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October 9, 2006

*Via Hand Delivery*

Ms. LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

Re: TCEQ Docket No. 2006-0884-MWD; Westlakes Utility Corporation; TPDES  
Permit No. WQ0014658001; Response to Request for Hearing

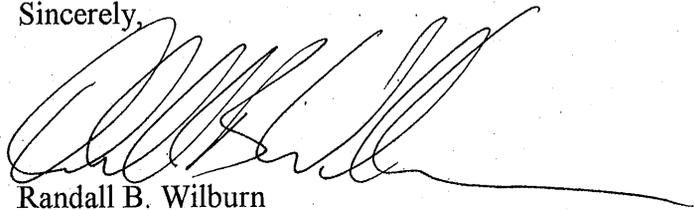
Dear Ms. Castañuela:

I have enclosed for filing the original and 11 copies of the Applicant's Response to San Antonio Water System's Request for Public hearing.

I have also enclosed an additional copy that I ask you to file stamp and return to the courier as evidence of delivery.

Thank you for your assistance in this matter.

Sincerely,



Randall B. Wilburn

Cc: Westlakes Utility Corporation  
Attached Mailing List

CHIEF CLERKS OFFICE

2006 OCT -9 PM 3:16

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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**WESTLAKES UTILITY CORPORATION TCEQ DOCKET NO. 2006-0884-MWD**

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TCEQ DOCKET NO. 2006-0884-MWD

IN THE MATTER OF THE  
APPLICATION OF WESTLAKES  
UTILITY CORPORATION FOR  
NEW TPDES PERMIT NO.  
WQ14658001

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§  
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§

BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

WESTLAKES UTILITY CORPORATION'S  
RESPONSE TO REQUEST FOR PUBLIC HEARING

COMES NOW, Westlakes Utility Corporation ("Westlakes" or the "Applicant") and files this,  
its Response to Hearing Request in the above-referenced matter:

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2006 OCT -9 AM 3:16  
CHIEF CLERK'S OFFICE

I.  
SUMMARY

Westlakes Utility Corporation respectfully asks that the Commission deny the  
Hearing Request of the San Antonio Water System ("SAWS") for the following reasons:

- 1) In its hearing request, SAWS failed to raise issues of fact that are relevant and material to the Commission issuing a water quality permit, which is required before the Commission may grant a hearing request;
- 2) In its hearing request, SAWS did not complain of any potential impairment of water quality and did not argue that the permit would not protect the receiving water;
- 3) SAWS' sole issue is over which utility should provide service to the area under a Certificate of Convenience and Necessity ("CCN"), not a water quality dispute;
- 4) The Commission has already referred the CCN dispute for a contested case hearing; therefore, referral of the TPDES Permit application would duplicate issues already before the State Office of Administrative Hearings
- 5) Despite its claim, SAWS is not a regional wastewater provider under State law; and
- 6) SAWS is not authorized to provide service to the property served by Westlakes Utility Corporation; therefore, SAWS lacks any justiciable interest in the matter.

For these reasons, Westlakes Utility Corporation respectfully requests that the Commission deny the hearing request of SAWS and issue TPDES Permit No. WQ14658001.

## **II.** **INTRODUCTION**

Westlakes has applied to the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") for a new permit, Proposed Permit No. WQ0014658001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 990,000 gallons per day. The facility will be located 2,000 feet west of Loop 1604 and approximately 1,000 feet south of Farm-to-Market Road 143 in Southwest Bexar County, Texas. The treated effluent will be discharged to a ditch; thence to an unnamed tributary; thence to Medina River Below Medina Diversion Lake in Segment No. 1903 of the San Antonio River Basin. The unclassified receiving water uses are no significant aquatic life uses for the ditch and limited aquatic life uses for the unnamed tributary. The designated uses for Segment No. 1903 are high aquatic life uses, public water supply, aquifer protection, and contact recreation. In accordance with Section 307.5 of the TCEQ Rules and the TCEQ implementation procedures for the Texas Surface Water Quality Standards, the TCEQ Executive Director (the "Executive Director" or "E.D.") performed an anti-degradation review of the receiving waters and determined that the issuance of this permit to Westlakes will not impair the receiving waters or degrade water quality. The E.D. has determined that the proposed permit maintains and protects the numerical and narrative criteria for the receiving water. Furthermore, the E. D. has determined that no water bodies with exceptional, high, or intermediate aquatic life uses are present within the stream reach assessed; therefore, no Tier 2 degradation determination is required. The E.D. does not foresee any significant degradation of water quality in water bodies with exceptional, high, or intermediate aquatic life uses downstream, and the proposed permit will

maintain and protect existing uses.

The E.D. has completed the technical review of the application and prepared a draft permit. The draft permit establishes the conditions under which the facility must operate. The E.D. has decided that this permit meets all statutory and regulatory requirements.

The Executive Director received the application for a permit on October 25, 2005, and declared the application administratively complete on December 7, 2005. The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit in the *San Antonio Express News* on December 23, 2005. Furthermore, the Applicant published the Notice of Application and Preliminary Decision for a Water Quality Permit in the *San Antonio Express News* on March 17, 2006. The comment period ended on April 17, 2006. The Executive Director filed his Response to Public Comment with the Office of Chief Clerk on May 31, 2006, and the time period for requesting reconsideration or a contested case hearing ended on July 3, 2006. This application is subject to the procedural requirements of House Bill 801, 76<sup>th</sup> Texas Legislature, 1999.

The Office of the Chief Clerk received a timely hearing request from the San Antonio Water System ("SAWS" or "Protesters"). In its protest, SAWS raised general issues regarding which utility should provide service to the area under a Certificate of Convenience and Necessity. SAWS further stated that it had *general* concerns about the draft permit.

The Executive Director did not make any revisions to the draft permit based upon SAWS public comments or hearing requests.

### **III.** **APPLICABLE LAW FOR EVALUATING HEARING REQUESTS**

The E.D. declared this application administratively complete after September 1, 1999. Therefore, this application is subject to the requirements of Section 5.556 of the Texas Water Code, added by Act 1999, 76<sup>th</sup> Leg., ch. 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a request for a public hearing must substantially comply with the following requirements:

- 1) be in writing;
- 2) be filed timely;
- 3) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- 4) 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;
- 5) 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
- 6) provide any other information specified in the public notice of the application.<sup>1</sup>

Under Section 55.203(a) of the TCEQ Rules, 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.<sup>2</sup> Relevant factors that the Commission will consider in determining whether a person is affected include the following:

- 1) whether the interest claimed is one protected by the law under which the application will be considered;
- 2) distance restrictions or other limitations imposed by law on the affected interest;
- 3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

<sup>1</sup> 30 TEXAS ADMIN. CODE ("TAC") § 55.201(d).

<sup>2</sup> *Id.*

- 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.<sup>3</sup>

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.<sup>4</sup>

Accordingly, 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.<sup>5</sup>

The Commission has also set forth specific criteria for evaluating whether the Commission should consider a group or organization to be an "affected person." Section 55.205(a) of the TCEQ Rules states that a group or association may request a hearing if:

- 1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- 2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- 3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

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<sup>3</sup> 30 TAC § 55.203(c).

<sup>4</sup> 30 TAC § 55.211(c).

<sup>5</sup> 30 TAC § 55.209(e).

#### IV. DISCUSSION

##### A. SAWS Failed To Raise Issues Of Fact That Are Relevant And Material To The Commission Issuing A Water Quality Permit

SAWS **FAILED** to raise one issue of fact relevant and material to a wastewater discharge permit. SAWS did not complain of any potential impairment of water quality. SAWS did not argue that the permit would not protect the receiving water. Instead, SAWS' sole complaint is that the Commission should allow SAWS to service the area, not the Applicant.

SAWS' issue in its hearing request centers around the Commission's authorization for one of the utilities to serve the property. The dispute is over which utility should receive a Certificate of Convenience and Necessity ("CCN"), **NOT** a water quality dispute. The issue is the very same issue that the Commission has already referred to the State Office of Administrative Hearings ("SOAH") for a Contested Case Hearing, SOAH Docket No. 582-06-2478, TCEQ Docket No. 2006- 0467-UCR. In that matter, Westlakes, at the request of the landowner, has requested a CCN from the Commission to allow that utility to serve the requested area. SAWS has filed a protest in the CCN matter, and the SOAH Administrative Law Judge has already named SAWS a party in that matter. At issue in that CCN matter is whether Westlakes or SAWS should provide wastewater service. In other words, an Administrative Law Judge is already considering SAWS sole issue as part of an ongoing contested case hearing.

Moreover, SAWS does **NOT** have authorization from the Commission, under a valid CCN, to serve this area. The proposed service area of Westlakes falls outside of the current CCN that the TCEQ has issued to SAWS. Without a CCN, State law forbids any utility, including SAWS, from providing retail service to the property. Furthermore, the landowner has requested

that Westlakes Utility Corporation, **NOT** SAWS, provide retail wastewater service to its property.

In filing this request for a contested case hearing, SAWS is attempting to have the Commission hear the CCN dispute as part of a water quality permit hearing, not in its rightful place as part of the ongoing CCN hearing. In other words, SAWS is attempting to have two different bites of the hearing apple regarding the CCN dispute. A hearing on the water quality permit application is **NOT** the appropriate place to determine which utility should provide service to the area. If the Commission grants SAWS its request for a contested case hearing on this CCN dispute, then the Applicant will have to defend the same issues in two different contested case hearings, which is waste of time, money, and effort for both the E.D. and the Applicant. For these reasons, the Commission should deny SAWS hearing request.

#### **B. SAWS is NOT a Regional Provider under State Law**

As part of its effort to confuse the Commission by bringing CCN issues into the discussion on this wastewater discharge permit, SAWS argues that the Commission should deny Westlakes' wastewater discharge permit because SAWS is a regional system. However, under State law, nothing could be further from the truth. SAWS is **NOT** a regional wastewater provider under State law.

Under State law, for SAWS or any other utility to be designated a regional system, the utility must submit and follow the provisions of Subchapter C of Chapter 26 of the Texas Water Code. The Texas Legislature has developed a specific process for the Commission to designate regional systems. The Legislature's process includes the following procedures.

- 1) The Commission must hold a public hearing in or near the area to determine whether a regional system should be designated in that area.
- 2) The Commission must give notice of the hearing to the local governments that in

the judgment of the commission may be affected.

- 3) If after the hearing the Commission finds that a regional or area-wide system or systems are necessary or desirable, then the Commission enters an order defining the area in which such a system or systems are necessary or desirable.
- 4) If the Commission receives a timely and sufficient request for an election, the Commission designates a presiding judge for an election, to determine whether the proposed regional or area-wide system or systems operated by the designated regional entity should be created.
- 5) An election is held within the boundaries of the proposed regional or area-wide system or systems to be operated by the designated regional entity upon the filing of a timely and sufficient request for an election.
- 6) If a majority of the votes cast in the election favor the creation of the regional or area-wide system or systems operated by the designated regional entity, then the Commission shall declare the regional system is created and enter the results in its minutes. If a majority of the votes cast in the election are against the creation of the regional or area-wide system or systems operated by the designated regional entity, then the Commission shall declare that the regional system was defeated and enter the result in its minutes.<sup>6</sup>

To date, the Commission has not designated SAWS to be a regional system. In fact, to date, only one utility in the State is designated as a regional utility provider, and it is **NOT** SAWS. SAWS is not anymore a regional system that Westlakes Utility Corporation, and SAWS lacks the legitimate ability to claim itself to be a regional system. For this reason, the Commission should deny SAWS hearing request.

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<sup>6</sup> Texas Water Code §§ 26.081 - .087.

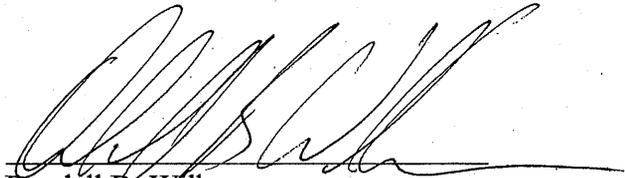
V.  
**CONCLUSION**

Westlakes Utility Corporation hereby prays that the Commission deny SAWS hearing request and issue TPDES Permit No. WQ14658001 as proposed by the Executive Director.

Respectfully submitted,

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By:

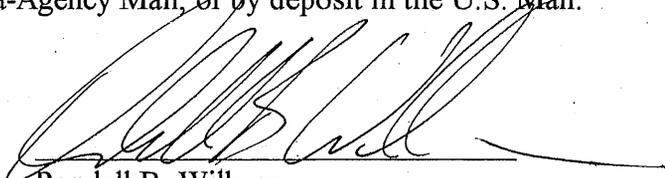
  
Randall B. Wilburn

**ATTORNEY FOR WESTLAKES UTILITY  
CORPORATION**

**CERTIFICATE OF SERVICE**

I hereby certify that on October 9, 2006, the original and eleven true and correct copies of Westlakes Utility Corporation's Response to Requests for Hearing were filed with the Office of 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, Intra-Agency Mail, or by deposit in the U.S. Mail.

By:

  
Randall B. Wilburn

**MAILING LIST**  
**WESTLAKES UTILITY CORPORATION TCEQ DOCKET NO. 2006-0884-MWD**

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