

Bryan W. Shaw, Ph.D., P.E., *Chairman*  
Toby Baker, *Commissioner*  
Jon Niermann, *Commissioner*  
Richard A. Hyde, P.E., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 29, 2016

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

Re: Docket No. 2015-1645-WR  
Popek & Son  
Water Rights Permit No. 12496

Dear Ms. Bohac:

Attached for filing please find an original and seven copies of the Executive Director's Response to Hearing Requests. Please feel free to contact me at [dinniah.tadema@tceq.texas.gov](mailto:dinniah.tadema@tceq.texas.gov) or (512) 239-0617 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Dinniah C. Tadema".

Dinniah C. Tadema  
Staff Attorney  
Environmental Law Division Enclosure

cc: Mailing List

**TCEQ DOCKET NO. 2015-1645-WR**

<b>APPLICATION BY POPEK AND SON</b>	<b>§</b>	<b>BEFORE THE</b>
<b>FOR NEW WATER USE</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>PERMIT NO. 12496</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

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

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The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) respectfully submits this response to hearing requests filed in the application by Popek and Son (Applicant) for new Water Use Permit No. 12496. Hearing requests were filed by John S. Runnells, III (Mr. Runnells); David Minze (Mr. Minze); and Franz Agriculture J.V. (Franz Agriculture).

The Executive Director respectfully recommends that the Commission grant Mr. Minze's hearing request and deny Mr. Runnells and Franz Agriculture's hearing requests.

Staff has prepared a map showing the location of Minze Land Investments, L.P.'s water right and Runnells Pierce Ranch's water right. Staff's map is attached as Attachment A.

**I. BACKGROUND**

Applicant seeks authorization to maintain an existing dam and reservoir on an unnamed drainage ditch, tributary of Hardeman Slough, tributary of Caney Creek, Brazos-Colorado Coastal Basin for agricultural purposes. The reservoir has a storage capacity of 4.2 acre-feet of water and a surface area of 1.38 acres. The Applicant also seeks authorization to use the bed and banks of the reservoir to convey 200 acre-feet of groundwater for subsequent diversion for agricultural purposes to irrigate 60 acres out of a 123.08 acre tract. The Applicant has estimated that conveyance losses will be approximately 2% of the discharged volume. The Applicant states that all state water will be passed, and the existing reservoir will be maintained full using groundwater the Chicot Aquifer.

**II. PROCEDURAL HISTORY**

The Commission received this application on September 3, 2009. The application was declared administratively complete on April 8, 2010. Notice of the application was mailed by the Commission's Chief Clerk on December 3, 2010, to water right holders of record in the Brazos-Colorado Coastal Basin. The notice for this application was published in the *Bay City Tribune* on December 22, 2010. The hearing request period for this application closed on January 21, 2011. Two timely hearing requests and one untimely hearing request for a contested case hearing were received.

### III. LEGAL AUTHORITY

Pursuant to 30 Texas Administrative Code Section 55.251(a), the following may request a contested case hearing on water rights applications: 1) the Commission; 2) the Executive Director; 3) the applicant; and 4) affected persons when authorized by law. Affected persons are authorized to submit hearing requests for water rights applications under Texas Water Code Section 11.132(a). The Commission, on the request of any affected person shall hold a hearing on a water rights application. The procedures for determining whether a hearing requestor is an affected person and whether the hearing request is valid are set forth in 30 Texas Administrative Code Sections 55.250-55.256, which apply to water rights applications such as this one that were declared administratively complete after September 1, 1999.

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." 30 Tex. Admin. Code § 55.256(a). An interest "common to members of the general public does not qualify as a personal justiciable interest." 30 Tex. Admin. Code § 55.256(a).

Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 Tex. Admin. Code § 55.256(b).

To determine whether a hearing requestor is an affected person, all relevant factors must be considered. 30 Tex. Admin. Code § 55.256(c). These factors include but are not limited to the following:

- 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).

In addition, the hearing request must substantially comply with the four requirements set forth in 30 Texas Administrative Code Section 55.251(c):

- 1) Give the name, address, and daytime telephone number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone

- number and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
- 2) 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;
  - 3) Request a contested case hearing; and
  - 4) Provide any other information specified in the public notice of application.

The request for a contested case hearing must be filed with the Commission's Chief Clerk during the public comment period. 30 Tex. Admin. Code § 55.251(d).

The Commission must grant a request for a contested case hearing made by an affected person if the request complies with the requirements of 30 Texas Administrative Code Section 55.251; is timely filed with the Chief Clerk; and is pursuant to a right to hearing authorized by law. 30 Tex. Admin. Code § 55.255(b)(2).

#### **IV. HEARING REQUESTS AND RECOMMENDATION**

Three hearing requests were filed by John S. Runnells, III; David Minze; and Franz Agriculture J.V. An outline of each hearing request and the Executive Director's recommendation on each request follows. The hearing requests from John S. Runnells, III and David Minze substantially complied with the procedural requirements of Section 55.251. Franz Agriculture J.V., however, failed to timely file its hearing request.

##### ***A. Recommendation to Grant Hearing Requests***

###### **David Minze**

David Minze is the general partner of Minze Land Investments, L.P. (MLI). In his hearing request, Mr. Minze represents that MLI owns 2200 acres of farmland 2.4 miles southeast and downstream of Applicant's proposed diversion point. Mr. Minze states that MLI owns a water right which authorizes MLI to divert water from Hardeman Slough for irrigation of crops. Mr. Minze further states that he is concerned with the following: 1) Applicant will take unauthorized state water and MLI's water right will be subordinated by the reduction of normal streamflow from upstream; 2) TCEQ allowing Applicant to permit the impoundment after the impoundment has been built; and 3) TCEQ allowing Applicant to use a public ditch as a private irrigation system.

Based on the factors in 30 Texas Administrative Code Section 55.256(c)(1) and (c)(3) through (c)(5), Mr. Minze is an affected person. MLI owns a water right downstream of the Applicant's proposed diversion point. MLI's water right is protected by the law under which the application will be considered. In addition, a reasonable relationship also exists between MLI's water right and the issuance of

the permit. MLI's water right and its use of water may be affected by this application; therefore, its hearing request should be granted.

### ***B. Recommendation to Deny Hearing Requests***

#### **John S. Runnells, III**

Mr. Runnells requests a contested case hearing on the basis that allowing the existing dam and water control system to remain in a County drainage easement would restrict Mr. Runnells's drainage located upstream.

Mr. Runnells is not an affected person, and his hearing request should be denied. Mr. Runnells has not shown that he has a personal justiciable interest related to a legal right affected by the application. Mr. Runnells's concern about drainage is not an interest that is protected by Texas Water Code Chapter 11 or the TCEQ rules considered in reviewing Popek and Son's application. Mr. Runnells has not shown that he is an affected person pursuant to the factors in 30 Texas Administrative Code § 55.256; therefore, his hearing request should be denied.<sup>1</sup>

#### **Franz Agriculture J.V.**

Franz Agriculture J.V. (Franz Agriculture) leases the Six Bar Ranch, which is owned by MLI for crop and livestock production. Franz Agriculture's farm is located a few miles southeast and downstream of the Applicant's proposed diversion point. Franz Agriculture's lease includes the right to pump water for irrigation from Hardeman Slough under the water right held by MLI. Franz Agriculture alleges that Applicant has pumped water without a permit and objects to the Applicant using water before it reaches Franz Agriculture's pump. Franz Agriculture alleges that this is especially a problem during extended dry periods when water is low. Franz Agriculture objects to Popek and Son's application on the basis that: 1) it allows the Applicant to take water before it reaches the land that Franz Agriculture leases, which could affect the availability of water for Franz Agriculture's rice crop; 2) TCEQ would be unable to monitor the amount of groundwater pumped into the ditch; 3) it allows Applicant to use a public ditch for irrigation which allows Applicant to save money by not having to invest in a private canal or pipeline system to serve his land and crops; and 4) although it does not affect Franz Agriculture, allowing an unpermitted dam in a public ditch could cause drainage delays or water to back up onto adjacent property. Franz Agriculture states that Applicant should be required to deliver his groundwater by canal or pipeline on his property to protect Franz Agriculture's water right and to protect adjacent landowners from flooding.

Franz Agriculture's hearing request should be denied because it failed to timely file its hearing request 30 days from the date of newspaper publication of notice in accordance with 30 Texas Administrative Code Section 55.251(d). Notice was published on Wednesday, December 22, 2010, in the *Bay City Tribune*; therefore,

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<sup>1</sup> Water Rights Staff found that Runnells Pierce Ranch owns a water right on Caney Creek upstream from the proposed water right. In his hearing request, Mr. Runnells does not mention the water right, nor does he argue that the water right will be affected by this application. The water right is located on Caney Creek upstream from the proposed water right, and would not be affected by this application.

the deadline to file a hearing request was Friday, January 21, 2011. Franz Agriculture filed its hearing request on Monday, January 24, 2011. Since Franz Agriculture's hearing request was filed late it should be denied.

Alternatively, if the Commission wishes to consider Franz Agriculture's hearing request on its merits, the hearing request should be denied because Franz Agriculture failed to show that it is an affected person. In its hearing request, Franz Agriculture states that it leases land from MLI, and that its "lease with MLI includes the right to pump water for irrigation." Franz Agriculture's right to pump water is a contractual obligation created by the lease between MLI and Franz Agriculture. Franz Agriculture's lease interest is not an interest that is protected by the law under which the application will be considered. The proper remedy for lack of performance would be breach of contract. Therefore, Franz Agriculture is not an affected person and its hearing request should be denied.

## V. CONCLUSION

The Executive Director respectfully recommends that the Commission grant David Minze's hearing request and deny Johns S. Runnells, III and Franz Agriculture's hearing requests.

Respectfully submitted,

TEXAS COMMISSION ON ENVIRONMENTAL  
QUALITY

Richard A. Hyde, P.E.  
Executive Director

Robert Martinez, Director  
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By 

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### Certificate of Service

I hereby certify that on this 29th day of August, 2016, a true and correct copy of the Executive Director's Response to Hearing Requests was filed with the Chief Clerk of the Texas Commission on Environmental Quality and sent to the persons on the attached Mailing List.



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Dinniah Tadema, Staff Attorney  
Environmental Law Divisio

**MAILING LIST  
POPEK & SON  
DOCKET NO. 2015-1645-WR;  
WRPERM 12496**

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**ATTACHMENT A**

