

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



Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 29, 2016

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: **POPEK & SON**
TCEQ DOCKET NO. 2015-1645-WR

Dear Ms. Bohac:

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

Sincerely,


Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2015-1645-WR

APPLICATION BY POPEK & SON	§	BEFORE THE
FOR WATER USE PERMIT NO.	§	TEXAS COMMISSION ON
12496	§	ENVIRONMENTAL QUALITY

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

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) and files this Response to Hearing Requests in the above-referenced matter. OPIC respectfully recommends that the Commission grant the hearing request of Minze Land Investments, L.P., and deny the requests of Franz Agriculture, J.V. and Runnells Pierce Ranch.

In support of its recommendation, OPIC respectfully submits the following:

I. INTRODUCTION

Popek & Son (Applicant or Popek) has applied to the Commission for 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. Applicant proposes 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 of a 123.08-acre tract in Matagorda County. The reservoir has a capacity of 4.2 acre-feet and a surface area of 1.38 acres. A point on the centerline of the dam is N 36.1875 °E, bearing N 70° E, 2,230 feet from the southwest corner of the I & G N RR Co. Original Survey No. 3, Lot 10, Abstract No. 252, in Matagorda County, Texas, also being at Latitude 29.065805°N, Longitude 95.942797°W.

The Applicant proposes to use groundwater from the Chicot Aquifer to maintain the reservoir at a constant elevation in order to pass inflows of state water. Groundwater will be discharged into the on-channel reservoir. The Discharge Point is at Latitude 29.073903°N and Longitude 95.951802°W, bearing N 8 °W, 3,465 feet from the southwest corner of the I & G N RR Co. Original Survey No. 3 approximately 5.91 miles northeast of Bay City, in Matagorda County, Texas.

The diversion point from the on-channel reservoir is located at Latitude 29.068542°N, Longitude 95.945918°W, bearing N 30°E, 2,081 feet from the southwest corner property marker of the I & G N RR Co. Original Survey No. 3, approximately 5.91 miles northeast of Bay City, in Matagorda County. Water will be diverted at a maximum rate of 1.3368 cubic feet per second (600 gallons per minute). Ownership of the lands to be inundated and irrigated is evidenced in a Warranty Deed with Vendor's Lien, Document No. 080671, as recorded in the Official Public Records of Matagorda County, Texas.

The application was received on September 3, 2009. Additional information and fees were received on November 24, December 4, December 15, 2009, February 18, 2010, and March 17, 2010. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on April 8, 2010. The Executive Director completed the technical review of the application and prepared a draft permit. The deadline to request a contested case hearing was January 21, 2011.

II. REQUIREMENTS OF APPLICABLE LAW

A. Requirements to Obtain Affected Person Status

This application was declared administratively complete after September 1, 1999, and is subject to Chapter 55, Subchapter G, sections 55.250 - 55.256. According to these rules, an

“affected person” must submit a timely contested case hearing request in writing and in compliance with Commission requirements for making a request.¹ In addition, the request must identify the person’s personal justiciable interest affected by the application, including a brief, specific explanation regarding “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 the members of the general public.”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” in a manner not common to members of the general public.³ Relevant factors considered in determining a person’s affected person status include:

- (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 the 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.⁴

A contested case hearing should be granted if an affected person’s hearing request meets all requirements of applicable law. A request for hearing shall be granted if the request is made

¹ 30 TEX. ADMIN. CODE (“TAC”) §§ 55.251 *et seq.* and 30 TAC § 295.171.

² 30 TAC § 55.251(c)(2).

³ 30 TAC § 55.256(a). “This standard does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will potentially suffer harm or have a justiciable interest that will be affected.” *United Copper v. TNRCC*, 17 S.W.3d 797, 803 (Tex.App. - Austin 2000).

⁴ 30 TAC § 55.256(c).

by the applicant or the executive director.⁵ The Commission may also refer an application to the State Office of Administrative Hearings if the Commission determines that a hearing would be in the public interest.⁶

A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.⁷

B. Requirements for a Water Use Permit

Section 11.022 of the Texas Water Code (TWC) provides that “the right to the use of state water may be acquired by appropriation in the manner and for the purposes provided in this chapter.” Section 11.134(b) provides in pertinent part that the Commission shall grant an application to use state water only if:

- (2) unappropriated water is available in the source of supply;
- (3) the proposed appropriation:
 - (A) is intended for a beneficial use
 - (B) does not impair existing water rights or vested riparian rights;
 - (C) is not detrimental to the public welfare;
 - (D) considers the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152;
 - (E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement;

⁵ 30 TAC § 55.255(b)1

⁶ 30 TAC § 55.255(c).

⁷ 30 TAC § 55.252(a).

Section 11.147(d) of the Water Code also requires the Commission to consider the effect of a proposed permit on existing instream uses and water quality.

III. DISCUSSION

A. Determination of Affected Persons

1. Minze Land Investments, L.P.

On December 30, 2010, David Minze submitted a hearing request in this matter on behalf of Minze Land Investments (MLI). MLI is the owner of 2,200 acres of farmland approximately 2.4 miles southeast and downstream of the proposed diversion point. MLI is concerned about potential impacts on their water right. The executive director (ED) for the Commission produced a map in this proceeding that confirms that the property owned by MLI is downstream and in close proximity to the proposed diversion points. As an existing water rights holder, MLI has a personal justiciable interest under Texas Water Code §11.134(b)(3)(B). OPIC therefore recommends that MLI be determined an affected person and that the Commission grant its request for a contested case hearing.

2. Franz Agriculture J.V.

On January 24, 2011, Franz Agriculture submitted a hearing request in this matter. Franz Agriculture leases the property owned by MLI and pumps water for irrigation purposes under the right held by MLI. Although the referenced property is downstream and in close proximity to the proposed diversion points, Franz Agriculture does not own an existing water right, and therefore cannot be determined an affected person under the Texas Water Code. OPIC therefore recommends that the Commission deny its request for a contested case hearing.

3. Runnells Pierce Ranch

On December 22, 2010, John S. Runnells, III submitted a hearing request in this matter on behalf of Runnells Pierce Ranch (RPR). RPR is concerned that the proposed permit would allow the existing dams and water control system to remain in a county drainage easement, which could potentially affect drainage.

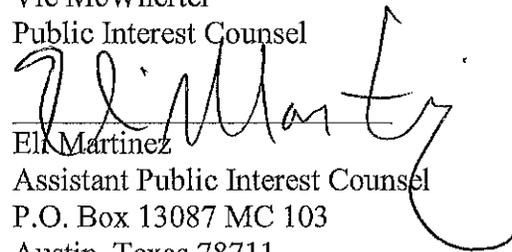
The map produced by the executive director (ED) in this proceeding demonstrates that the property owned by RPR lies in a separate tributary to the east of the proposed diversion. RPR's water rights would not be affected by the proposed application and therefore OPIC cannot find that they are an affected person under the Texas Water Code. OPIC therefore recommends that the Commission deny RPR's request for a contested case hearing.

IV. CONCLUSION

OPIC recommends that the Commission grant the hearing request of Minze Land Investments, L.P., and deny the requests of Franz Agriculture, J.V. and Runnells Pierce Ranch. Based on the foregoing, OPIC respectfully requests that the Commission refer this matter to State Office of Administrative Hearings for a contested case hearing.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

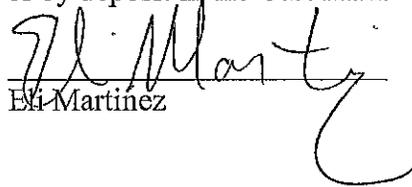


Eli Martinez

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2016, the original and seven true and correct copies of the Office of the Public Counsel's Response to Hearing Requests 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.


E. Martinez

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