

TCEQ DOCKET NO. 2012-0815-WR

APPLICATION BY	§	BEFORE THE
SADDLE CREEK	§	
DEVELOPMENT	§	TEXAS
LTD, FOR A WATER	§	COMMISSION
USE PERMIT	§	
PURSUANT TO	§	ON
TEXAS WATER	§	
CODE § 11.143;	§	ENVIRONMENTAL
APPLICATION	§	QUALITY
12202	§	

**THE EXECUTIVE DIRECTOR'S RESPONSE
TO HEARING REQUESTS**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to a hearing request for Saddle Creek LTD's (Saddle Creek or Applicant) application for water use permit in Parker County. The Executive Director recommends denial of the remaining hearing request.

PROCEDURAL HISTORY

The Executive Director received an application from Applicant seeking a water use permit pursuant to Texas Water Code §11.143 and TCEQ Rules located at 30 Texas Administrative Code (TAC) §§295.1, et seq on March 27, 2007 . The application was declared administratively complete and was filed with the Office of the Chief Clerk on May 15, 2007. The notice of the application was filed with the Chief Clerk on August 7, 2007, and notice was subsequently mailed to downstream water right holders of record in the Trinity River Basin. The Commission received timely hearing requests from two requestors (Dr. Denis R. Benjamin, MD and the City of Dallas). The Commission subsequently received additional untimely comments from Dr. Benjamin and a request to withdraw its protest from the City of Dallas. A Conservation technical memo was completed on April 20, 2007. An environmental technical review was completed and memorandum issued on August 1, 2007 and an addendum issued on February 21, 2008. A hydrology review was completed and memorandum issued on August 1, 2007. A Dam Safety review and memorandum were completed on September 14, 2007. A draft permit was issued in December 2007. A revised Draft Permit was issued September 26, 2012.

THE APPLICATION

Saddle Creek Development LTD applied for a Water Use Permit (Application No. 12202) for authorization to modify and maintain an existing dam and reservoir on Brown Branch, tributary of the Clear Fork Trinity River, tributary of the Trinity River, Trinity River Basin, for in-place recreational use in Parker County, Texas. The formerly exempt reservoir has a capacity of 6.7 acre feet and a surface area of 1.32 acres. The Applicant proposes to maintain the reservoir at a constant level with groundwater from an existing well.

LEGAL AUTHORITY

The application is subject to the procedures for evaluating hearing requests on applications declared administratively complete on or after September 1, 1999 in 30 Texas Administrative Code, Chapter 55, Subchapter G (Sections 55.250-55.256).

Title 30, Sections 55.251 (b) of the Texas Administrative Code specifies 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 comply with requirement (1) above and must "substantially comply" with requirements (2) through (4). 30 Tex. Admin. Code § 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:

- (A) complies with the requirements of 30 Tex. Admin. Code § 55.251;
- (B) is timely filed; and
- (C) is pursuant to a right to hearing authorized by law.

30 Tex. Admin. Code § 55.255(b)(2).

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. An interest common to the general public does not constitute a justiciable interest. 30 Tex. Admin. Code § 55.256(a).

To determine whether a person 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.

30 Tex. Admin. Code § 55.256(c).

DISCUSSION OF HEARING REQUESTS

The City of Dallas' hearing request

On August 25, 2008, the City of Dallas submitted a request for changes to the Draft Permit. Upon completion of the requested changes, Dallas expressed its wish to withdraw its hearing request. The changes have been made to the revised draft permit and Counsel for Dallas has confirmed its intent to withdraw its hearing request. Therefore, this response does not address the merits of Dallas' hearing request.

Dr. Benjamin's hearing request

The Commission received one other timely hearing request from Dr. Denis R. Benjamin, MD. Dr. Benjamin raised the following five issues in his hearing request: 1) an objection to the use of groundwater for an aesthetic use (waste of groundwater); 2) failure to prove that groundwater is available or that the groundwater conservation district rules have been satisfied (availability of groundwater); 3) the State has a responsibility to conserve the groundwater (waste of groundwater); 4) keeping the pond full will eliminate a buffering effect of the dam during storm surges; and 5) improper notice of the application (that he did not receive notice). Dr. Benjamin submitted 3 additional untimely letters after the comment period in response to a letter response to his concerns from the ED. Regarding issue no. 5, notice of the application was published and mailed

to downstream water rights holders of record in the Trinity basin pursuant to 30 Tex. Admin. Code § 295.153. The ED notes that the Dr. Benjamin is not a water right holder of record in the TCEQ database and, therefore, he did not receive mailed notice of the application.

The Applicant has provided the ED with Parker County Appraisal District records that purportedly show that in 2010 Dr. Benjamin conveyed the property upon which he based his hearing request. However, the requestor has not withdrawn his hearing request and all Commission attempts to contact Dr. Benjamin have been unsuccessful. Since the hearing request has not been withdrawn, the ED provides the following evaluation of the merits of Dr. Benjamin's hearing request.

The requestor has failed to demonstrate that he is an affected person pursuant to 30 Tex. Admin. Code § 55.256

Dr. Benjamin's request complies with the requirements of 30 Tex. Admin. Code § 55.251(b), however, Dr. Benjamin has identified a personal justiciable interest that is not protected by the applicable statutes governing water rights. 30 Tex. Admin. Code § 55.256. The justiciable interest Dr. Benjamin is claiming (groundwater rights) is not pertinent to the processing of this application.

The first factor in section 55.256 is "whether the interest claimed is one protected by the law under which the application will be considered." Dr. Benjamin raised the following five issues in his hearing request: 1) an objection to the use of groundwater for an aesthetic use (waste of groundwater); 2) failure to prove that groundwater is available or that the groundwater conservation district rules have been satisfied (availability of groundwater); 3) the State has a responsibility to conserve the groundwater (waste of groundwater); 4) keeping the pond full will eliminate a buffering effect of the dam during storm surges; and 5) improper notice of the application (that he did not receive notice).

Jurisdiction over the permitting of groundwater (and whether such uses are available or wasteful) falls squarely under the jurisdiction of the local groundwater conservation district (GCD) – in this case the Upper Trinity GCD. The Requestor's interest in groundwater quantity is not one that is protected by the law under which this application will be considered. For water rights applications, that interest is typically a water right that may be affected by the application. Dr. Benjamin did not name a water right for which he has ownership rights, nor has he made any claims for riparian rights. Dr. Benjamin states: "Our property is approximately 400 yards from the proposed well. However, the pond maintained by this well empties into Brown Creek, which abuts our western property line." Even if the Commission assumes that Dr. Benjamin's address is a downstream property, he has still failed to identify a water right or to claim riparian water rights that would be affected. Instead, Dr. Benjamin complains about the use of the groundwater and how the use of the groundwater will affect his potential use of the same aquifer. Under Tex. Water Code § 11.303(l) and 30

Tex. Admin. Code § 297.21(a), landowners along a river have the right to use the normal flow of the river for domestic and livestock uses.

30 Tex. Admin. Code § 297.118 defines “domestic” use as:

Use of water by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard; for watering of domestic animals; and for water recreation including aquatic and wildlife enjoyment. If the water is diverted, it must be diverted solely through the efforts of the user. Domestic use does not include water used to support activities for which consideration is given or received or for which the product of the activity is sold.

Dr. Benjamin does not state that he diverts water from the tributary for domestic purposes. He mentions the groundwater source well, but never states that the application will affect his domestic use of surface water. Dr. Benjamin’s request is deficient with respect to the requirements of 30 Tex. Admin. Code § 55.256, because it identifies a personal justiciable interest that is not protected by the law under which the application will be considered.

Dr. Benjamin’s remaining concern is that keeping the previously exempt reservoir full with groundwater will eliminate the buffering effect that he claims the reservoir now provides. Once the Applicant began to develop the property around the previously exempt reservoir it became a commercial enterprise. Therefore, the reservoir could no longer be maintained in its exempt form. The reservoir must be removed or remain full to protect downstream State water users. As an exempt reservoir it is not required to be kept full with groundwater. Therefore, when the flows are not sufficient to go over the top of the reservoir, the owner is keeping State water that would be available to senior water rights holders. The condition requiring the owner to keep the reservoir full with an alternative source is intended to protect senior water rights holders by ensuring that any flows be passed through the reservoir. In other words, the intent is to pass flows as if the reservoir did not exist. The only options in this matter are to deny the permit and require removal of the dam or to protect senior water rights holders by requiring the owner to keep it full with alternative sources of water. In either case, the buffering effect that Dr. Benjamin wants to protect would not be protected. Dr. Benjamin’s claim that the existing reservoir buffers flooding is not an interest that is protected by the law under which this application will be considered. There is no statute or rule that requires a landowner to maintain an artificial flood buffer for the benefit of another landowner.

Under the second factor, the Commission must consider “distance restrictions or other limitations imposed by law on the affected interest.” Dr. Benjamin’s property (assuming he still owns it) is within a close enough proximity to the existing dam and reservoir that this factor standing alone would not limit his affected person status.

The third factor for consideration is “whether a reasonable relationship exists between the interest claimed and the activity regulated.” The requester appears to be claiming that the proposed use of groundwater will be harmful to his own use or access to groundwater. There is a relationship between the use of groundwater as an alternative source, however, the activity complained of is regulated by another entity – the Upper Trinity GCD.

The fourth factor is “the likely impact of the regulated activity on the health, safety, and use of property of the person.” The Requestor claims that the existing reservoir currently provides a flood buffer. However, once the landowner began to develop the property around the previously exempt reservoir it became a commercial enterprise. Therefore, the reservoir could no longer be maintained in its exempt form. The reservoir must be removed or remain full to protect downstream State water users. If the Applicant does not either remove the reservoir or keep it full with an alternative source, the Applicant would be unlawfully appropriating State water that is not available. There is no option to leave the reservoir in its current state. The requestor claims that the activity authorized by the proposed draft permit would impact his health, safety, or use of property. As addressed above, there is nothing in the water code or Commission rules that allows the Commission to require a landowner to maintain an artificial flood buffer for the benefit of his neighbor. On the other hand, the Commission does have statutory requirements to protect senior water rights holders from unlawful appropriations of State water.

The final factor relevant to this affected person determination is “the likely impact of the regulated activity on the use of the impacted natural resource by the person.” The request never states that Dr. Benjamin uses or diverts the “impacted natural resource”, that is that he diverts surface water for use. Instead, Dr. Benjamin alleges that the use of groundwater to keep the reservoir full will adversely affect his own use of groundwater. As has been explained above, the use of groundwater as the Applicant’s alternative source is regulated by the Upper Trinity GCD and more properly considered by that entity.

Considering all of the factors in total, Dr. Benjamin’s request fails to adequately show that he is an “affected person” under the requirements of 30 Tex. Admin. Code § 55.256. Specifically, the issues raised by Dr. Benjamin are not protected under the law that this application will be considered. Therefore the Executive Director respectfully requests that the Commission deny the request for a hearing.

CONCLUSION

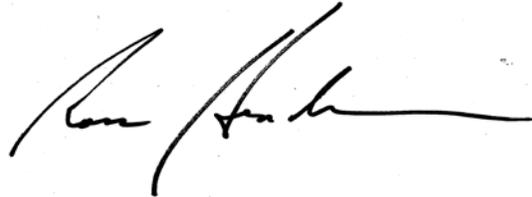
For the foregoing reasons, the Executive Director respectfully recommends that the Commission deny Dr. Benjamin's request for a hearing.

Respectfully submitted,

Texas Commission on Environmental
Quality

Zak Covar
Executive Director

Robert Martinez, Director
Environmental Law Division



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REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2012, the Executive Director's Response to Hearing Request was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk and was served via hand delivery, facsimile transmission, email, or by first class mail to all the parties on the mailing list.

A handwritten signature in black ink, appearing to read "Ross Henderson", written over a horizontal line.

Ross Henderson
Environmental Law Attorney

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DOCKET NO. 2012-0815-WR; WRPERM 12202

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WATER USE PERMIT

PERMIT NO. 12202

TYPE: §11.143

Permittee:	Saddle Creek Development Ltd.	Address:	751 Hwy 287 N Suite 104 Mansfield, Texas 76063
Filed:	May 15, 2007	Granted:	
Purpose:	Recreation	County:	Parker
Watercourse:	Brown Branch, tributary of the Clear Fork Trinity River, tributary of the Trinity River	Watershed:	Trinity River Basin

WHEREAS, Applicant seeks authorization to modify and maintain an existing dam and reservoir on Brown Branch, tributary of the Clear Fork Trinity River, tributary of the Trinity River, Trinity River Basin with a surface area of 1.32 acres and impound therein 6.7 acre-feet of water for recreational purposes in Parker County; and

WHEREAS, the dam and reservoir are located in the William Robinson Original Survey, Abstract No. 1109 in Parker County, Texas, 3.28 miles southeast of the City of Aledo, Texas. The centerline of the dam is located N78.1167°W, 503 feet from the southeast corner of the Robinson Survey, also being at Latitude 32.6549°N, Longitude 97.5737°W; and

WHEREAS, the applicant indicates there is to be a maintenance agreement for the Home Owners Association (HOA) that will provide for the perpetual maintenance and care of the Saddle Creek Dam. This agreement will require the owners of two (2) lots that will share direct ownership of the dam to keep the dam and rock rip rap areas clear of tree growth by mowing the dam and clearing rock rip rap areas of seedlings each year; and

WHEREAS, ownership of the lands to be inundated is evidenced by a Warranty Deed with document number 608774 recorded in the Official Records of Parker County, Texas; and

WHEREAS, pursuant to 30 Texas Administrative Code §297.42, the applicant has provided evidence of an alternate source of water, which the applicant has identified as groundwater; and

WHEREAS, the Texas Commission on Environmental Quality finds that jurisdiction over the application is established; and

WHEREAS, the Executive Director recommends special conditions be included; and

WHEREAS, the Commission has complied with the requirements of the Texas Water Code and Rules of the Texas Commission on Environmental Quality in issuing this permit;

NOW, THEREFORE, Water Use Permit No. 12202 is issued to Saddle Creek Development Ltd., subject to the following terms and conditions:

1. IMPOUNDMENT

Permittee is authorized to modify and maintain an existing dam and reservoir on Brown Branch, tributary of the Clear Fork Trinity River, tributary of the Trinity River, Trinity River Basin in Parker County with a surface area of 1.32 acres and impound therein 6.7 acre-feet of groundwater. The dam and reservoir are located in the William Robinson Original Survey, Abstract 1109 in Parker County, 3.28 miles southeast of the City of Aledo Texas. The centerline of the dam is located N78.1167°W, 503 feet from the southeast corner of the William Robinson Original Survey, also being at Latitude 32.6549°N, Longitude 97.5737°W. Ownership of the lands to be inundated is evidenced by a Warranty Deed recorded in the official records of Parker County as document number 608774.

2. USE

Permittee is authorized to use the reservoir for recreational purposes with no right of diversion.

3. PRIORITY

The time priority for this right is May 15, 2007.

4. TIME LIMITATIONS

A. Rehabilitation of the dam for Saddle Creek Lake must be in accordance with plans approved by the Executive Director. Rehabilitation of the dam without final approval of the plans is a violation of this authorization.

B. Construction shall begin within one year of issuance of this permit and be completed within two years of the issuance of this permit, unless Permittee applies for and is subsequently granted an extension of time before the expiration of these time limitations.

C. Failure to begin construction of the proposed dam and reservoir within the period stated above shall subject all rights to this permit to forfeiture, subject to notice and hearing. After beginning construction, failure to timely construct the proposed dam and reservoir stated above shall subject this permit to cancellation in whole or in part, subject to notice and hearing.

5. SPECIAL CONDITIONS

A. This permit does not allow Permittee to impound state water. Therefore, Permittee shall provide and maintain suitable outlets in good working condition in the reservoir to pass all inflows of state water downstream. Upon termination of this permit, permittee shall activate the outlets such that no state water is impounded in the reservoir.

- B. Permittee shall maintain and operate at least one groundwater well with the capability of producing adequate quantities of groundwater to maintain the reservoir at an elevation that allows the free passage of all inflows of State Water to ensure that no State Water is used. Permittee has identified groundwater from the Paluxy Aquifer as the alternate source of water for this project.
- C. Discharge of commingled surface and ground water from the reservoir into the downstream watershed shall be of sufficient quality to meet the requirements of the *Texas Surface Water Quality Standards* (30 TAC 307) for Segment 0831.
- D. This permit is issued contingent upon the Permittee's maintenance of the alternate source of water identified in Item B above. In the event the groundwater well will not be used as the alternate source, Permittee shall immediately cease impoundment of water under this permit and either apply to amend this permit with documentation of the new alternate source of water, or voluntarily forfeit the permit. If Permittee does not amend or forfeit the permit, the Commission may begin proceeding to cancel this permit. Permittee shall notify the Commission immediately if the groundwater well(s) will not be used as the alternate source of water for permit.
- E. Permittee shall implement and maintain appropriate best management practices (BMPs) in the area surrounding the reservoir in order to minimize potential pollutant loadings through the control of sediment and nutrients. BMPs shall include but are not limited to:
 - 1. Installation and placement of erosion resistant materials in areas of high velocity flows;
 - 2. The use of sediment control barriers;
 - 3. Temporary and permanent ground cover (both natural and artificial types); and
 - 4. Proper management and control of fertilizer, herbicide, and pesticide applications.
- F. Permittee shall maintain a vegetated buffer of at least 50 feet in average width around the perimeter of the reservoir with the exception of the dam structure and reasonable access points. The buffer zone shall have a slope no greater than 15% and be planted with native vegetation at a density to ensure complete coverage at maturity.

This permit is issued subject to all superior and senior water rights in the Trinity River Basin.

Permittee agrees to be bound by the terms, conditions and provisions contained herein and such agreement is a condition precedent to the granting of this permit.

All other matters requested in the application which are not specifically granted by this permit are denied.

This permit is issued subject to the Rules of the Texas Commission on Environmental Quality and to the right of continuing supervision of State water resources exercised by the Commission.

For the Commission

ISSUED: