

TCEQ DOCKET NO. 2011-2288-WR

APPLICATION BY	§	BEFORE THE
BENTWOOD CC, LLC	§	
FOR AN AMENDMENT TO	§	TEXAS COMMISSION ON
CERTIFICATE OF	§	
ADJUDICATION NO. 14-1290A	§	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. 14-1290A. One hearing request was timely received from Brian Treadwell on behalf of the Treadwell Cattle Company. The Executive Director respectfully recommends that the commission deny the hearing request.

I. Background

The applicant has leased water from a co-owner of Certificate of Adjudication No. 14-1290A and requests an amendment (14-1290B) to add a diversion point on the South Concho River, downstream from the existing diversion point, for the leased portion of water under 14-1290A. The application also requests an authorization to divert the leased portion of water for storage in two off-channel reservoirs and to add an additional 250 acres of land for irrigation. The owner of the portion of the water right subject to this amendment has expressly consented to Bentwood's diversion and use of the water by letter dated March 24, 2010 to the Concho River Watermaster. The co-owner of the certificate, the Christoval Independent School District, received notice of the application and did not submit a hearing request. The draft permit acknowledges the ability of Bentwood CC, LLC to divert and use water under the certificate and authorizes the additional diversion point and place of use with certain special conditions added for the protection of water rights within the basin and the environment.

II. Procedural History

This application was received April 25, 2011. The application was declared administratively complete on August 19, 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 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 states that the requestor owns "the property across the river from the Stultz location" and implies that the requestor owns two water rights in the basin. A review of agency records by the Water Rights Permitting and Availability section indicates 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 14-1290A. Because this application only authorizes activities approximately 14 miles downstream from that location, and because the request fails to explain how or why this amendment will affect Mr. Treadwell or the Treadwell Cattle Company in a manner not common to the general public, the Executive Director concludes that the requestor is not an affected person.

V. Conclusion and Recommendation

The Executive Director respectfully recommends that the Commission deny the hearing request of Brian Treadwell and only refer this matter to hearing if it finds, in its discretion, that a hearing would 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

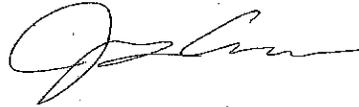
Robert Martinez, Director
Environmental Law Division



By _____
James Aldredge, Staff Attorney
Environmental Law Division
State Bar No. 24058514
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
(512) 239-2496
Representing the Executive Director of the
Texas Commission on Environmental Quality

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.



James Aldredge, Staff Attorney
Environmental Law Division
State Bar No. 24058514

**MAILING LIST
BENTWOOD CC, LLC
DOCKET NO. 2011-2288-WR; ADJ 1290**

Brad Fluitt
Kevin Collins
Bentwood Country Club
2111 Club House Lane
San Angelo, Texas 76904-8015

Brian Christian, Director
Texas Commission on Environmental Quality
Small Business and Environmental Assistance Program
Public Education Program, MC-108
P.O. Box 13087
Austin, Texas 78711-3087

Amy Swanholm
Texas Commission on Environmental Quality
Public Interest Counsel, MC-103
P.O. Box 78711-3087

Brian Treadwell
5476 West FM 2335
Christoval, Texas 76935