general public. Id. §55.256(a). Accordingly, the request should be granted.

V. Conclusion

The Executive Director respectfully recommends that the Commission grant the hearing requests of the City of Austin, the Lower Colorado River Authority, and Ira Jon Yates.

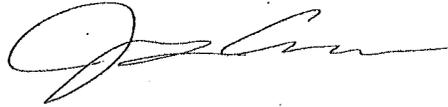
The Executive Director further recommends that this matter be referred to the State Office of Administrative Hearings for a contested case hearing for the foregoing reasons in addition to any finding by the commission that a hearing would generally be in the public interest. 30 TEX. ADMIN. CODE §§55.255(c).

Respectfully submitted,
Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

² In response No. 8 in the Response to Comments filed June 12, 2007, the Executive Director noted that “although under Tex. Water Code § 11.151, the TCEQ shall consider the affects of an application for a water right on groundwater, that provision does not apply in this case because the draft permit, if issued for this application, would not allow diversion or impoundment of state water.” As noted above, the application was amended on October 17, 2008 to add a request for an authorization to divert state water. The Executive believes that issues raised by the city relating to groundwater recharge are now relevant to this application.

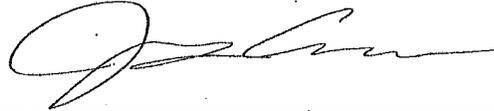
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CERTIFICATE OF SERVICE

I certify that on March 5, 2012, an original and seven copies of the "Executive Director's Response to Hearing Requests" was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, was electronically filed with the same, and a complete copy was transmitted by electronic mail, facsimile, or United States mail to all persons on the attached mailing list.



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