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

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

January 2, 2006

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
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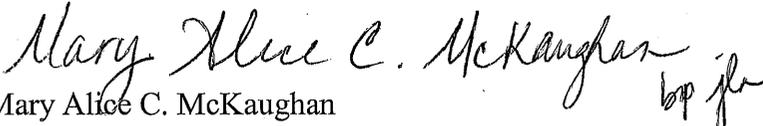
TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2006 JAN -2 PM 4:36  
CHIEF CLERKS OFFICE

RE: Wynne Jackson, Inc. And West Foundation  
TCEQ DOCKET NO. 2005-1094-MWD

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to a Request for a Contested Case Hearing in the above-entitled matter.

Sincerely,

  
Mary Alice C. McKaughan  
Public Interest Counsel

cc: Mailing List

Enclosure

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**TCEQ DOCKET NO.2005-1094-MWD**

**IN THE MATTER OF THE  
APPLICATION BY WYNNE  
JACKSON, INC. AND WEST  
FOUNDATION FOR  
PERMIT NO. WQ0014535001**

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**BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL  
QUALITY**

CHIEF CLERKS OFFICE

2005 JUN -2 PM 4:36

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO A REQUEST FOR A CONTESTED CASE HEARING**

TO THE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) submits the following response to North Texas Municipal Water District's ("District" or "requester") request for a contested case hearing on Wynne Jackson, Inc. and West Foundation's ("Applicant") application for proposed permit No. WQ 0014535001 to construct and operate a wastewater treatment plant. OPIC recommends that the Commission grant the District's request for a contested case hearing on this application, and in support of its recommendation respectfully presents the following facts and arguments:

**I. INTRODUCTION**

On May 28, 2004, Applicant applied to the TCEQ for a new permit to construct the West Foundation Wastewater Treatment Facility ("Facility") and to authorize the Facility to discharge treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day in the interim phase and a daily average flow not to exceed 634,700 gallons per day in the final phase. The Facility will serve the West Foundation development and will be located approximately 2 miles northeast of the intersection of Highway 740 and Highway 80 in Kaufman County, Texas.

The treated effluent will be discharged to an unnamed tributary, which flows into a National Resource Conservation Service (NRCS) reservoir, which flows into Buffalo Creek, which flows into the East Fork Trinity River in Segment No. 0819 of the Trinity River Basin. The unclassified receiving water uses are limited aquatic life uses for the unnamed tributary, high aquatic life uses for the NRCS reservoir, and limited aquatic life uses for Buffalo Creek. The designated uses for Segment No. 0819 are intermediate aquatic life uses and non-contact recreation. Segment No. 0819 is currently listed on the State's 2000 inventory of impaired and threatened waters (the Clean Water Act Section 303(d) list). The listing is specifically for elevated bacteria levels in the lower 14 miles of the segment. The facility has proposed to disinfect the effluent by means of chlorination and is therefore not expected to contribute to the segment impairment.

The Executive Director ("ED") declared the application administratively complete on July 8, 2004. The Applicant published the Notice of Receipt of Application and Intent to Obtain a Water Quality Permit on July 26, 2004 in the *Dallas Morning News*. The Notice of Application and Preliminary Decision for a Water Quality Permit was published January 13, 2005, in the *Forney Messenger* and the comment period closed on February 14, 2005. The Executive Director's Response to Public Comment was mailed on June 1, 2005. The deadline to request a contested case hearing was July 3, 2005. The District filed the only timely request for a contested case hearing on this Application.

This matter was originally set to be considered at the Commission's October 26, 2005 Agenda. By letter dated September 30, 2005, Applicant requested a continuance to allow Applicant and the District additional time to finalize an agreement whereby the District would provide the wastewater treatment capacity contemplated in Applicant's permit application. By

letter dated October 3, 2005, the General Counsel continued the original Agenda date to Wednesday, January 25, 2006. According to a conversation with Applicant's counsel Mr. Tonn, Applicant has reached an agreement with the City of Forney, and the City of Forney has reached an agreement with the District, to provide the requested wastewater treatment capacity. However, to date, OPIC has not received any documentation of this agreement; therefore, OPIC files the following brief in support of granting the District's hearing request.

## **II. REQUEST FOR A CONTESTED CASE HEARING**

### **A. Requirements of Applicable Law**

Because the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Texas Water Code § 5.556 added by Acts 1999, 76<sup>th</sup> Leg., ch. 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TEXAS ADMINISTRATIVE CODE (TAC) § 55.201(d).

Under 30 TAC § 55.203(a), 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." This justiciable interest does not include an interest common to the general public.

30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restriction 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 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.

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application. 30 TAC §55.211(c).

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing

## **B. Discussion**

### **1. Determination of Affected Person Status**

The District requested a contested case hearing on the Application by letter dated January 28, 2005 and filed with the TCEQ on January 28, 2005. The District is a regional conservation district that owns/operates nineteen wastewater treatment plants north and east of Dallas. The District claims that it could provide the wastewater treatment service applied for by Applicant upon completion of the Buffalo Creek Interceptor Pipeline Project which is expected to be completed and in service by April of 2005. According to the information available to OPIC the pipeline was completed in August of 2005. The District also contends that granting Applicant's permit will be detrimental to the District's plan to provide centralized service from an established retail public utility, and be contrary to the State goal of regionalization set forth at Tex. Water Code Section 26.0282.

The District is a governmental entity created under Chapter 59 of the Water Code. As a governmental entity, the District may be considered to be an affected person if it has statutory authority over, or an interest in the issues relevant to the Application.<sup>1</sup> Pursuant to Section 49.230 of the Texas Water Code, the District has an interest in area-wide wastewater treatment.

Specifically,

[t]he powers and duties conferred on the district are granted subject to the policy of the state to encourage the development and use of integrated area-wide wastewater collection, treatment, and disposal systems to serve the wastewater disposal needs of the citizens of the state whenever economically feasible and competitive to do so, it being an objective of the policy to avoid the economic burden to the people and the impact on the quality of the water in the state that result from the construction and operation of numerous small wastewater collection, treatment, and disposal facilities to serve an area when an

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<sup>1</sup>30 TAC Section 55.203(c)(6)

integrated area-wide wastewater collection, treatment, and disposal system for the area can be reasonably provided.<sup>2</sup>

We conclude that, the District has a statutory and economic interest in the issues of regional disposal and processing of domestic wastes, including the wastewater that is the subject of this Application. These issues are relevant to the Application. Therefore, OPIC recommends that the Commission find the District to be an affected person pursuant to 30 TAC § 55.203(c)(6).

A finding that the District is an affected person based upon concerns about the availability of regional treatment alternatives would also be consistent with the Commission's decision and order resulting from its November 30, 2005 public meeting where the Commission considered hearing requests concerning the application of 14875 Partners, Ltd for a new wastewater treatment plant (TCEQ Docket No. 2005-1519-MWD). In that case, the Commission found that regionalization concerns could provide a basis for affected party status and granted the request of Ms. Julia Jackson Gray based, in part, on concerns regarding the availability of regional treatment alternatives.. The Commission's order also directed the State Office of Administrative Hearings to determine "whether the Upper Trinity Regional Water District has jurisdiction in the area in which Applicant proposes to provide wastewater service such that the District qualifies as an affected person. If so, it shall be admitted as a party." (An Interim Order concerning the application by 14875 Partners, Ltd, for new TPDES Permit No. WQ0014516001; TCEQ Docket No. 2005-1519-MWD dates December 13, 2005) The Commission referred to hearing the issues which formed the basis of the Ms. Gray's request, including: "[w]hether existing or proposed areawide or regional waste collection, treatment, and disposal systems can satisfy the need for the

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<sup>2</sup> TEX. WATER CODE § 49.230.

proposed new wastewater treatment plant.” A finding that the District is an affected person would be consistent with the Commission’s prior interim order on the application of 14875 Partners, Ltd. Accordingly, OPIC recommends that the Commission find that the District is an affected person.

## **2. Issues Raised in the Hearing Requests**

The following issue was raised in the District’s hearing request:

(1) Whether there is a need for the proposed facility, including consideration of the availability of other systems to treat the projected wastewater flows?

### **a. Issue Disputed:**

There is no agreement of the parties on the issue raised by the District. With regard to regionalization, the ED contends in the RTC that there is no existing wastewater treatment facility located within a three mile radius from the proposed plant and all necessary steps were taken by the applicant to find an alternative means of handling the wastewater.<sup>3</sup> Thus, the need for the facility is a disputed issue.

### **b. Issue of Fact:**

The issue discussed above is an issue of fact, rather than an issue of law or policy; therefore, it is appropriate for referral to hearing. *See* 30 TAC §55.211(b)(3)(A) and (B).

### **c. Issue Raised During the Comment Period:**

The issue raised by the District was also raised during the public comment period, and the comments raising the issue have not subsequently been withdrawn.

### **d. Relevant and Material Issue:**

The issue raised by the District is relevant and material to the decision by the Commission

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<sup>3</sup> RTC, Response to Comment No. 2, at p. 3.

on this permit application.<sup>4</sup> Questions of regionalization are governed by Texas Water Code (TWC) §§ 26.003, 26.0282, & 26.081 - 26.086. Even if a treatment system has not been formally declared as a regional provider, TEXAS WATER CODE §26.282 provides that the Commission may deny or alter the terms and conditions of a permit based on need and availability of area-wide or regional waste collection, treatment, or disposal systems. Further, TEXAS WATER CODE §26.081 provides that it is “necessary to the health, safety, and welfare of the people of the state to implement the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state.” Therefore, the issue of whether there is a need for the proposed facility is relevant and material to the Commission’s decision of the pending application because it is addressed by the substantive law governing the application, is within the jurisdiction of the TCEQ, and can be addressed in a hearing on the pending application.

e. Issues Recommended for Referral

OPIC recommends that the following issue be referred for consideration in a contested case hearing:

1. Should the Commission deny or alter the terms and conditions of the proposed permit, based on consideration of need and the availability of existing or proposed area-wide or regional waste collection, treatment, and disposal systems?

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<sup>4</sup> See *Anderson V. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law’s identification of which facts are critical and which facts are irrelevant that governs.”)

### 3. Maximum Expected Duration of Hearing

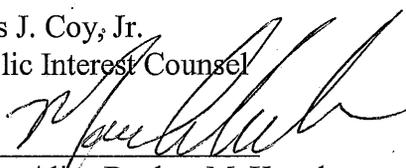
Commission rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), the OPIC estimates that the maximum expected duration of a hearing on this application would be nine (9) months from the first date of the preliminary hearing until the proposal for decision is issued.

### **IV. CONCLUSION**

OPIC recommends that the Commission grant the District's hearing request filed on this permit.

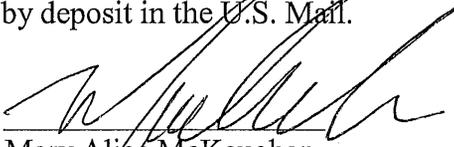
Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
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### CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2006, the original and eleven true and correct copies of the Office of the Public Counsel's Response to Request for Hearing 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 McKaughan

**MAILING LIST**  
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**TCEQ DOCKET NO. 2005-1094-MWD**

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