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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 16, 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

CHIEF CLERKS OFFICE

2007 NOV 16 PM 4:25

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**RE: CITY OF BELLVILLE
TCEQ DOCKET NO. 2007-0652-MWD**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Petition to Revoke Water Quality Permit No. WQ0010385002 in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Christina Mann".

Christina Mann, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

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TCEQ DOCKET NO. 2007-0652-IWD

IN THE MATTER OF A
PETITION TO REVOKE
WATER QUALITY
PERMIT NO.
WQ0010385002

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO PETITION
TO REVOKE WATER QUALITY PERMIT NO. WQ0010385002**

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 (the Commission or TCEQ) and files this
Response to Yulanda Turner's Petition to Revoke City of Bellville's Water Quality
Permit No. WQ0010385002.

I. Background

The City of Bellville (City) is operating its wastewater plant under water quality
permit no. WQ0010385002, which was renewed September 24, 2004. The permit was
granted, even though the City had not yet complied with 30 TAC Section 309.13(e)
requiring "sufficient evidence of legal restrictions prohibiting residential structures within
the part of the buffer zone not owned by the applicant."¹ in fact, the City was granted a
renewal for an existing permit, which should have required that legal restrictions
establishing the buffer zone be in place *before construction* following the issuance of the
initial permit. Nevertheless, the Executive Director granted the renewal application for
the existing permit, with the following language, "Three of the four required buffer zone
easements were submitted on March 3, 2004 and are located in the permit file. *The*

¹ See 30 TAC § 309.13 (e)(3)

*remaining legal restriction shall be submitted to the Executive Director of the Commission in care of the Wastewater Permitting Section (MC 148) within 30 days after the permit issuance.”*² It appears that the City has yet to comply with the above permit condition.³

II. Ms. Turner’s Petition

Since the date of issuance of the renewal in 2004, Yulanda Turner, an apparent owner of the piece of property referred to as the required “last legal restriction,” filed the subject petition to revoke the City’s permit because the City does not have a buffer zone as required by TCEQ regulations. Ms. Turner argues that the City is required to maintain a buffer zone and it has not done so. Further, she actually desires to place a residence on a portion of her property which would be closer than 150 feet from the wastewater treatment plant and she states that the City has not attempted to obtain her permission to use her property. She argues in favor of revocation of the City’s permit as allowed by 30 TAC § 305.66(a)(4) and 30 TAC § 305.66(a)(1). According to Ms. Turner, the City misrepresented to the Commission that all requirements for an odor buffer zone have been met, and the City is in continuing violation of its permit.

III. Analysis

The City has not complied with 30 TAC § 309.13(e)

The City has chosen the alternative provided by 30 TAC § 309.13(e)(3) to comply with the “requirement to abate and control a nuisance of odor prior to construction of a

² TPDES Permit No. WQ0010385002, issued September 24, 2004, Page 26, Other Requirements, No. 5.

³ The City of Bellville passed an ordinance effective May 29, 2007 which states: No residential structure is permitted within a buffer zone as that term is used in 30 TAC § 309.13. OPIC is unaware if the City intends the Ordinance to satisfy the legal restriction requirement. See Attachment A.

new wastewater treatment plant unit, or substantial change in the function or use of an existing wastewater treatment unit.”

According to 30 TAC § 309.13(e)(3):

The permittee must submit sufficient evidence of legal restrictions prohibiting residential structures within the part of the buffer zone not owned by the applicant. Sufficient evidence of legal restriction may, among others, take the form of a suitable restrictive easement, right-of-way, covenant, deed restriction, deed recorded, or a private agreement provided as a certified copy of the original document. The request shall be submitted, prior to construction, either with a permit application and subject to review during the permitting process or submitted for executive director approval after the permitting process is completed.

A provision in the permit acknowledges that the City had not yet submitted sufficient evidence at the time of permit issuance of a fourth remaining legal restriction (presumably Ms. Turner’s property).⁴ OPIC reviewed an ordinance passed by the City in May 2007, nearly three years after the City was directed to submit evidence of a legal restriction. First, OPIC notes that the City is attempting to retroactively create a buffer zone and notes that the City has been in violation of its permit, at least since it was renewed in 2004. Regardless of the timing of the ordinance, OPIC finds that it is insufficient evidence of a legal restriction. 30 TAC § 309.13(e)(3) provides a list of examples of acceptable restrictions, and an ordinance attempting to restrict home development is not found in the list. OPIC recognizes the rule intends the list to be non-exclusive. However, the list only includes options such as covenants, private agreements and deed restrictions- the kind of restrictions which have to be negotiated between two parties. This ordinance merely proclaims to restrict land use, and does not provide the commission with the kind of assurances necessary to provide a valid nuisance odor buffer zone.

⁴ TPDES Permit No. WQ0010385002, issued September 24, 2004, Page 26, Other Requirements, No. 5.

Initiation of Revocation Proceedings by the Commission is Not Yet Necessary

OPIC sympathizes with the obstacles faced by Ms. Turner in attempting to develop her property. Likewise, OPIC is frustrated by the lack of response from the City regarding the buffer zone requirements after its permit renewal was granted over three years ago. However, given the reality of municipal wastewater service, and the severity of a permit revocation, OPIC cannot support initiation of permit revocation proceedings at this time. OPIC recommends the Commission direct the City to provide evidence that it has initiated proceedings or good faith negotiations to meaningfully address Ms. Turner's property rights, rather than merely passing an ordinance which is likely to initiate further litigation. If the City is unable or unwilling to do so, following a continuance of this matter, OPIC would support initiation of permit suspension or revocation proceedings as directed by 30 TAC § 305.66.

IV. Conclusion

OPIC recommends the Commission continue the matter for approximately sixty days to allow time for the City to initiate negotiations or other proceedings to eventually satisfy the requirements of 30 TAC § 309.13(e)(3).

Respectfully submitted,

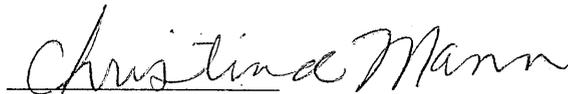
Blas J. Coy, Jr.
Public Interest Counsel

By 

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2007 the original and eleven true and correct copies of the Office of the Public Interest Counsel's Response to Yulanda Turner's Petition to Revoke City of Bellville's Water Quality Permit No. WQ0010385002 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


Christina Mann

ATTACHMENT A

No. 1349

**AN ORDINANCE AMENDING CHAPTER 3 OF THE CITY CODE OF ORDINANCES
BY ADDING ARTICLE 3.16 REGULATING THE CONSTRUCTION OF RESIDENTIAL
STRUCTURES WITHIN A BUFFER ZONE.**

Section 1. Chapter 3 of the Bellville Code of Ordinances is amended by adding the following article:

No residential structure is permitted within a buffer zone as that term is used in 30 Texas Administrative Code §309.13.

Section 2. This ordinance is declared an emergency and shall take effect immediately upon passage.

Motion of Alderman Browning and the second by
Alderwoman Kistler with 5 voting aye and 0 voting nay.

PASSED, APPROVED and ADOPTED this 29th day of May, 2007.

THE CITY OF BELLVILLE, TEXAS

Monte D. Richardson
MAYOR

ATTEST:

Betty Hollon
Betty Hollon
CITY SECRETARY

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TCEQ Docket No. 2007-0652-MWD

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