

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 AUG 14 PM 4:14

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY CHIEF CLERKS OFFICE

Protecting Texas by Reducing and Preventing Pollution

August 14, 2008

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

Re: Petition of Polk County Fresh Water Supply District No. 2 (FWSD) for Approval to Levy Operation and Maintenance Standby Fees in Polk County, Texas; Internal Control No, 07132006-D07

Dear Ms. Castañuela:

Enclosed please find the Executive Director's Response to Hearing Requests.

Please do not hesitate to contact me at (512) 239-4761 if you have any questions regarding this material. Thank you for your attention to this matter.

Respectfully submitted,

A handwritten signature in cursive script that reads "Kayla Murray".

Kayla Murray, Staff Attorney
Environmental Law Division

Enclosures

cc: mailing list

TCEQ DOCKET NO. 2007-1068-DIS

2008 AUG 14 PM 4: 14

**PETITION OF POLK COUNTY FRESH
WATER SUPPLY DISTRICT NO.2
(FWSD) FOR APPROVAL TO LEVY
OPERATION AND MAINTENANCE
STANDBY FEES IN POLK COUNTY,
TEXAS, INTERNAL CONTROL NO.
07132006-D07**

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BEFORE THE

CHIEF CLERKS OFFICE

TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

NOW COMES the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) and files this response to two protest letters filed in response to Polk County FWSD No. 2's (District's) petition to levy an operation and maintenance standby fee. The Petition was filed pursuant to section 49.231 of the Texas Water Code and title 30, section 293.141 of the Texas Administrative Code, seeking to levy an annual operation and maintenance standby fee of \$24. In response to the letters, the ED shows the following:

I. BACKGROUND

On July 14, 2006, the District filed its petition to levy an operation and maintenance standby fee in the amount of \$24 per year. The District received approval to charge this amount for 2001 through 2003, 2004 through 2006, and is seeking to continue charging this amount for 2007 through 2009. The ED sent the District a notice of deficiency on November 27, 2006; a response adequately addressing the deficiency was received on January 23, 2007. After program review, notice of the application was mailed by the applicant via certified mail on May 1, 2007, and published in the Polk County Enterprise on May 3, 2007, and May 10, 2007. After notice, due to an oversight, an initial determination was made that no hearing requests had been submitted and the application was processed as an uncontested application. The final memo and order were sent to the OCC on August 3, 2007. Upon discovery that several hearing requests

had been timely submitted, the application was not issued by the ED, and the application was subsequently set for Commission consideration of the hearing requests.

In response to the notice, the TCEQ received three letters. The first letter, received on May 23, 2007, from L.D. Smith, Jr., stated that he was requesting a contested case hearing. The second letter, received on May 25, 2007, from Ted and Ana Watkins, also stated that they were requesting a contested case hearing. The Watkins, however, withdrew their protest on September 19, 2007. The third letter, received on May 29, 2007, from Sharon Threadgall, did not include a request for a contested case hearing. ED staff composed a memorandum, dated July 19, 2007, summarizing its findings and recommendations. A copy of the memorandum is attached to this Response. The ED has not issued an order in this case.

II. LEGAL AUTHORITIES

The District's petition is subject to the TCEQ rules governing requests for contested case hearings found in title 30, chapter 55, subchapter G of the Texas Administrative Code.¹ Under section 55.251(a), an affected person may request a contested case hearing. The request must be in writing and filed with the chief clerk within the time period specified in the notice.² The request must also substantially comply with the requirements found in section 55.251(c). A document that comments on an application but does not request a hearing is treated as public comment.³

To be an affected person, a person must have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the petition.⁴ An interest

¹ 30 TEX. ADMIN. CODE § 55.250 (West 2007).

² *Id.* § 55.251(b), (d).

³ *Id.* § 55.251(e).

⁴ *Id.* § 55.256(a).

common to members of the general public is not a personal justiciable interest.⁵ Section 55.256(c) lists other factors that shall be considered when determining if someone is an affected party. If someone is an affected person, then their hearing request shall be granted if it complies with the section 55.251 requirements, is timely filed, and is pursuant to a right to hearing authorized by law.⁶

III. ANALYSIS

A. Mr. Smith's Letter

1. Summary of the letter

In his letter, Mr. Smith stated that the District recently had a rate increase. Moreover, he states the District is asking him for “help” and that he has not asked for its help when he has incurred expenses. Mr. Smith also states that the district should have been more knowledgeable about the expenses associated with running its facilities before it was created. Mr. Smith provided a post office box number, telephone number, the District's name, the TCEQ internal control number, and stated, “I protest and request a hearing.”

2. The requirements in section 55.255(b) have more than likely been met:

Under section 55.251(a), Mr. Smith may request a contested case hearing if he is an affected person. There is some question if he meets the definition of an affected person.⁷ Mr. Smith's letter implies that the proposed standby fee will be imposed on his property, but he does not specifically state that he owns unimproved property in the district. However, the fact that he owns property in the district can be inferred from the comment about the recent rate increase, as well as the comment regarding his never asking the district for monetary help. Assuming that Mr. Smith owns unimproved property in the District, he has a personal justiciable interest related

⁵ *Id.*

⁶ *Id.* § 55.255(b).

⁷ *Id.* § 55.256(a).

to an economic interest affected by the application that is not common to members of the general public. As the owner of unimproved property in the District, he will have to pay the standby fee. Therefore, if one assumes that Mr. Smith owns unimproved property in the district, then Mr. Smith is an affected person.

Mr. Smith's request for a hearing is also pursuant to a right to hearing authorized by law. Under title 30, section 293.145(d) of the Texas Administrative Code, an affected person can request a public hearing during the thirty days following the final publication of notice of application. Therefore, Mr. Smith's letter seems to fulfill this requirement. Looking at all the hearing request requirements, his letter complies with most aspects of section 55.251. It was timely filed, and it is pursuant to a right to hearing authorized by law. However, pursuant to 55.251(c)(1), Mr. Smith did not provide an address; he only provided a post office box number. However, for the reasons stated earlier, it can be inferred that Mr. Smith owns unimproved property located within the district. Therefore, the section 55.255(b) requirements have been met, and his hearing request should be granted.

B. Mrs. Threadgall's Letter

1. Summary of the letter

In her letter, Mrs. Threadgall stated that since the lot she purchased to increase her yard would never be built upon or require sewage, she did not feel she should be subject to the standby fee. She also said that the standby fee was a method for the District to obtain more money from its residents. Furthermore, Mrs. Threadgall stated that the standby fee would be burdensome on the residents with fixed incomes. Mrs. Threadgall provided a post office box number and the District's name.

2. The requirements in section 55.255(b) have not been met.

Mrs. Threadgall did not request a contested case hearing pursuant to section 55.251(c)(4). Furthermore, there was no language in her letter indicating or inferring that she wanted to protest the application at TCEQ. Although Mrs. Threadgall would likely qualify as an affected person, she has not met one of the fundamental requirements of section 55, that is, she did not request a hearing. Therefore, the ED recommends that her letter be considered as a public comment on the application instead of a hearing request.

IV. CONCLUSION

The ED recommends that the Commission grant L.D. Smith, Jr.'s request for a contested case hearing. Sharon Threadgall's letter does not meet the hearing request requirements. The ED recommends that her letter be considered a public comment.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Mark Vickery, Executive Director

Robert Martinez, Director
Environmental Law Division

By Kayla Murray
Kayla Murray, Staff Attorney
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CERTIFICATE OF SERVICE

I certify that on August 14, 2008, a copy of the foregoing documents was sent by first class, agency mail, and/or facsimile to the persons on the attached Mailing List.



Kayla Murray, Staff Attorney
Environmental Law Division

TEXAS
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2008 AUG 14 PM 4:15

CHIEF CLERKS OFFICE

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DOCKET NO. 2007-1895-DIS; TCEQ INTERNAL CONTROL NO. 07132006-2007

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FOR THE CHIEF CLERK:

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Crosby, Texas 77532-3228

INTERESTED PERSON:

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