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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 15, 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

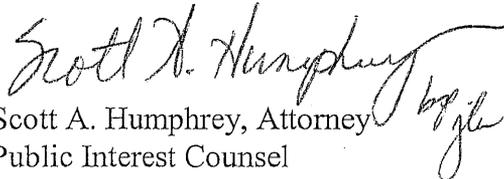
2007 OCT 15 PM 2:21
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**RE: CAPE ROYALE UTILITY DISTRICT
TCEQ DOCKET NO. 2007-0550-MWD**

Dear Ms. Castañuela:

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

Sincerely,


Scott A. Humphrey, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: www.tceq.state.tx.us

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APPLICATION BY CAPE	§	BEFORE THE
	§	
ROYALE UTILITY DISTRICT	§	
	§	TEXAS COMMISSION ON
FOR RENEWAL OF	§	
	§	
TPDES PERMIT NO. WQ0010997001	§	ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTS 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 (the Commission or TCEQ) files the following response to requests for a contested case hearing in the above-referenced matter.

I. INTRODUCTION

Cape Royale Utility District (Applicant or District) has applied to the TCEQ for a renewal of an existing Texas Pollution Discharge Elimination System (TPDES) Permit No. WQ0010997001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day (gpd). The District's facility is an activated sludge process operated in the contact stabilization mode. Treatment units include a bar screen, two contact stabilization chambers, two re-aeration basins, two final clarifiers, two aerobic sludge digesters, a chlorine contact chamber, a mixed media filter, a mud well and a TCEQ authorized land application site or co-disposal landfill.

The effluent limitations in the draft permit, based on a 30-day average, are 10 mg/l five-day Biochemical Oxygen Demand (BOD₅), 15 mg/l Total Suspended Solids (TSS), a reporting

requirement for mg/l Ammonia-Nitrogen (NH₃-N) and 4.0 mg/l minimum dissolved oxygen (DO). The effluent shall contain a chlorine residual of at least 1.0mg/l and shall not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow.

The effluent limitations in the draft permit will maintain and protect the existing instream uses.

The treated effluent is discharged directly to Lake Livingston in Segment No. 0803 of the Trinity River Basin. The designated uses for Segment No. 0803 are high aquatic life use, public water supply and contact recreation. Segment No. 0803 is currently listed on the State's inventory of impaired and threatened waters, the 2004 Clean Water Act Section 303(d) list. The listing is specifically for elevated pH values and depressed dissolved oxygen concentrations. This application is for renewal of an existing authorization and will not represent an increase in the permitted levels of oxygen-demanding constituents to Segment No. 0803.

The facility is located approximately 5.5 miles north of the City of Coldspring in the northwest corner of the Cape Royale Subdivision, on the shore of Lake Livingston in San Jacinto County, Texas. The existing wastewater treatment facility serves Cape Royale Municipal Utility District.

The TCEQ received the permit renewal application on August 8, 2006, and the Executive Director (ED) of the TCEQ declared the application administratively complete on August 28, 2006. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published on September 7, 2006 in the *San Jacinto News Times*. The Notice of Application and Preliminary Decision for a Water Quality Permit was published on December 14, 2006 in the *San Jacinto News Times*. The public comment period ended on January 18, 2007. In response to the notices, the TCEQ received both joint and separate hearing requests from the following: Robert and

Pamela Chandler; Larry V. Green; William and Helen Williams; and Patrick Shay. OPIC recommends the Commission deny the requests for a contested case hearing.

II. REQUEST FOR CONTESTED CASE HEARING

A APPLICABLE LAW

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(c). 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;
- (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).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;
- (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.

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).

B. RIGHT TO A CONTESTED CASE HEARING

As an initial matter, the Commission must determine whether a right to a contested case hearing exists on this application. No right to a contested case hearing exists on a renewal or amendment application under Texas Water Code § 26.028(d) and 30 TAC § 55.201(i)(5) 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 opportunity for public meeting has been given;
- (D) consultation 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

Based on the information provided in the ED's technical summary and the proposed draft permit, OPIC concludes that a right to hearing does not exist on this renewal application.

Effluent limitations and monitoring requirements in the draft permit remain the same as the existing requirements with the exception of a monitoring requirement for ammonium nitrogen.

In addition, the standard permit conditions, sludge provisions, pretreatment requirements and "other requirements" section of the draft permit have been updated. Finally, there are no enforcement orders against the District. The ED's Response to Comments discusses the issuance of notices of violation and the corresponding measures taken by the Applicant to prevent future unauthorized discharges. In addition, the Applicant's compliance history score is 1.80, which is classified as "average." Therefore, OPIC cannot find that the Applicant's compliance history

² 30 TAC § 55.201(i)(5).

warrants a hearing on its requested renewal.

A public meeting was not required on this permit and response to all timely public comment has been made. Therefore, OPIC recommends that a hearing not be granted on this application because there is no opportunity for a contested case hearing on this application. If the Commission disagrees with OPIC's analysis, OPIC provides the following recommendation regarding affected person status.

C. AFFECTED PERSON STATUS AND ISSUES

In their individually written hearing requests, the Williams and Chandlers each indicate they live in close proximity of the District's facility (the Williams specify they live 150-200 yards away from the facility). They both complain of noise nuisance, odor nuisance, poor operation and maintenance and inaccurate reporting of discharges, and the Chandlers add the plant is an unsightly mess. Mr. Shay and Mr. Green do not describe where they live in relationship to the facility. They also cite noise and discharges of untreated effluent, and they also allege that the District is in violation of a deed restriction. The letter filed jointly reraises the issues of deed restriction, odor and noise.

Based on the information provided, the Williams and the Chandlers are affected persons. Proper operation of the facility, meeting reporting requirements and whether the operation of the facility adversely affects the use and enjoyment of their property are interests protected by the law under which this application would be considered. A reasonable relationship exists between the interests claim and the activity regulated. There is a likely impact of the regulated activity on the health, safety and use of property of the person. Without additional information, OPIC cannot determine whether the remaining parties are affected persons.

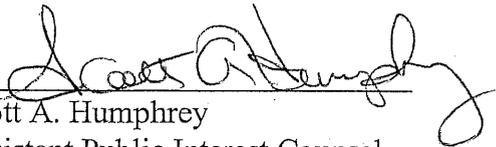
In the event the Commission finds there is a right to hearing, OPIC would recommend the Williams and the Chandlers be granted a hearing on the following disputed issues of fact, all of which are addressed by the law governing these proceedings, and therefore relevant and material: (1) Will operations under the renewed permit result in nuisance odor?; (2) Will operations under the renewed permit adversely affect the Williams' and Chandlers' use and enjoyment of their property?; and (3) Will the renewed permit adequately ensure proper operation and maintenance of the Applicant's facility?

III. CONCLUSION

OPIC recommends that the Commission find that no right to a contested case hearing exists on the Applicant's renewal application because the effluent limitations remain the same as the existing permit. OPIC recommends the Commission deny the requests for a contested case hearing.

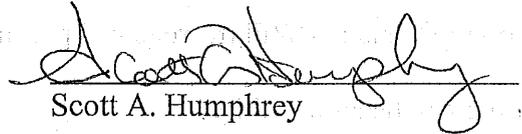
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
Scott A. Humphrey
Assistant Public Interest Counsel
(512)239-6363 PHONE
(512)239-6377 FAX

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2007, the original and eleven true and correct copies of the Office of the Public Counsel's Response to Request for a Contested Case 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

MAILING LIST
CAPE ROYALE UTILITY DISTRICT
TCEQ DOCKET NO. 2007-0550-MWD

FOR THE APPLICANT:

Tim Tucker
Bruce Conner
Cape Royale Utility District
1330 Cape Royale Drive
Coldspring, Texas 77331-8573
Tel: (936) 653-4862
Fax: (936) 653-2611

FOR THE EXECUTIVE DIRECTOR:

Celia Castro, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

Samuel Trevino, Technical Staff
Texas Commission on Environmental Quality
Water Quality Division, MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4618
Fax: (512) 239-4114

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE
RESOLUTION:

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

REQUESTERS:

Robert and Pamela Chandler
271 North Fairway Loop
Coldspring, Texas 77331

Larry V. Green
40 Pebble Beach Circle
Coldspring, Texas 77331-3012

Patrick Shay
12418 Normont Dr.
Houston, Texas 77070-2455

William and Helen A. Williams
251 North Fairway Loop
Coldspring, Texas 77331-3085