

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: Robert D. Rogers, Jr.; Water Rights Temporary Permit No. 12452;
Docket No. 2016-0532-WR

Dear Ms. Bohac:

Attached for filing please find an original and seven copies of the Executive Director's Response to Hearing Requests in the above referenced matter. Please feel free to contact me at linda.horn@tceq.texas.gov or (512) 239-0676 if you have any questions.

Sincerely,

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

Linda Horn
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

TCEQ DOCKET NO. 2016-0532-WR

| | | |
|-----------------------------------|----------|------------------------------|
| APPLICATION BY | § | BEFORE THE |
| ROBERT D. ROGERS, JR. | § | TEXAS COMMISSION ON |
| TEMPORARY PERMIT NO. 12452 | § | 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 hearing requests filed in the application by Robert D. Rogers, Jr. for Temporary Water Use Permit No. 12452. Two timely hearing requests were filed by Robert D. Rogers, Jr. and Debra Markwardt. Robert D. Rogers, Jr. subsequently filed a withdrawal of hearing request.

The Executive Director respectfully recommends that the Commission deny Debra Markwardt's hearing request.

Staff has prepared a map showing the location of the water use of the hearing requestor located in the Trinity River Basin. Staff's map is attached as Attachment A.

I. BACKGROUND

Robert D. Rogers, Jr. filed an application for Temporary Water Use Permit 12452 to divert and use not to exceed 900 acre-feet of water within a period of three years from a reservoir (Flood Prevention Dam No. 9) authorized by Certificate of Adjudication No. 08-3401 on Cottonwood Creek, tributary of Soap Creek, tributary of Mountain Creek, tributary of West Fork Trinity River, tributary of Trinity River, Trinity River Basin, at a maximum diversion rate of 0.334 cfs (150 gpm) for mining purposes (gas well fracturing) in Ellis County. The Executive Director recommends granting the application for 726 acre-feet subject to flow requirements within the draft permit.

II. PROCEDURAL HISTORY

The Commission received this application on April 20, 2009. The application was declared administratively complete on July 7, 2009. Notice of the application was mailed by the Commission's Chief Clerk on October 6, 2009, to downstream water right holders. No publication notice was required for this temporary water use permit application.

The hearing request period for this application closed on October 28, 2009. Two timely hearing requests were filed by Robert D. Rogers, Jr. and Debra Markwardt. Robert D. Rogers, Jr. subsequently filed a withdrawal of hearing request.

III. LEGAL AUTHORITY

Pursuant to 30 Texas Administrative Code Section 55.251(b), 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).

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).

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 REQUEST AND RECOMMENDATION

Aside from the withdrawn hearing request, one hearing request filed on October 26, 2009, from Debra Markwardt remains. The hearing requestor substantially complied with the procedural requirements of Section 55.251. However, she did not show that she was an affected person.

Debra Markwardt alleges that the proposed permit would diminish the water supply in Cottonwood Creek and affect her water supply for livestock. Ms. Markwardt is an upstream domestic and livestock user and property owner.

The Executive Director recommends that Ms. Markwardt's hearing request be denied because she has not established that she is an affected person. The hearing requestor's property and livestock use of the water are upstream of the proposed diversion. As an upstream property owner, the hearing requestor has not shown how the proposed permit would impact her upstream use of water. Thus, Ms. Markwardt's hearing request does not meet the requirements of 30 Tex. Admin. Code § 55.256 and should be denied.

V. CONCLUSION

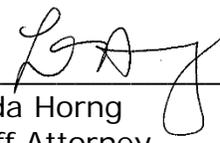
The Executive Director respectfully recommends that the Commission deny the hearing request of Ms. Debra Markwardt.

Respectfully submitted,

TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY

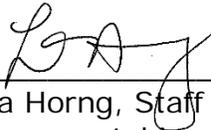
Richard A. Hyde, P.E.
Executive Director

Robert Martinez, Director
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By 
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CERTIFICATE OF SERVICE

I certify that on August 29, 2016, the original and seven copies of the "Executive Director's Response to Hearing Requests" for Robert D. Rogers, Jr.'s application for Temporary Water Use Permit No. 12452, were filed with the TCEQ's Office of the Chief Clerk and a complete copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, electronic submittal, or by deposit in the U.S. Mail.

By 
Linda Horng, Staff Attorney
Environmental Law Division
SBN: 24078690

MAILING LIST
ROBERT D. ROGERS, JR.
DOCKET NO. 2016-0532-WR; WRTP 12452

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FOR THE CHIEF CLERK

via electronic filing:

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REQUESTER(S):

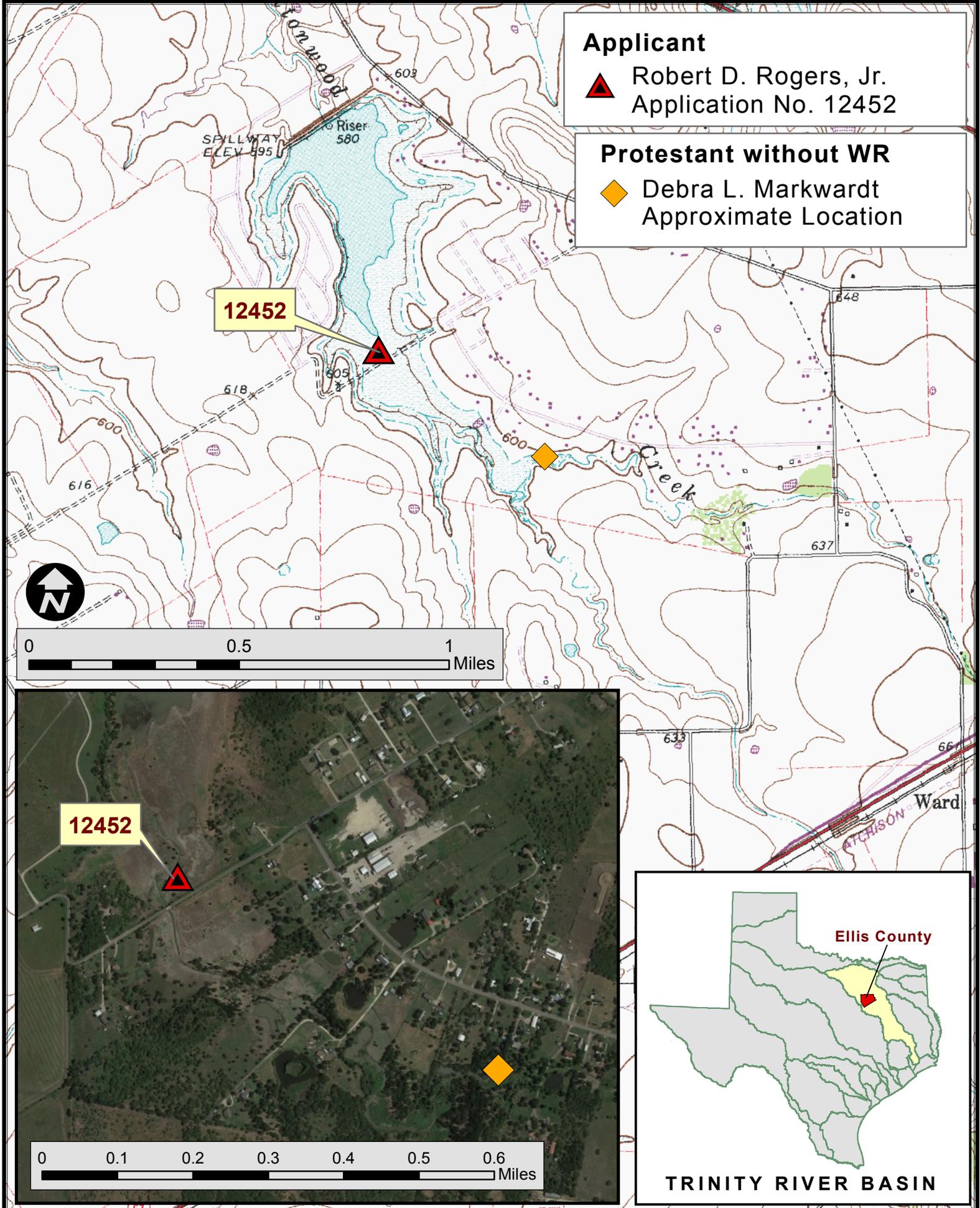
Debra L. Markwardt
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Midlothian, Texas 76065-1323

WITHDRAWAL OF REQUEST(S):

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ATTACHMENT A



Applicant
▲ Robert D. Rogers, Jr.
Application No. 12452

Protestant without WR
◆ Debra L. Markwardt
Approximate Location

