

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 23, 2012

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

RE: BENTWOOD CC, LLC
TCEQ DOCKET NO. 2011-2288-WR

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanholm".

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2011-2288-WR

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION TO AMEND	§	TEXAS COMMISSION ON
BENTWOOD CC, LLC.'S WATER	§	ENVIRONMENTAL QUALITY
RIGHTS PERMIT NO. ADJ 1290B	§	

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTS FOR HEARING**

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Response to Requests for Hearing in the above-referenced matter.

I. INTRODUCTION

Bentwood C.C., L.L.C., 2111 Clubhouse Lane, San Angelo, Texas, 76904, (Bentwood or Applicant) has applied to the Texas Commission on Environmental Quality to amend Certificate of Adjudication No. 14-1290. Certificate of Adjudication No. 14-1290 authorizes the owner to maintain a dam and reservoir located on the South Concho River and impound up to 50.0 acre-feet of water, to divert and use up to 116.4 acre-feet of water per year, with a time priority of July 29, 1914, at a combined maximum rate of 15.11 cfs (6,800 gpm) from the reservoir for agricultural purposes to irrigate 94 acres of land out of a tract in Tom Green County. The water right also authorizes the diversion and use of up to 56.0 acre-feet of water per year, with a time priority of March 12, 1964, at a maximum rate of 4.44 cfs (2,000 gpm) from a point on the South Concho River for agricultural purposes to irrigate the same 94 acres of land.

Christoval ISD acquired a 6 acre-foot portion (July 29, 1914 priority) of the water right and amended that portion. The remaining 166.4 acre-feet of water is currently owned by Jonathan R. Stultz and Kelly D. Stultz. Pursuant to a *Lease of Water Rights* between Jonathan R. Stultz and Kelly D. Stultz and Bentwood, Bentwood seeks to amend the 166.4 acre-foot portion of Certificate of Adjudication No. 14-1290 to add recreational use, change the diversion point to a point on Lake Nasworthy located on the South Concho River, add two off-channel reservoirs as part of the irrigation system, and change the place of use to a 419.643-acre tract in Tom Green County. The Applicant does not seek to increase the diversion rate.

Lake Nasworthy is owned by the City of San Angelo. The City has consented to Bentwood diverting from Lake Nasworthy.

The proposed off-channel reservoirs are described as follows:

- The South Golf Course Lake has a capacity of 2.8 acre-feet with a surface area of 1.3 acres and is located at Latitude 31.398214° N, Longitude 100.480183° W, in the Heinrich F. Gantz Original Survey No. 179, Abstract No. 231, bearing S 19.003333° E, 6,230 feet from the northwest corner of the Gantz Original Survey, approximately 5.3 miles southwest of the City of San Angelo, Tom Green County, Texas.
- The North Golf Course Lake has a capacity of 4.0 acre-feet with a surface area of 0.9 acres and is located at Latitude 31.403699° N, Longitude 100.467411° W, in the Gantz Original Survey, bearing N 30.000278° E, 6,300 feet from the southeast corner of the Gantz Original Survey, approximately 4.36 miles southwest of the City of San Angelo, Tom Green County, Texas.

The proposed diversion point is located on Lake Nasworthy, located on the South Concho River, approximately 5.3 miles in a southwest direction from the City of San Angelo, Tom Green County, Texas.

Ownership of the land to be irrigated is evidenced by a Special Warranty Deed, dated July 20, 2006, and a Special Warranty Deed, dated December 7, 2006, and

The application and required fees were received on August 13, 2010. Additional information and fees were received on April 25, June 27, July 5, July 7, and July 11, July 27, and August 8, 2011. The application was declared administratively complete and filed with the Office of the Chief Clerk on July 26, 2011. The Executive Director completed the technical review of the application and prepared a draft amendment. The draft amendment, if granted, would include special conditions including, but not limited to, a requirement that there be inflows to Lake Nasworthy prior to diversion.

The comment period closed on October 27, 2011, the same day as the deadline to request a contested case hearing. TCEQ received one timely hearing request from Treadwell Cattle Co. on October 17, 2012.

II. APPLICABLE LAW

Water rights holders must obtain authority from the TCEQ to alter their water right, including changing the place of use, purpose of use, point of diversion, rate of

diversion, acreage to be irrigated, or any other change to their current authority under Texas Water Code (TWC) § 11.323.¹ TCEQ shall approve the requested amendment unless the amendment increases the amount of water to be diverted, the rate at which the water will be diverted, or the requested change would have an adverse impact on other water rights holders or the environment, beyond that which would occur if the water right holder seeking an amendment fully exercised its existing right.² The amendment also must “meet all other applicable requirements” of Chapter 11 of the Texas Water Code.³

A. Requirements for Contested Case Hearing Requests

This application was declared administratively complete on July 26, 2011. 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 contested case hearing may be requested by the Commission, the ED, the applicant, and affected persons. 30 TAC § 55.251(a).

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.”⁴

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.”⁵ 30

¹ TWC § 11.122(a).

² TWC § 11.122(b).

³ *Id.* See also *City of Marshall*, 206 S.W. 3d 97, 109-111, (Tex. 2006).

⁴ 30 TAC § 55.251(b), (c); 30 TAC § 295.171.

⁵ 30 TAC § 55.256(a).

TAC § 55.256(c) provides relevant factors to 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.⁶

In addition, governmental entities with authority under state law over issues contemplated by the application may be considered affected persons.⁷

The Commission shall grant a request for a contested case hearing if (1) the request is made by the applicant, or (2) the request is made by an affected person, timely filed with the chief clerk, and made pursuant to a right to hearing authorized by law.⁸

III. HEARING REQUESTS

One entity, Treadwell Cattle Co. (Treadwell) filed a timely hearing request with the Commission. Treadwell, in its hearing request, states that it is requesting a hearing because the water at the South Concho River where Bentwood is currently diverting water does not flow to the proposed diversion location. Instead, the flow from the South Concho River is terminated at the South Pool of Twin Buttes Reservoir. Treadwell asserts that the amendment application is actually a new water appropriation and should have failed the TCEQ's water availability review. Treadwell also argues that the amendment would authorize the movement of the discharge point to a different,

⁶ 30 TAC § 55.256(c).

⁷ 30 TAC § 55.256(b).

⁸ 30 TAC § 55.255(b).

disconnected watershed and effectively would create a new permit with a senior priority date on the already over-appropriated Middle Concho/Spring Creek Watershed. The request also states that Treadwell owns property across the river from the Stultz location and the property where the Bentwood portion of Certificate of Adjudication No. 14-1313 originated.

The Commission may not grant an application to amend an existing permit if it will have an adverse impact upon other water right holders.⁹ Treadwell owns water rights in the same basin and along the same waterway as the water right at issue. Treadwell and Bentwood co-own Certificate of Adjudication No. 14-1313. As part-owner of that water right, Treadwell may divert 371 acre-feet per year for irrigation from the same diversion point as Bentwood. Treadwell also owns Certificate of Adjudication No. 14-1310. Therefore, Treadwell's interest in the potential adverse effects to its existing water rights is protected by the law under which the application will be considered.¹⁰ Furthermore, a reasonable relationship exists between Treadwell's interest in protecting its existing water rights and the activity regulated.¹¹ Based on this showing, OPIC recommends that the Commission find that Treadwell has demonstrated it is affected and entitled to a hearing.

IV. CONCLUSION

For the reasons set forth above, OPIC respectfully recommends that the Commission grant the contested case hearing request of Treadwell. OPIC also recommends that the Commission refer this matter to the State Office of Administrative Hearings for a contested case hearing.

Respectfully submitted,

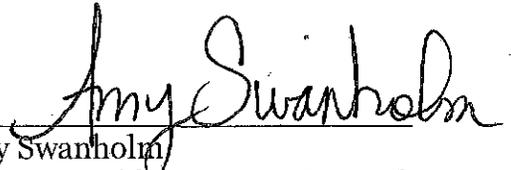
Blas J. Coy, Jr.
Public Interest Counsel

⁹ TWC § 11.122(b).

¹⁰ 30 TAC § 55.256(c)(1).

¹¹ 30 TAC § 55.256(c)(3).

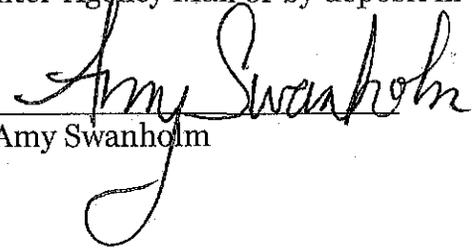
By



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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2012, the original and seven 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.



Amy Swanholm

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TCEQ DOCKET NO. 2011-2288-WR**

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