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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 30, 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
JUL 30 PM 3:35
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

RE: **AQUA UTILITIES, INC.**
TCEQ DOCKET NO. 2006-1629-MWD

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in blue ink, appearing to read "Scott A. Humphrey".

Scott A. Humphrey, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2006-1629-MWD

2007 JUL 30 PM 3:35

IN THE MATTER OF THE
APPLICATION BY AQUA
UTILITIES, INC. FOR RENEWAL
OF TPDES PERMIT NO. 13989-001

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BEFORE THE CHIEF CLERKS OFFICE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTS FOR 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) files this Response to Requests for Hearing in the above-referenced matter, and would respectfully show the following:

I. INTRODUCTION

Aqua Utilities, Inc. (Aqua or Applicant) has applied to the TCEQ for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. 13989-001. The proposed renewal would authorize the applicant to dispose of treated domestic wastewater at a volume not to exceed a daily average flow of 0.25 million gallons per day (MGD) via surface irrigation of 143 acres of land in the interim phase and 0.375 MGD via surface irrigation of 175 acres of land in the final phase . The proposed permit authorizes Aqua to build the wastewater treatment facility in two stages. The first stage, referred to as the interim phase, has been built and is in service. The second stage, referred to as the final phase, will be built when Aqua anticipates needing the additional capacity.

The wastewater treatment facilities and disposal site are located approximately 1200 feet south and southeast of the intersection of Farm-to-Market Road 2325 and Jacob's Well Road,

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approximately 4 miles north of Wimberley in Hays County, Texas. The wastewater treatment facility serves the City of Woodcreek. The disposal site is located in the drainage basin of Cypress Creek in Segment No. 1815 of the Guadalupe River Basin. No discharge of pollutants into water in the state is authorized by this permit.

The TCEQ received the application on August 18, 2000 and the Executive Director (ED) of the TCEQ declared the application administratively complete on September 12, 2000 and technically complete on September 22, 2000. After the ED completed the technical review of the application and prepared a draft permit, the Notice of Application and Preliminary Decision was published on February 1, 2001. The TCEQ held a public meeting on June 11, 2001 at the Danforth Junior High School in Wimberley. The initial comment period closed at the close of the public meeting. On December 21, 2004, the TCEQ received an application to transfer the application from Woodcreek Utilities to Aqua. The ED approved the transfer on January 27, 2005. A revised notice of Application and Preliminary Decision was published on July 15, 2005. The second public comment period ended on August 15, 2005.

In response to the notices concerning this renewal, the TCEQ received requests for a contested case hearing from the following parties: David H. Glenn and attorney Richard Lowerre, both on behalf of Wimberley Neighbors for Healthy Water (WNWH); and attorney Emily Rogers on behalf of the Village of Wimberley (Village). OPIC recommends granting both requests for a contested case hearing.

II. REQUIREMENTS OF APPLICABLE LAW

The permit renewal application was received on August 18, 2000 and was declared

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administratively complete on September 20, 2000. Because the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Texas Water Code Chapter 5, Subchapter M, Environmental Permitting Procedures, §§5.551 to 5.556, added by Acts 1999, 76th Leg., ch. 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a person requesting a hearing must file the request in writing with the chief clerk no later than 30 days after the chief clerk's transmittal of the executive director's response to comments. 30 TEX. ADMIN. CODE (TAC) §55.201(a). The request must also 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 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;

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- (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.

In addition, 30 TAC §55.205(a) sets forth the following requirements that a group or association must meet in order to request a hearing:

- (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.

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).¹

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;

¹ A hearing request can not be based on an issue raised solely in comments that have been withdrawn by written letter filed with the chief clerk prior to the filing of the executive director's response to comments. 30 TAC §55.211(c)(2)(A).

- (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.

III. DISCUSSION

As an initial matter, the Commission must determine whether a right to a contested case hearing exists on this application. The Commission may approve an application without a right to a hearing for a renewal or amendment under Chapter 26 of the Texas Water Code if:

- (A) the applicant is not applying to:
 - (i) increase significantly the quantity of waste authorized to be discharged; or
 - (ii) change materially the pattern or place of discharge;
- (B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;
- (C) any required notice and opportunity to request a public meeting has been given;
- (D) consideration and response to all timely received and significant public comment has been given; and
- (E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit.²

According to the information reviewed by OPIC, Applicant's renewal application satisfies

² TEXAS WATER CODE §26.028(d) and 30 TAC § 55.201(i)(5).

the first four requirements. The application does not propose to increase the amount of effluent authorized, nor does it change the pattern or place of discharge. The renewal contains the same effluent limitations as the original permit, thereby maintaining the quality of waste authorized to be discharged. The notices informed the public of the right to request a public meeting on this application. The ED's response to public comment was mailed by the Chief Clerk's Office on August 8, 2006.

OPIC does conclude, however, that both hearing requests raise issues regarding the Applicant's compliance history. One of the hearing requests submitted by WNHW states the draft renewal permit fails to address and remedy many of the issues and concerns arising from bad compliance history at the Applicant's facilities located in Hays County as well as its other facilities in Texas. The hearing request letter cites violations by the Applicant including: (1) operating without valid permits; (2) repeated unlawful discharges of raw sewage and treated effluent from various point sources including, but not limited to, wastewater treatment plants, lift stations, lines, grinder pumps, force mains, holding ponds and irrigation sites; (3) repeated discharges of sludge causing accumulation in receiving stream; (4) repeated failures to construct, maintain and operate facility equipment; (5) repeated exceedences of permit limitations for Total Suspended Solids (TSS), Biochemical Oxygen Demand (BOD), Dissolved Oxygen (DO), Ammonia, Nitrogen and Chlorine; (6) repeated exceedences of permitted flows for facilities; (7) repeated failures to maintain and/or file with agency reporting records; and (8) causing nuisance odors.³ The request also identifies examples of noncompliance for the facility at issue: (1)

³ See Lowerre brief, pgs. 3-5

improperly constructing and maintaining the pipes, lines, taps and lift stations; (2) refusing facility inspection; (3) violating agreed orders; (4) illegally connecting customers outside its Certificate of Convenience and Necessity (CCN) boundaries; (5) violating permit requirements by failing to control the operation, maintenance and disposal by irrigation; and (6) violating the Texas Water Code by causing, allowing and permitting an entity to discharge without a permit.⁴

The Village also states its concern that the Applicant's compliance record includes numerous unauthorized discharges and, therefore, that additional reporting requirements and adequate spill response and contingency plans be added to the permit. The request also refers to an unlawful discharge of untreated sewage at the Brookshire Brother lift station and suggests that the wastewater collection, transport and treatment facilities may have been inadequately designed and constructed. The Village references agency permits held by the Applicant and Commission Orders signed by the Applicant in support of its argument.

The ED responded to the comments regarding compliance history issues.⁵ First, the ED stated that he had compiled a compliance history that includes pertinent information from the last five years pursuant to 30 TAC Chapter 60.⁶ According to the ED, the compliance history includes a review of all of the facilities in Texas owned by the Applicant, and the Applicant has a 1.27 classification, which falls in the average range, and the site rating itself is 2.00, also within

⁴ *Id.*, pgs. 6-8

⁵ *See* ED's Response to Comments, pgs. 7-9

⁶ *Id.*, p. 7

average.⁷ At the Woodcreek facilities, a TCEQ inspector identified that the Applicant was operating a Phase II wastewater treatment facility with an expired permit.⁸ In addition, although the Phase I and Phase II wastewater treatment facilities had numerous violations for exceeding their permitted flow rates, the ED noted that now that the Phase III plant is operational, the other two plants are no longer needed and have been converted to lift stations.⁹ Finally, the ED indicates his opinion that the proposed permit contains adequate response and contingency plans including agency notification within 24 hours of becoming aware of the noncompliance and a written report of the instances of noncompliance within five working days.¹⁰

OPIC concludes that both WNHW and the Village have identified portions of the Applicant's compliance history that raises issue concerning the Applicant's ability to comply with a material term of the permit. Therefore, having established the right to hearing in this matter, OPIC offers the following analysis of the hearing requests.

A. Determination of Affected Person

1. Wimberley Neighbors for Healthy Water

The Commission may grant the request only if it finds that WNHW is an affected person in accordance with the group or association requirements found in 30 TAC § 55.205(a). In the Lowerre hearing request, the group describes itself as an organization with goals and purposes that

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*, pgs. 8-9

include conservation, public education, protection of the natural resources and health of the community and protection of the members' property interests and other economic interests. They are concerned about the loss of use and enjoyment of property and injury to their health and the natural resources they rely on due to such events as sewage back-up into houses and property, ponding of irrigation effluent on the golf course, odors emanating from the disposal of effluent on the golf course and sewage and effluent leaking and/or spilling from faulty or inadequate equipment for sewage treatment, transportation and irrigation disposal. They identify members Johanna Smith, Barbara Knoll and Dwayne Patlyek who share these concerns.

OPIC concludes that WNHW has established a reasonable relationship exists between the activity claimed and the activity regulated. There is a likely impact of the regulated activity on the health, safety and use of property of a person as well as an impact on the use of a natural resource by a person. WNHW has also met the requirements for an association as an affected person. At least one member of the group would have standing in his/her own right, and that person's participation in the hearing would not be required for the claim asserted or the relief requested. Furthermore, the interests the group seeks to protect are germane to the organization's purpose. Therefore, OPIC recommends a finding that WNHW is an affected person entitled to a contested case hearing.

2. Village of Wimberley

The Village is concerned about the Applicant's commitment to protecting Wimberley's creeks and streams. This concern stems partly from the fact that the Applicant has refused to work with its host city, Wimberley, on various environmental protection concerns related to its

wastewater treatment plant, lift stations, collection lines and disposal methods. In support of its concerns, the Village references the Applicant's poor compliance record and notes several unauthorized discharges that occurred on or about January 5, 2001.

OPIC concludes that the Village is a governmental entity that is an affected person entitled to a contested case hearing. The Village has raised issues that are relevant and material to the disposition of this renewal. Therefore, OPIC recommends a finding that the Village of Wimberley is an affected person entitled to a contested case hearing.

B. Issues Raised in the Hearing Requests

In addition to the compliance history issue, WNHW raises the issue that the Applicant has made misrepresentations in its application for a renewal. The Village has also expressed concern that the areas irrigated by the Applicant do not have adequate soil depth and/or appropriate crops to ensure that no effluent is discharged from the irrigated areas.

1. Issues Disputed

All of the issues regarding compliance history, accuracy of the application and appropriateness of irrigation areas remain disputed.

2. Issues of Fact

Whether the Applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit, whether the application is accurate and whether the proposed application areas are appropriate are all questions of fact appropriate for referral to the State Office of Administrative Hearings (SOAH).

3. Issues Raised During the Comment Period

Questions regarding the Applicant's compliance history, accuracy of the application and appropriateness of the irrigation areas were raised in a timely manner during the comment period.

4. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). Concerns regarding the Applicant's compliance history are properly before the Commission in an application for a renewal. Similarly, Texas Water Code Chapter 26 addresses application and permit requirements for the protection of Texas surface water and ground water.

5. Issues Recommended for Referral to Hearing

In light of the requirements of 30 TAC §§ 50.115(b) and 55.211(b)(3)(A)(i), OPIC recommends that the Commission refer the following disputed issue of fact to SOAH:

1. Does the Applicant's compliance history for the previous five years raise any issues regarding the Applicant's ability to comply with a material term of the permit?
2. Does the application contain misrepresentations?
3. Does the application propose irrigation areas with adequate soil depth and appropriate crops?

C. Maximum Expected Duration of Hearing

Commission rule 30 TAC § 50.115(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

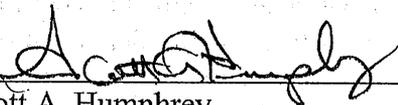
decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

III. CONCLUSION

OPIC recommends granting the hearing requests submitted by Wimberley Neighbors for Healthy Water and the Village of Wimberley and referring this matter to SOAH with the above-referenced issues.

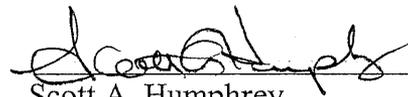
Respectfully submitted,

Blas J. Coy, Jr.
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By 
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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2007 the original and eleven true and correct copies of the Office of the Public Counsel's Response to the Requests 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 facsimile transmission, and Inter-Agency Mail or by deposit in the U.S. Mail.



Scott A. Humphrey

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TCEQ DOCKET NO. 2006-1629-MWD

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