

Kathleen Hartnett White, *Chairman*  
Larry R. Soward, *Commissioner*  
Martin A. Hubert, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**  
*Protecting Texas by Reducing and Preventing Pollution*

February 5, 2007

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

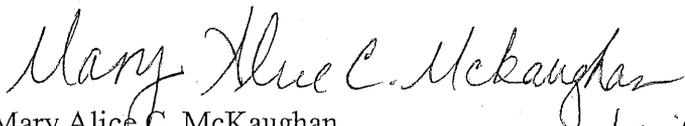
2007 FEB - 5 PM 4: 31  
CHIEF CLERK'S OFFICE  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**RE: ELAN DEVELOPMENT, L.P.**  
**TCEQ DOCKET NO. 2007-0012-MWD**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Motion to Overturn in the above-entitled matter.

Sincerely,

  
Mary Alice C. McKaughan  
Public Interest Counsel  
*by jlb*

cc: Mailing List

Enclosure



TCEQ DOCKET NO. 2007-0012-MWD

2007 FEB -5 PM 4:31

IN THE MATTER OF  
ELAN DEVELOPMENT, LP'S  
APPLICATION FOR  
TPDES PERMIT NO. WQ0014694001

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BEFORE THE CHIEF CLERKS OFFICE  
TEXAS COMMISSION  
ENVIRONMENTAL

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO MOTION TO OVERTURN**

**To the Members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) files this response to Jeffrey D. Lochore's ("Movant") motion on behalf of Little Princess's Investment Company to overturn ("Motion") the executive director's (ED) issuance of a water quality permit to Elan Development, LP ("Elan Development" or "Applicant") because he did not receive mailed notice of the application.

**I. Introduction**

On March 6, 2006, Elan Development applied to the Texas Commission on Environmental Quality (TCEQ) for a new Texas Pollutant Discharge Elimination System (TPDES) permit for a wastewater plant to be located approximately 4,300 feet east and 1,500 feet north of the intersection of Farm to Market Road 1314 and Calhoun Road in Montgomery County, Texas ("Facility"). The application was declared administratively complete on May 31, 2006. Pursuant to Title 30 of the Texas Administrative Code ("TAC") § 305.48(a)(2) the Applicant filed an adjacent landowners list showing the names and addresses of the owners of the tracts of land adjacent to the Facility and for a reasonable distance along the watercourse from the proposed point of discharge. The

original landowner list submitted by Applicant did not list Little Princess's Investment Company. The address for Little Princess's Investment Company was listed on the supplemental adjacent landowner list filed by the Applicant with the TCEQ on May 23, 2006.

The Applicant's Notice of Receipt of Application and Intent to Obtain Permit ("NORI") was published June 21, 2006, in *The Courier*, and its Notice of Application and Preliminary Decision (NAPD") was published October 6, 2006 in the same newspaper. Applicant was required to publish alternate language notice pursuant to 30 TAC §39.405(h) and Texas Health and Safety Code ("THSC") § 382.056(b). Applicant did not publish a Spanish version of its NORI. Applicant did publish a Spanish version of its NAPD in the *El Sol Newspaper* on October 27, 2006.

Pursuant to 30 TAC § 39.551(c)(2) the TCEQ Chief Clerk mailed copies of Applicant's NORI and NAPD to all persons listed on Applicant's adjacent landowner list. In all notices the Facility location was given as, "4,300 feet east and 1,500 feet north of the intersection of Farm-to-Market Road 1314 and Calhoun Road in Montgomery County, Texas." The discharge route was described in the notices as follows: "The treated effluent will be discharged to an on-site drainage channel; thence to a pumped detention pond; thence to a drainage channel which crosses under Old Houston Road; thence to a series of drainage ditches; thence to Dry Creek; thence to Caney Creek in Segment No. 1010 of the San Jacinto River Basin."

The comment period on this application ended on November 27, 2006. No timely comments or hearing requests were received on this application. The permit was posted for issuance on December 1, 2006. The Executive Director ("ED") received two late

hearing requests on the application, one from Mr. Lochore on behalf of Little Princess's Investment Company on December 6, 2006 and one from Tom A. Martin, the President of Crystal Springs Water Co., Inc. on December 11, 2006. Both hearing requesters complained that Applicant's Notice did not describe the discharge route accurately, that the discharge route crosses their property, and that there is no drainage channel. The requesters are concerned that there would be an unauthorized sheet flow of sewer discharge across their properties.

On December 12, 2006, the ED sent a letter to the Requesters stating that their hearing requests would not be considered because they were untimely. On January 3, 2007, Mr. Jeffrey D. Lochore, a partner in Little Princess's Investment Company, filed a letter stating that Little Princess's Investment Company owned a 79 acre tract adjoining the Elan Development property and he did not receive mailed notice as required by 30 TAC § 39.551(c)(2). The ED treated Mr. Lochore's letter as a Motion to Overturn. For the reasons discussed herein, the OPIC cannot recommend that Mr. Lochore's motion to overturn be granted on the grounds that he did not receive notice. However, because Applicant failed to publish its NORI in a Spanish newspaper as required by the Texas Clean Air Act and the TCEQ rules OPIC recommends that the permit be remanded and re-noticed.

## **II. Applicable Law**

### **A. Requirements for Motion to Overturn**

Title 30 Texas Administrative Code ("TAC") § 50.139(a) states that the applicant, OPIC, or other person may file with the chief clerk a motion to overturn the ED's action on an application. A motion to overturn must be filed no later than 23 days after the date

the agency mails notice of the signed permit to the applicant and persons on any required mailing list for the action. An action by the ED is not affected by a motion to overturn filed under this section unless expressly ordered by the Commission. The Commission or General Counsel may extend the period of time for filing motions to overturn and for taking action on the motions.

**B. Requirements Applicable to Application and Notice of Wastewater Discharge Permit**

Applicant was required by 30 TAC § 305.48(a)(2) to state in its application the ownership of the tracts of land adjacent to the treatment facility and for a reasonable distance along the watercourse from the proposed point of discharge. Additionally, Applicant was required to list on a map, or in a separate sheet attached to the map, the names and addresses of the owners of such tracts of land as can be determined from the current county tax rolls or other reliable sources. The application must also state the source of this information. The TCEQ chief clerk is required by 30 TAC §39.413 to mail Applicant's NORI and NAPD to the landowners named on the application map or supplemental map or the sheet attached to the application map or supplemental map.

**III. Discussion**

Mr. Lochore's December 20, 2006 letter that "rejects" the ED's denial of his hearing request was timely filed and may be considered as a Motion to Overturn the ED's December 1, 2006, decision to grant Applicant's Permit. The motion alleges that Notice of the Application was defective because Movant was not notified in time to protest the application in a timely manner. The motion also states that David Warner, the Elan Development Engineer mailed out Applicant's notices for public comment and that Mr. Warner admitted that Applicant's Landowner's List was not up to date, that the

Landowner's List did not show Movant as the owner of the 79 acre tract of land adjacent to the proposed Facility site and that Applicant did not mail Movant notice of the application.

As required by 30 TAC § 305.48, the Applicant provided a map and list of adjacent landowners to the TCEQ with its application ("Landowner's List"). Movant's property does not appear on the map, and Movant's address is not on Applicant's original Landowner's List. However, Applicant updated and supplemented its Landowner's List to include the same address used by Movant on its letterhead before the TCEQ Chief Clerk mailed out Applicant's NORI and NAPD. Therefore OPIC does not recommend that the Motion to Overturn be granted on grounds of improper notice to Movant.

However, because we have found that notice on this application was defective, OPIC recommends that the Commission overturn the ED's decision and remand this matter for re-notice. Applicant was required to publish both its NORI and its NAPD in a Spanish language newspaper. Applicant only published its NAPD in the Spanish Language Newspaper "El Sol." Failure to publish both notices in the alternate language newspaper as required by the TCEQ rules is a fatal notice defect. OPIC recommends that the ED's decision be overturned on this ground.

#### **IV. Conclusion**

Movant's Motion seeks to have the ED's decision to issue Applicant's permit overturned because of defective notice. As an adjacent landowner listed on the Applicant's supplemental Landowner's List Movant is presumed to have received mailed notice of Applicant's NORI and NAPD from the TCEQ Chief Clerk. However, Applicant's failure to publish its NORI in an alternate language newspaper constitutes a

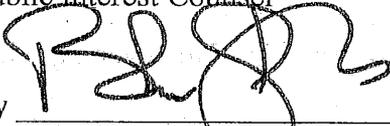
fatal notice defect and the ED's decision should be overturned on these grounds.

Applicant's permit application should be remanded to the ED and the Applicant should be required to re-notice its permit. OPIC reserves the right to modify its recommendation upon the receipt of new or additional information.

Respectfully submitted,

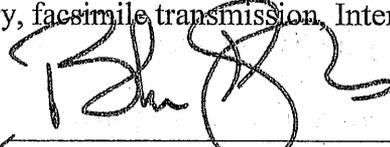
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By

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on February 5, 2007, the original and eleven true and correct copies of the Office of the Public Interest Counsel's Reply to Motion To Overturn 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.

  
Mary Alice Boehm-McKaughan

**MAILING LIST**  
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**TCEQ DOCKET NO. 2007-0012-MWD**

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THE UNIVERSITY OF CHICAGO  
DEPARTMENT OF CHEMISTRY  
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3. Boiling point  
4. Melting point  
5. Density

6. Refractive index  
7. Optical rotation  
8. Infrared spectrum  
9. NMR spectrum  
10. Mass spectrum

11. UV spectrum  
12. X-ray diffraction  
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14. Crystallographic data  
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