

Ralph H. Duggins

December 2, 2010

Via First Class Mail and

Via e-mail: chloe.lieberknecht@sunset.state.tx.us

Chloe Lieberknecht

Project Manager

Sunset Advisory Commission

P.O. Box 13066

Austin, Texas 78711

Re: TCEQ Sunset Report – Dam Safety Regulatory Program

Dear Ms. Lieberknecht:

I submit these comments on behalf of Charca Ltd., a partnership of my wife, my two sons and me.

Section 4.3 of the November 2010 Sunset Staff Report contains a recommendation for statutory changes authorizing the TCEQ to assess administrative penalties for violations of the Agency's dam safety regulations. TCEQ's new dam safety regulations impose arbitrary and significant hardships on lake owners all over the State. Whether or not the Commission elects to adopt Staff's recommendation in Section 4.3, I request that the Commission recommend an additional statutory change that would instruct the TCEQ to "grandfather" the owners of certain pre-existing small dams from retroactive imposition of Agency rules that utilize hydrologic and hydraulic criteria different from the criteria applied when the dams were engineered and constructed.

Charca Ltd. owns a small ranch in Johnson County, Texas. There are two small dams located on that property. The first dam was constructed around 1976 pursuant to permit number 3348 issued by the TCEQ's predecessor agency, the Texas Water Rights Commission. Construction of the dam was required to be in accordance with plans approved by the Agency. The dam and spillway was engineered by Brown & Davies and the Agency approved those plans. Those plans, and the construction of the dam, provided for a design to accommodate an appropriate and reasonable probable storm event.

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In 1982, the dam was inspected by the Agency. According to the report filed by Warren Samuelson, the Agency "found the overall condition of the dam to be excellent." The Agency's report also characterized the downstream hazard of the dam to be "low". Since 1982, the dam has been properly maintained and it continues to be safe structure. However, in the last couple of years, two things have happened.

First, approximately 2-1/2 miles west of the dam, someone chose to build a house about 15 feet above the creek that carries runoff when there is runoff from the lake. Second, TCEQ revised its rules to impose more stringent hydrologic and hydraulic criteria on dams based upon their hazard classification and size. This year, TCEQ personnel came out to inspect the Charca dam. In the report of that inspection, the same Mr. Samuelson who characterized the dam as low risk in the 1970's and 1980's re-classified the downstream risk as "significant". That re-classification had absolutely nothing to do with the condition of the dam but instead was based upon the subsequent construction of the home more than two miles downstream and because he cited a low water crossing on County Road 1233A about 2.25 miles downstream. That crossing was in existence in 1976 when the plans for the dam were approved by TCEQ and a permit issued.

As a result of that arbitrary re-classification under the revised rules, TCEQ now takes the position that our dam must accommodate 50% of a theoretical "probable maximum flood" event. If TCEQ refuses to change its position, it could in the future seek to assess administrative penalties against Charca Ltd. – as well as hundreds of other dam owners all over the State – because structures were not specifically designed and constructed to accommodate 50% or more of the theoretical probable maximum flood event – something that might occur, if at all, once every 10,000 years. The TCEQ, is effectively imposing upon Charca Ltd. and other small dam owners all over the State a retroactive regulatory obligation to rebuild dams to relieve downstream property owners of their decision to subsequently build a habitable structure at a location that is projected to be subject to inundation in the event of a "probable maximum flood."

Even if we were willing and able to incur the very substantial cost to rebuild our dams to accommodate 50% of the theoretical probable maximum flood event, we have no control over future downstream development. If future downstream development were to occur, the TCEQ could purport to use these new regulations to re-classify the dam to a "high" risk and seek to force us to then accommodate 75% of the hypothetical probable maximum flood event. Without grandfathering, we would face huge costs to again re-engineer and re-construct.

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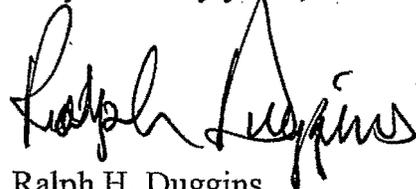
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Although the TCEQ dam safety program purports to be predicated on avoiding potential loss of life due to flooding, the hazard classifications and fatality assumptions used by the Agency's rules, by definition, do not take into consideration either the actual physical condition of the dam or any mitigation that could occur with evacuation or other emergency actions. The program, therefore, retroactively imposes arbitrary and unreasonable hydrologic and hydraulic criteria even though dam owners may keep their structures in sound condition, free from defect or damage that hinders the function of the structures as designed, or who develop a written plan to prevent and mitigate the effects of a failure of the structure. Charca Ltd. considers this to be retroactive regulatory taking that relies on theoretical worst case assumptions rather than the actual or reasonably foreseeable risks associated with a pre-existing and fully authorized improvement to real property. It is also an approach that fails to impose any responsibility whatsoever on downstream property owners for their wholly subsequent development activities within the same watershed.

Charca Ltd. recognizes that the TCEQ rules contain a generalized provision allowing dam owners to submit proposed "alternatives" to using structural improvements to upgrade a dam to meet the more stringent hydrologic and hydraulic criteria. Nevertheless, there is no indication in the current dam safety statute or implemented regulations that the owner of a pre-existing small dam in sound condition or who has an emergency action plan is entitled to a variance, much less to be grandfathered from the hydrologic and hydraulic criteria in the new rules. We therefore believe the Commission should affirmatively recommend an additional statutory change directing the TCEQ to grandfather the owners of certain pre-existing small dams from the retroactive imposition of hydrologic and hydraulic requirements, particularly the minimum design flood hydrograph criteria that are expressed as a percentage of the "probable maximum flood."

Thank you for your consideration.

Very sincerely yours,

A handwritten signature in black ink, appearing to read "Ralph H. Duggins". The signature is written in a cursive, somewhat stylized script.

Ralph H. Duggins