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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 12, 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 NOV 12 PM 3:37
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**RE: GRAY UTILITY SERVICE L.L.C.
TCEQ DOCKET NO. 2007-1713-MWD**

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Christina Mann".

Christina Mann, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2007-1713-MWD

**IN THE MATTER OF
THE APPLICATION OF
GRAY UTILITY
SERVICE L.L.C. FOR
WATER QUALITY
PERMIT NO.
WQ0014728001**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUEST FOR HEARING**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

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 Request for Hearing in the above-referenced matter.

I. INTRODUCTION

Gray Utility Service L.L.C. (Applicant) has applied to TCEQ for new Texas
Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014728001 to
authorize the discharge of treated wastewater at a volume not to exceed a daily average
flow of 99,000 gallons per day. The domestic wastewater treatment facility is proposed to
be located approximately 2,500 feet west of Farm-to-Market Road 565 and
approximately 3,500 feet north of Interstate Highway 10 in Chambers County, Texas.
The discharge route is proposed to run through an unnamed tributary (Icet Bayou) to Old
River, through Old River Lake, through Old River, and into Trinity Bay in Segment No.
2422 of the Bays and Estuaries. The designated uses for Segment No. 2422 are high
aquatic life, oyster waters, and contact recreation.

The application was received on June 30, 2006 and was declared administratively complete on July 26, 2006. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit Amendment (NORI) was published in the *Baytown Sun* on August 12, 2006. The Executive Director completed the technical review of the application and prepared a draft permit on November 6, 2006. The Notice of Application and Preliminary Decision (NAPD) was published in the *Baytown Sun* on February 22, 2007.

The comment period ended on March 26, 2007. The chief clerk of the TCEQ mailed the Decision of the Executive Director and the Executive Director's Response to Comments (RTC) on July 23, 2007. The TCEQ received a timely hearing request from Mary Carter on behalf of Ms. Lin Neese.

II. DISCUSSION

A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code § 5.556 added by Acts 1999, 76th Leg., ch 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must 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 TEXAS ADMINISTRATIVE CODE (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 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;
- (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).

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.

B. Determination of Affected Person Status

The Office of the Chief Clerk received a request for a contested case hearing on August 23, 2007 from Ms. Carter on behalf of Ms. Lin Neese.

Ms. Carter states that her client owns approximately 65 acres less than 50 yards downstream of the proposed facility. Ms. Neese also resides at this location, and the discharge route is directly through her property. She raises issues related the water quality impacts of the discharge; ability of the unnamed tributary to properly discharge the effluent; and compliance with the State's regionalization policy.¹ Because of the proximity of the requestor's property to the discharge point and facility and the environmental and regionalization concerns raised by Ms. Neese, there is a reasonable relationship between the interests claimed and the activity regulated. OPIC recommends the Commission find Lin Neese to be an affected person.

C. Issues Raised in the Hearing Requests

1. Discharge Route Concerns. Ms. Neese raises an issue related to whether the discharge route (particularly the portion flowing through her property known as Icet Bayou or Icet Gully) will be able to function as intended. According to the requestor, the gully is strewn with debris and fallen trees. In addition, Ms. Neese questions whether the specific location of the discharge route is clear, because the gully or bayou might not extend to the applicant's property without a pipe to access the proposed discharge route.

¹ See hearing request received August 23, 2007 from Mary Carter.

2. Private Property Rights. Ms. Neese raises an issue related to her private property rights. She states that although a discharge route has been identified which would flow through her property, no property rights have been granted to the applicant.

3. Water Quality Concerns. Ms. Neese raises an issue related to whether the applicant has demonstrated that the proposed discharge will not have a negative impact on water quality in the receiving waters.

4. Regionalization. Ms. Neese raises an issue related to whether the applicant has adequately addressed the issue of regionalization as identified in Texas Water Code §26.081.

D. Issues raised in Comment Period

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c) and (d)(4), 55.211(c)(2)(A).

E. Disputed Issues

There is no agreement between Ms. Neese and the applicant or Executive Director on the issues raised in the hearing request.

F. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy; it is appropriate for referral to hearing if it meets all other applicable requirements. All of the issues raised are issues of fact. *See* 30 TAC §55.211(b)(3)(A) and (B).

G. Relevant and Material Issues

The hearing request raises 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). In

order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.² Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.³ Issues concerning the permitted activity's effect on water quality are all relevant and material to the Commission's decision. Issue 3 above directly relates to protection of water quality. Also related to protection of water quality is whether the discharge route will function as intended. The Executive Director (ED) states in his RTC that "issues of flooding and erosion are outside the purview of the normal evaluation of water quality for wastewater permit applications."⁴ The Commission can consider whether or not potential erosion would impact the functioning of the discharge route. Likewise, the Commission may consider whether the effluent will actually flow through the proposed discharge route as modeled, or instead overflow the boundaries of the gully or bayou due to excessive untended debris. The proper identification and functioning of the discharge route as modeled by the ED is relevant to assessing the potential water quality and environmental impacts of the proposed activities. (Issue 1)

Private property issues are not adjudicated by TCEQ and OPIC notes that this permit would not limit Ms. Neese's ability to seek legal remedies against this applicant regarding any potential trespass or nuisance. OPIC agrees with the ED that the "issuance of this permit [would] not grant the permittee the right to use private or public property to

² See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

³ *Id.*

⁴ See ED's RTC, Page 5, response 6.

convey wastewater along the discharge route described.”⁵ Therefore this issue is not relevant and material to the Commission decision on this application. (Issue 2)

An issue concerning the need for the facility and the permitted activity’s consistency with the Commission’s regionalization policy is relevant and material to the Commission’s decision. (Issue 4)

H. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to the State Office of Administrative Hearings for a contested case hearing:

- 1) Will the proposed activities negatively impact the water quality or existing uses of the receiving waters?
- 2) Is the discharge route adequate to properly convey the wastewater to the receiving waters?
- 3) Has the Applicant complied with the State policy promoting the development and use of regional and area wide waste collection (regionalization requirements)?

I. Maximum Expected Duration of Hearing

Commission Rule 30 TEX. ADMIN. CODE § 55.115(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 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine

⁵ See ED’s RTC, Page 2, response 2.

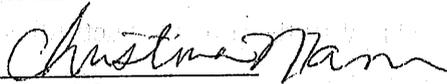
months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC recommends referring the matter to SOAH for an evidentiary hearing on the issues recommended above. OPIC further recommends a hearing duration of nine months.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2007 the original and eleven true and correct copies of the Office of the Public Interest Counsel's Response to Request for Hearing and 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


Christina Mann

**GRAY UTILITY SERVICE L.L.C.
TCEQ DOCKET NO. 2007-1713-MWD**

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