

TCEQ DOCKET NO. 2006-0200-MWD

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**IN THE MATTER OF THE
APPLICATION BY HUDSON HARBOR
FOR TPDES PERMIT NO. 14227001**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

CHIEF CLERKS OFFICE

**REPLY TO RESPONSES TO HEARING REQUEST BY
TRAVIS COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NO. 17**

TO THE HONORABLE COMMISSIONERS:

COMES NOW, TRAVIS COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NO. 17, (the "District") and files this reply to the responses to its hearing request ("Reply") in the above-referenced matter.

I. Executive Summary

Hudson Harbor Ltd's (the "Applicant") permit should not be renewed because there is not a need for the permit and service can be provided, if the project moves forward, by the District. The condominium project and the proposed facility (including the wastewater treatment plant site and the effluent disposal site) are located on property (the "Property") within the District's corporate boundaries and wastewater Certificate of Convenience and Necessity ("CCN") No. 20943. As the regional service provider for the area, and the political subdivision of the State of Texas charged with the responsibility of overseeing wastewater collection and treatment in its jurisdiction, the District is better-suited to provide service on a planned, regional level rather than allowing for the reissuance of a permit to a private developer for a speculative project. Though the District has attempted to work with the Applicant concerning the transfer of the permit and related facilities to the District after the completion of construction if certain conditions are met, the District has no interest in assuming a permit and wastewater facilities that do not meet District criteria, including the operation of a subsurface drip system in a floodplain.

Furthermore, the Applicant has failed to provide adequate information regarding need for service. Despite a remand of the above-referenced application (the "Application") back to the Executive Director ("ED") over a year ago for the sole purpose of requiring the Applicant to demonstrate need, the Applicant has only produced two letters from its attorney informing the Commission that, among other items, Applicant no longer owns the Property due to a foreclosure earlier this year and that "several critical permits for the project" have expired or are close to expiration. Rather than bolster the Applicant's argument with regard to need, such information regarding change in Property ownership and the expiration of "critical" development permits only further raises fact questions with regard to need and necessitating referral of the Application to the State Office of Administrative Hearings ("SOAH").

Although there may not be a right to a contested case hearing in this matter, public policy dictates that a hearing be held to ensure that renewal of the permit is needed and is consistent with the state's policy of regionalization. The District urges the Commission to submit issues to SOAH as contained in the conclusion of this Reply.

II. Project/Permit Background and Property Ownership

The Texas Commission on Environmental Quality ("TCEQ") originally issued a permit to LTLP, Ltd. in 2001 for a proposed multi-story condominium project covering the construction of a treatment facility and disposal of up to 14,000 gallons per day of effluent via subsurface drip irrigation on site. In 2004, the Applicant filed an application to renew the permit in which it purported to be the owner of the treatment plant and disposal site. The permit was not officially transferred to the Applicant until 2005. Upon the District's request for hearing on the Application filed on February 21, 2006, the Application was placed on the Commission's agenda for May 31, 2006. However, on May 3, 2006, the ED requested that the matter be remanded in order "to require the Applicant to demonstrate need for the application."¹ The Applicant's sole response to the ED's request consists of two letters submitted by the Applicant's attorney, attached hereto as **Exhibits A** and **B**. In such correspondence, the Applicant's attorney explains that the Applicant's lender foreclosed on the Property in January 2007, that the new owner of the Property is Marshall Investment Corporation, and that Marshall Investment Corporation has entered into an option agreement with an entity called Argonaut Development Group, Inc.

TCEQ rules and the draft permit itself require the Applicant to promptly supplement its application when it "becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in an application..."² Although the Applicant stated that it is the owner of the plant site and the effluent disposal site in the Application, and by its own admission no longer holds title to the Property, it appears the Applicant failed to appropriately supplement the Application in accordance with TCEQ requirements. In effect, then, the Application is not properly before the Commission at this time because the Application is no longer administratively complete pursuant to 30 *Tex. Admin. Code* §§ 281.17(d) and 281.5.

Furthermore, an applicant for a domestic wastewater permit must own the land where the treatment plant will be located and the effluent disposal site.³ If the applicant does not own the property, it must obtain a long-term lease or some other suitable interest in the property before the application may be granted.⁴ Because the Applicant has admitted that it does not own the plant or effluent disposal site, has not supplemented the Application, and has not demonstrated that it has any interest in the Property, the Commission should not grant the Application, but should refer it to SOAH for a hearing on the matters discussed herein.⁵

¹ See Executive Director's Motion for Remand, filed May 3, 2006.

² 30 TEX. ADMIN CODE § 305.125(19); See also Draft Permit, Permit Condition No. 1, page 6 (See Attachment A to the Executive Director's Response to Hearing Requests).

³ See Application for Renewal of Permit No. WQ0014227001 by Hudson Harbor, Ltd., Domestic Administrative Report 1.0, TNRCC-10053 (Revised 03/02), Page 5, section 4(d) and (e) (filed October 29, 2004).

⁴ See *Id.*

⁵ See 30 TEX. ADMIN. CODE § 305.64(i)(2), authorizing TCEQ to transfer a permit involuntarily after notice and an opportunity for hearing if the facilities have not been built, and the permittee no longer has sufficient property rights in the site of the proposed facilities.

III. Background on the District and Wastewater Service

As mentioned previously, the proposed condominium project falls within the District's corporate boundaries. The District is a water control and improvement district created by the Travis County Commissioner's Court in 1958 and operates under Chapters 49 and 51 of the Texas Water Code. The District's boundaries encompass 14,000 acres in Travis County in which it provides retail water and wastewater service. The District currently serves a population of 20,000 people and has 40 regular full time employees. It owns and operates the Steiner Ranch Wastewater Treatment Plant serving approximately 2,800 customers with retail wastewater service, and the Flintrock Wastewater Treatment Plant, which serves approximately 300 customers in the southern portion of the District, including the Flintrock Ranch Estates Defined Area and surrounding properties along RR 620.

The District is very active in the planning and construction of wastewater treatment and disposal facilities to meet the needs of customers within its boundaries. Based in part on these activities, the District obtained CCN No. 20943 covering all of the property within its boundaries so that retail wastewater service can be brought to all areas of the District in an organized and planned fashion. The District desires to discourage the continued proliferation of small wastewater treatment facilities designed to serve discreet developments and to promote the construction of centralized wastewater treatment and disposal facilities that it will own and operate such as the plants serving the Steiner Ranch and Flintrock areas. Where a centralized system may not be immediately available, the District seeks to provide service through ownership and operation of on-site systems that are designed and constructed in a manner that, based on the District's experience, lead to the most efficient operations and are most protective of human health and the environment.

IV. The District's Hearing Request

The ED and the Applicant argue that the Commission should deny the District's hearing request because there is no right to a contested case hearing pursuant to 30 *Tex. Admin. Code* § 55.201(i) and TEX. WATER CODE ANN. § 26.028(d). While this assertion may be technically correct, the provisions of 30 *Tex. Admin. Code* § 55.201(i) and TEX. WATER CODE § 26.028(d) apply only when the applicant's compliance history raises no issues regarding its ability to comply with a material term of its permit.⁶ However, as discussed above and according to the Applicant's attorney, the Applicant no longer owns the Property on which the wastewater treatment plant and effluent disposal system will be located. As such, the compliance history report prepared by the ED in this matter is inapplicable.

However, even overlooking the change in ownership and the problem of who the actual applicant may be in this proceeding, public policy necessitates that the Commission use its discretion to grant a hearing on this Application. The Texas Legislature has found and declared "that it is necessary to the health, safety, and welfare of the people of this 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

⁶ TEX. WATER CODE § 26.028(d)(4).

state and to prevent pollution and maintain and enhance the quality of the water in the state.” TEX. WATER CODE ANN. §§ 26.081. Accordingly, the Commission “may deny or alter the terms and conditions of [a] proposed permit, amendment, or *renewal* based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order.” TEX. WATER CODE ANN. § 26.0282 (emphasis added).⁷

Regionalization is not just a question of whether a central system is immediately available. The concept also involves the question of whether a regional entity with a proven track record of owning and operating wastewater systems such as the District is a better choice to be responsible for the design, construction, and operation of wastewater systems in its service area than a private developer.⁸ An example of why a local regional provider makes better sense can be found in reviewing the proposed disposal site for this Application in relation to the floodplain. The Applicant maintains in the Application that the effluent disposal site is not located within the 100-year frequency flood level.⁹ However, the map included with the draft permit appears to indicate that at least a large portion of the “land application area” is within the currently existing 100-year floodplain, which exists up to the 716 contour line on the Property. Furthermore, FEMA is currently in the process of amending the floodplain elevations in Travis County, which, if adopted, would amend the 100-year floodplain to include all land up to the 722 contour line.¹⁰ Such an amendment would place most, if not all, of the “land application area” shown on the map included with the draft permit in the 100-year floodplain. The fact that the Applicant proposes to construct effluent disposal facilities in the 100-year floodplain is of significant concern to the District due to the operational challenges of maintaining a disposal system in such an area.

The Applicant’s repeated suggestions that it unsuccessfully offered to transfer the permit and related facilities to the District upon the completion of construction are misleading. While it is true that the District has no interest in assuming a permit and related wastewater facilities that do not meet District criteria, especially when most of those facilities may be located in the 100-year floodplain, the District offered a proposed service agreement to the Applicant that would have transferred the permit and facilities to the District if certain conditions were met. The Applicant failed to provide any response to the District regarding this proposed service agreement.

The District is keenly interested in the development of safe, reliable, and regional wastewater service options within its CCN area. The establishment of a small, wastewater

⁷ See also Draft Permit, Special Provisions No. 1, page 22 (See Attachment A to the Executive Director’s Response to Hearing Requests) (authorizing the Commission to amend the permit to require integration into a regional system).

⁸ See, *Application of Lake Travis II Investments, Ltd. for a Water Quality Land Application Permit*; TCEQ Docket No. 2002-1378-MWD; SOAH Docket No. 582-03-2828, TCEQ Final Order, February 28, 2005 (denial of application for TLAP permit because Commission found issuance of permit not to be in furtherance of state policy of regionalization since project was located in the District’s CCN and service was available from the District under facts similar to the present application).

⁹ See Application for Renewal of Permit No. WQ0014227001 by Hudson Harbor, Ltd., Domestic Administrative Report 1.0, TNRCC-10053 (Revised 03/02), Page 13, section 4 (filed October 29, 2004).

¹⁰ 71 Fed. Reg. 45498-45510 (August 9, 2006).

system with a disposal area literally on the shores of Lake Travis (the source of the District's drinking water supply) owned and operated by either an entity with a history of financial predicaments (Hudson Harbor, Ltd.) or an entity that is currently unknown to the Commission (the current Property Owner) should not be favored over service by the District, which has a proven track record of providing safe, reliable, and regional wastewater service in its CCN area.

The District's regionalization arguments are furthered by the clear lack of need for this facility. As noted above, the ED previously remanded this matter in order to assess the level of need for the permit. Nearly eight months after the ED requested additional information from the Applicant regarding this matter, the Applicant's attorney provided two letters describing the proposed development on the Property and outlining the costs it has expended in preparing the Property for development.¹¹ Instead of demonstrating the need for the permit, these letters highlight serious concerns regarding the Applicant's ability to own, operate, and maintain a wastewater treatment facility. Not only does the Applicant's attorney admit that important permits for the development have expired or are nearing expiration, its admitted financial woes and last-minute pleas are no reason to renew the permit without a hearing on the merits to determine whether the permit is necessary and consistent with the state's policy of regionalization.

The Applicant obtained the permit it now seeks to renew in 2001, but has yet to begin construction of the wastewater facilities or the condominiums on the Property. This failure to begin construction and subsequent foreclosure on the Property¹² provides additional evidence that the need for the facilities does not exist and raises issues concerning whether the Applicant has complied with applicable TCEQ regulations.¹³ In any event, because the Applicant has admitted that it no longer owns the Property on which the wastewater treatment plant is proposed to be located, the Commission should not grant the Application, but should refer it to SOAH for a hearing on the merits, as discussed above.¹⁴ Even assuming, *arguendo*, that the Applicant may obtain a permit to construct a wastewater treatment plant and related facilities on property in which it has no legal or equitable interest, the present situation can be distinguished from permit renewals for discharges that are necessary to serve existing customers.

Though there may be no right to a contested case hearing in this matter, the Commission may, in its discretion, refer the Application to SOAH for a hearing on the merits. Due to the change in ownership of the Property, the District would submit that the Application is not a true

¹¹ See Exhibit A, Letter dated March 12, 2007, from the Applicant to Kerrie Jo Qualtrough, Senior Attorney in Water Quality, Scott R. Shoemaker, Water Quality Staff Attorney, and Firoj B. Vahora, Water Quality Division Team Leader; Exhibit B, Letter dated April 3, 2007, from the Applicant to Glenn Shankle, Executive Director, and LaDonna Castanuela, Chief Clerk.

¹² See Exhibit A. In this letter, the Applicant insinuates that the foreclosure was caused by the two month period during which the Applicant and the District attempted to negotiate a settlement on this matter. The District would respectfully disagree with such a proposition, as the Applicant had more than five years between the granting of the original permit to the commencement of negotiations with the District, during which time it failed to begin construction of any kind on the property.

¹³ See Section II, *supra*; 30 TEX. ADMIN CODE § 305.125(19); Draft Permit, Permit Condition No. 1, page 6 (See Attachment A to the Executive Director's Response to Hearing Requests).

¹⁴ See 30 TEX. ADMIN. CODE § 305.64(i)(2), authorizing TCEQ to transfer a permit involuntarily after notice and an opportunity for hearing if the facilities have not been built, and the permittee no longer has sufficient property rights in the site of the proposed facilities. See also 30 TEX. ADMIN CODE § 305.64(i)(7).

“renewal” as contemplated by 30 *Tex. Admin. Code* § 55.201(i) and TEX. WATER CODE ANN. § 26.028(d). Furthermore, TCEQ regulations and state law call for the consideration of regionalization and need when issuing permits. Therefore, the District respectfully requests that the Commission submit issues to SOAH as contained in the conclusion of this Reply.

V. The District is an Affected Person

The ED, the Office of Public Interest Counsel (“OPIC”), and the Applicant all agree that the District is an “affected person”.¹⁵

VI. Alternative Dispute Resolution

The District has no objection to the referral of this Application for Alternative Dispute Resolution prior to referral to SOAH and consents to mediation on this matter in accordance with the Commission’s rules.

VII. Conclusion

There is no dispute among the parties that the District is an affected person and that its hearing request was timely filed and raises issues that are relevant and material to the Commission’s decision on the Application. The ED and the Applicant argue there is no right to a contested case hearing because the factors of Section 26.028(d) of the Texas Water Code apply. However, the application of this provision is not clear given information provided by the Applicant’s attorney that ownership of the project site has changed and the compliance history report developed by the ED is for an entity that no longer owns or has an interest in the project. Certainly there are enough fact questions regarding need and regionalization that support the Commission’s referral of the Application to SOAH even if there is no right to a hearing given the convoluted history of the project and the fact that it is located within the boundaries of a political subdivision responsible for providing the type of service at issue here. Therefore, the District respectfully requests that the Application be referred to SOAH on the following issues:

- 1) What entity will own the treatment plant and disposal site and what entity will be responsible for operations and maintenance upon permit issuance? Will such entity be able to comply with the terms and conditions of the draft permit?¹⁶
- 2) Does the renewal of the permit encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems?
- 3) Is the proposed development likely to occur so that the permit is needed, or should the Commission deny or alter the terms of the permit based on need?

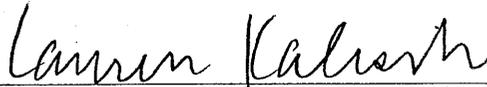
¹⁵ See Executive Director’s Response to Hearing Requests, filed on June 25, 2007, at page 6; Applicant’s Response to Hearing Request, filed on June 25, 2007, at page 2; The Office of Public Interest Counsel’s Response to Hearing Requests, filed on June 4, 2007, at page 6.

¹⁶ The District did not raise this issue during the comment period because, at that time, the Applicant still owned the Property. It was not until the Applicant’s attorney notified TCEQ of the foreclosure in March 2007 that the District could have raised this issue, and that was after the time period for filing a hearing request on the Application had ended.

Respectfully submitted,

**LLOYD GOSSELINK BLEVINS ROCHELLE
& TOWNSEND, P.C.**

816 Congress Avenue
Suite 1900
Austin, Texas 78701
(512) 322-5847
FAX: (512) 472-0532

By: 
LAUREN KALISEK
State Bar No. 00794063

**ATTORNEY FOR TRAVIS COUNTY
WATER CONTROL AND
IMPROVEMENT DISTRICT NO. 17**

IRION | SLADE

ATTORNEYS & COUNSELORS AT LAW
A PROFESSIONAL LIMITED LIABILITY COMPANY

Terrence L. Irion
Attorney at Law

2224 Walsh Tarlton
Suite 210
Austin, Texas 78746

512.347.9977
Fax: 512.347.7085
tirion@isblaw.com

March 12, 2007

Ms. Kerrie Jo Qualtrough - kqualtrough@tceq.state.tx.us
Senior Attorney, Water Quality
Mr. Scott R. Shoemaker - sshoemaker@tceq.state.tx.us
Staff Attorney, Water Quality
Environmental Law Division
Texas Commission on Environmental Quality
12100 Park 35 Circle, Bldg. A
Austin, Texas 78753

Mr. Firoj B Vahora - fvahora@tceq.state.tx.us
Team Leader,
Water Quality Division
12100 Park 35 Circle, Bldg. F
Austin, Texas 78753

Re: Application to Renew Permit No. WQ0014227001; Hudson Harbor, Ltd.

Dear Mr. Shoemaker:

I have represented Hudson Harbor, Ltd., holder of the above referenced Permit and applicant for renewal permit.

You advised me on July 17, 2006, that upon further review of the application materials the Executive Director determined that the applicant must demonstrate need for the renewal of the Permit as required by Section 26.0282 of the Water Code. I agreed to do that on applicant's behalf, and to date I have not done so.

Let me explain. My client anticipated that whatever demonstration of need was submitted to TCEQ would be opposed by WCID #17. Consequently, we first sought to negotiate a settlement with WCID #17. We met with the General Manager and its General Counsel on August 1, 2006 and, I thought agreed to the outline of a settlement agreement. My client agreed to pay the District a professional fee to have a draft of the proposed settlement agreement prepared. We did not get the draft from the District's attorney until September 26, 2006 and were quite disappointed that it went way beyond what the applicant felt was reasonable conditions on the operation of the permit and beyond the scope of our settlement discussions.

By this time, however, the applicant's lender (a participating consortium of lenders) was losing patience with the applicant's failure to secure permits and roll into a construction loan and took steps to initiate a foreclosure procedure. The lender group, led by Marshall Investment Corporation, a Delaware corporation located in Minneapolis, Minnesota finally did foreclose on the property in January. The new owner of the property is Marshall Investment Corporation. Subsequently, Marshall Investment Corporation, freed from the cumbersome management structure of the consortium of lenders, has negotiated an option agreement with Argonaut Development Group, Inc., to repurchase the property and develop it in accordance with the original plans.

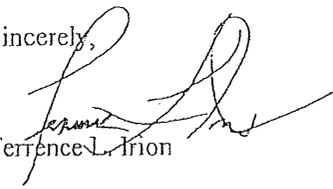
Argonaut Development Group, Inc. was the 99% limited partner in Hudson Harbor, Ltd. Essentially the principals in Hudson Harbor, Ltd., but with new development partners, will be moving forward to repurchase and finance the construction of the project as originally conceived. It is critical to this effort that the Argonaut Development Group, Inc. have the assurance of the renewed permit. The project cannot be built without the TCEQ disposal permit and the delay in its renewal is what has delayed the financing commitment to the construction of the project since last summer.

You and your staff have been extremely patient with the applicant, who experienced financing complications due to the expiration or pending expiration of several of the critical permits for the project. Argonaut Development Group, Inc. has done rather extensive marketing research and is confident the demand for this project exists and is confident it has put together the development partners necessary to repurchase the property from the foreclosing lender and move forward with the construction.

Argonaut Development Group, Inc. is confident that upon renewal of the permit, the site development permit issued by the City of Austin in Travis County can be renewed within the next 120 days and construction financing secured to commence construction on the project by early 2008. Accordingly, we would ask that you provide the Argonaut Development Group, Inc. additional time to obtain the transfer of the permit and demonstrate its ability to move forward with the development.

Thank you for your attention to this matter.

Sincerely,



Terrence L. Irion

TLI:lm

Cc: Robert A. Butler

IRION | SLADE

ATTORNEYS & COUNSELORS AT LAW
A PROFESSIONAL LIMITED LIABILITY COMPANY

Terrence L. Irion
Attorney at Law

2224 Walsh Tarlton
Suite 210
Austin, Texas 78746

512.347.9977
Fax: 512.347.7085
tirion@isblaw.com

2006-0700-1111D

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April 3, 2007

VIA FACSIMILE: 239-3939
AND U.S. MAIL
Mr. Glenn Shankle
Executive Director
Texas Commission on Environmental Quality - MC-109
P.O. Box 13087
Austin, TX 78711-3087

VIA FACSIMILE: 239-3311
AND U.S. MAIL
Ms. LaDonna Castanuela
Chief Clerk
Texas Commission on Environmental Quality-MC-105
P.O. Box 13087
Austin, TX 78711-3087

CHIEF CLERK'S OFFICE
2007 APR -5 AM 10:43
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: Application to Renew Permit No. WQ0014227001 - Hudson Harbor, Ltd.

Dear Ms. Castanuela and Mr. Shankle:

I have represented Hudson Harbor, Ltd. on the above referenced Permit and application for renewal permit and continue to represent the owner of the property subject to this Permit.

It is my understanding that the Executive Director determined that the Applicant must demonstrate need for the renewal of the Permit as required by Section 26.0282 of the Texas Water Code. I agreed to do that on the Applicant's behalf. I have had a number of communications, both written and oral, with TCEQ Staff Attorney Scott Shoemaker and Team Leader Firoj Vahora. I know it has been some considerable time since the request for demonstration of need was first submitted. Please let me explain.

My client anticipated that whatever demonstration of need was submitted to TCEQ would be opposed by WCID #17. Accordingly, we first sought to negotiate a settlement with WCID #17. We met with the General Manager and its General Counsel in August and, I thought, agreed to the outline of the settlement agreement. My client agreed to pay the District's professional fee to have a draft of a proposed settlement agreement prepared. We did not get the draft from the District's attorney until late September of 2006 and were quite disappointed that it went way beyond what the Applicant felt were reasonable conditions on the operation of the Permit, and beyond the scope of our settlement discussions.

As has been discussed with your Staff Attorneys and Team Leader, this Permit is for the development of a residential condominium project located on Lot 1 Hudson Harbor Subdivision, a 10.61 acre lot located at 6409 Hudson Bend Road. The Applicant previously went through the subdivision plat process to obtain final plat approval of Lot 1; submitted a site development plan for the project to the City of Austin, Travis County in ESD No. 6; obtained approval from all three agencies for a multi-story residential condominium building. The architectural plans propose 108 units with a varying range of bedroom counts and square foot plans. There is no centralized wastewater system available to serve this project.

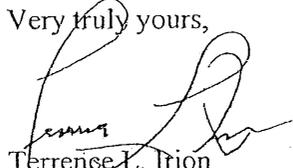
The project site has, subsequent to the issuance of the Permit, apparently been annexed into the CCN of Water District #17, which acknowledges that it does not have the present ability to serve this project. Hundreds of thousands of dollars have gone into site acquisition, platting, land site planning through the City of Austin, Travis County, and ESD No. 6 and the designing of an under-building water storage area for fire suppression, as well as the design and permitting of the subject disposal permit. The owners have no other viable option to the subject Permit for providing domestic wastewater treatment for the development of the property, which it is their earnest and immediate present intent to develop.

The project cannot be built without the TCEQ disposal permit and the delay in its renewal is what has delayed the financing commitment to the construction of the project since last summer. The owners are confident that upon renewal of the Permit, the site development permit issued by the City of Austin and Travis County can be renewed within the next 120 days and construction financing secured to commence construction on the project by next year.

Accordingly, we would request that you recommend renewal of this Permit and set the matter back on the agenda of the Commission for consideration.

Thank you for your attention to this matter.

Very truly yours,



Terrence L. Irion

TLI:lm

Cc: Firoj Vahora -via email: fvahora@tceq.state.tx.us
Scott Shoemaker -via email: sshoemak@tceq.state.tx.us

CERTIFICATE OF SERVICE

**HUDSON HARBOR, LTD.
TCEQ DOCKET NO. 2006-0200-MWD**

I hereby certify that on this 9th day of July, 2007, a true and correct copy of the foregoing document has been sent via facsimile, certified mail, return receipt requested, first class mail, or hand-delivered to the following:

Steven Morse, Vice President
Hudson Harbor, Ltd.
6400 Hudson Bend Road
Austin, Texas 78734-1336

Firoj Vahora
TCEQ Water Quality Division
P.O. Box 13087 – MC 148
Austin, Texas 7875
Fax: 239-4114

Andrew Rooke, P.E.
Turner Collie & Braden, Inc.
400 West 15th Street, Suite 500
Austin, Texas 78701-1600
Fax: 472-7519

Blas Coy
TCEQ Office of Public Interest Counsel
P.O. Box 13087 – MC 103
Austin, Texas 78711-3087
Fax: 239-6377

Terrence C. Irion
Irion Slade
2224 Walsh Tarlton, Suite 210
Austin, Texas 78746
Fax: 347-7085

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle
Bldg. F – 1st Floor
Austin, Texas 78753
Fax: 239-3311

Patti R. Clark
P.O. Box 1306
Dripping Springs, Texas 78620-1306
Fax: (512) 858-1394

Bridget Bohac
TCEQ Office of Public Assistance
P.O. Box 13087 – MC 108
Austin, Texas 78711-3087
Fax: 239-4007

Scott Shoemaker
TCEQ Environmental Law Division
P.O. Box 13087 – MC 173
Austin, Texas 78711-3087
Fax: 239-0606

Kyle Lucas
TCEQ Alternative Dispute Resolution Program
P.O. Box 13087 – MC 222
Austin, Texas 78711-3087
Fax: 239-4015


LAUREN KALISEK