Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*

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

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

October 10, 2008

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 OCT 10 PM 3:48
CHIEF CLERKS OFFICE

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

Re: **MAILING LIST**
**JOCO HOLDING CORPORATION**
**TCEQ DOCKET NO. 2006-2167-IWD**

Dear Ms. Castañuela:

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

Sincerely,

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 OCT 10 PM 3:48
CHIEF CLERKS OFFICE

**TCEQ DOCKET NO. 2006-2167-IWD**

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| **IN THE MATTER OF THE APPLICATION OF JOCO HOLDING CORPORATION FOR AN AMENDMENT TO TCEQ PERMIT NO. WQ0002730000** | §<br>§<br>§<br>§<br>§ | **BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY** |

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO REQUESTS FOR RECONSIDERATION**

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 Requests for Reconsideration in the above-referenced matter, and would respectfully recommend denying the requests.

## I. INTRODUCTION

On January 31, 2008, the JOCO Holding Corporation (hereinafter "Applicant" or "JOCO") submitted an amended permit application to the TCEQ for the renewal of TPDES Permit No. WQ0002730000, which authorizes the disposal of domestic wastewater by evaporation and irrigation of coastal Bermuda grass at an application rate not to exceed 3.85 acre-feet per year per acre irrigated. This permit renewal will not authorize a discharge of pollutants into waters of the state.

The facility and land application site are located on the east side of Interstate Highway 35 West, approximately 2,000 feet southeast of the Bethesda Road overpass and approximately 5.1 miles southeast of the City of Burleson in Johnson County, Texas. The facility and land application site are located in the Upper Trinity River Basin, Segment No. 0828 of the Bays and Estuaries.

Originally, the Applicant applied for a major amendment to its existing permit, seeking authorization to discharge treated domestic and food wastewaters at a daily average flow of

10,000 gallons per day. The TCEQ received this application on October 20, 2004, and the Executive Director ("ED") declared the application administratively complete on January 28, 2005. The original Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published on February 9, 2005, in the *Burleson Star*, and the original Notice of Application and Preliminary Decision (NAPD) was published on November 2, 2005, in the *Burleson Star*. Notice of a public meeting was published on May 14, 2006 in the *Burleson Star*, and that meeting was held on June 22, 2006 at the Chamber of Commerce Building in Burleson, Texas. To correct an error in the original notices regarding the location of the application for public review, a second NAPD was published on August, 23, 2006 in the *Burleson Star*. The public comment period ended September 22, 2006. The ED issued a Response to Public Comment on November 7, 2006.

The TCEQ received timely requests for reconsideration from Mr. Tim Davis and Faye Woods on November 29, 2006, and November 28, 2006, respectively. These requests were set to be considered by the commissioners during the public meeting on March 28, 2007. However, on March 21, 2007 the Applicant filed a letter with the executive director requesting a withdrawal of the major amendment portion of the permit application seeking authorization to discharge, and expressed its intent to proceed only with the renewal of the land application permit. On March 23, 2007, the application was remanded to the executive director for processing as a renewal application.

The combined NORI/NAPD for Applicant's amended application was published on February 20, 2008 in the *Burleson Star*. The public comment period ended on March 21, 2008. No public comments were received during the most recent public comment period. The Executive Director's First Amended Response to Public Comment was issued on April 25, 2008.

Based on the information submitted in the requests and a review of the information available in the Chief Clerk's file on this application, OPIC recommends denying the requests for reconsideration.

## II. APPLICABLE LAW

This application was declared administratively complete on January 28, 2005. As 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, section 5.551 to 5.556, added by Acts 1999, 76th Leg., ch. 1350 (commonly known as "House Bill 801"). In addition to changing the requirements for requests for contested case hearings, House Bill 801 created a procedural mechanism, a request for reconsideration, that allows for the Commission's review of the Executive Director's decision on an application. Following the ED's technical review and consideration of comments, a person may file a request for reconsideration, a request for a contested case hearing, or both. TEX. WATER CODE § 5.556; 30 TEX. ADMIN. CODE ("TAC") § 55.201(e).

Any person may file a request for reconsideration of the ED's decision. 30 TAC § 55.201(e). A request for reconsideration must state the reasons why the decision should be reconsidered. *Id.* Responses to requests for reconsideration should address the issues raised in the request. 30 TAC 55.209(f).

## III. DISCUSSION

Mr. Davis and Ms. Woods' requests for reconsideration raise the following issues:

(1) the discharge will result in undesirable amounts of standing water on the requestors' property because the series of drainage ditches on the property were dug to facilitate adequate drainage on that property;
(2) the discharge will result in treated wastewater on the requestors' property, and the cattle will ingest the treated wastewater;
(3) the community probably would not approve the proposal;

(4) the motel should install a septic system or have the City of Burleson handle their sewage;
(5) no real series of ditches leads to Quil Miller Creek from the site;
(6) the discharge may cause long-term environmental damage; and
(7) the discharge may not reach Lake Arlington.

While sympathetic to the concerns raised in the requests for reconsideration, OPIC cannot recommend granting these requests. The requestors' concerns are generally predicated on the potential effects of effluent discharge, which could result in undesirable amounts of standing water on the requestors' property[1] and related nuisances. Such concerns are rendered moot by the withdrawal of the major amendment portion of the application and Applicant's request for only a no-increase permit renewal. The Applicant no longer seeks authorization to discharge effluent, but rather to continue previously authorized land application disposal.

Mr. Davis explains in his request that the series of ditches referenced by the Executive Director as part of the discharge route are "ditches that I have dug to help my place drain adequately," and insists that his property already does not drain well. In instances where discharge into waters of the state are to occur, as in the Applicant's original petition for an amended permit, the Commission may consider the adequacy of a proposed discharge route (issues 1, 2, 5, and 7).[2] However, no discharge will result from the amended permit. Therefore, OPIC cannot support a reversal of the Executive Director's decision to grant the proposed permit based on the assertions made by the requestors.

While the concern with "mud" is addressed by the Commission rule that "surface waters shall be essentially free of settleable solids conducive to changes in flow characteristics of stream

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[1] Ms. Woods states that Mr. Davis is the lessee of her property. Therefore, the property referred to in both Mr. Davis' request for reconsideration and Ms. Woods' request for reconsideration are one and the same.
[2] See 30 TAC section 309.12(3), which prohibits issuance of a permit unless the proposed site minimizes possible contamination of surface water and ground water upon consideration of, *inter alia*, the separation distance from the point of discharge to surface water.

channels or the untimely filling of surface water in the state,"[3] and although the Commission may consider public health issues[4] and potential environmental damage in its permitting decisions,[5] effluent discharge would simply not be an activity permitted by the amended Applicant's permit renewal. These concerns would furthermore require an evidentiary record to provide sufficient basis for denial of the permit the renewal application.

As to the suggestion that the TCEQ require Applicant to consider alternative disposal methods, such as septic systems, there is no proposed wastewater discharge under the permit renewal to utilize such an alternative. Further, the TCEQ does not consider alternative methods of disposal in its permitting decisions, but rather determines only if, given the Applicant's chosen type of discharge, the Applicant will meet the requirements of applicable environmental laws within the jurisdiction of the Commission.

The requestors also raise the concern that the community would not approve the proposed permit. TCEQ has specific rules designed to gain input from the public on each of its wastewater permitting decisions. In this case, the Applicant published various notices in the *Burleson Star* to inform the public of its original amendment application and its revised renewal application during which the public had the opportunity to comment. TCEQ also held a public meeting to formally obtain public input on this application. OPIC cannot find that the Executive Director has failed to fulfill its duty to obtain and respond to the comments submitted in this matter.[6]

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[3] 30 TAC § 307.4(b)(3) (2006).
[4] TEX. WATER CODE §§ 26.003; 26.027(a) (2006).
[5] *Id.*; *see also* TWC § 26.023 (2006); 30 TAC Chapter 307.
[6] 30 TAC § 55.156(b)(1) (2006) (requiring the ED to "prepare a response to all timely, relevant and material, or significant public comment" prior to approving an application).

## IV. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission deny the requests for reconsideration.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By _____
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## CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2008, the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Reconsideration 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.

_____
Eli Martinez

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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**MAILING LIST**
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**TCEQ DOCKET NO. 2006-2167-IWD**

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