

TCEQ DOCKET NO. 2011-2287-WR

APPLICATION BY	§	BEFORE THE
BENTWOOD CC, LLC	§	
FOR AN AMENDMENT TO	§	TEXAS COMMISSION ON
CERTIFICATE OF	§	
ADJUDICATION NO. 14-1313	§	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 Bentwood CC, LLC (Applicant) for an amendment to Certificate of Adjudication No. 14-1313. One hearing request was timely received from Brian Treadwell on behalf of the Treadwell Cattle Company. The Executive Director respectfully recommends that the commission grant the hearing request and refer this matter to the State Office of Administrative Hearings for a contested case hearing.

I. Background

The applicant is co-owner along with Treadwell Cattle Company, and Kent Schultz, of Certificate of Adjudication No. 14-1313. Applicant has requested an amendment (14-1313A) to add a diversion point on the South Concho River, downstream from the existing diversion point, for its portion of water under 14-1313. The application also requests an authorization for Bentwood CC, LLC to divert its portion of water for storage in two off-channel reservoirs and to add an additional 250 acres of land for irrigation. The draft amendment authorizes the requested activities with certain special conditions added for the protection of water rights within the basin and the environment.

II. Procedural History

This application was received August 13, 2010. The application was declared administratively complete on July 26, 2011. Notice for the application was mailed by the Chief Clerk to water rights holders interjacent to the original diversion point and the proposed additional diversion point on October 10, 2011. The hearing request period ended on October 27, 2011.

Following the Texas Supreme Court decision in *City of Marshall v. City of Uncertain*, the Commission issued guidance on new standards for public notice in water rights amendment applications in a work session on January 18, 2008. Notice for this application was given pursuant to guidance provided at the commission's agenda hearings held August 20, 2008 and September 24, 2008.

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).

Sections 55.251(b) and (c) 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 Request

Mr. Treadwell's hearing request was timely submitted. However, the request does not substantially comply with all technical requirements for hearing requests in 30 TEX. ADMIN. CODE §55.251 in that it does not include a statement explaining the requestor's distance relative to the proposed activity or how or why the requestor believes he will be affected in a manner not common to the general public. Id. §55.251(c)(2). The request primarily states concerns generally relating to the hydrological dynamics of the stream segment and watershed in which authorized activities under this amendment will take place.

The request further states that the requestor owns "the property across the river from the Stultz location" and implies that the requestor co-owns Certificate of Adjudication 14-1313 and one other water right in the basin. A review of agency records by the Water Rights Permitting and Availability section indicates that Treadwell Cattle Company is the co-owner of this certificate and that the diversion points assigned to the rights identified in the request are in the same general location as the previous diversion point for Certificate of Adjudication 14-1313. Because the Treadwell Cattle Company is a co-owner of this water right, the Executive Director believes the requestor may be affected by this application in a manner not common to the general public. Accordingly, the Executive Director concludes that the requestor is an affected person with a right to hearing authorized by law.

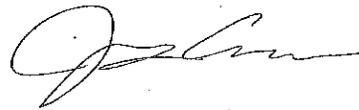
V. Conclusion and Recommendation

The Executive Director respectfully recommends that the Commission grant the hearing request and refer this matter 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

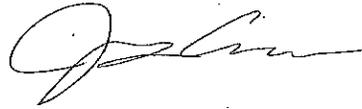
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CERTIFICATE OF SERVICE

I certify that on April 23, 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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