

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

August 15, 2008

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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 AUG 15 PM 3:38
CHIEF CLERKS OFFICE

Re: **POLK COUNTY FRESH WATER SUPPLY DISTRICT NO. 2**
TCEQ DOCKET NO. 2007-1895-DIS

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 cursive script that reads "Eli Martinez" followed by the initials "mp glr".

Eli Martinez, Attorney
Assistant 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

printed on recycled paper using soy-based ink

TCEQ DOCKET NO. 2007-1895-DIS

IN THE MATTER OF THE
APPLICATION BY POLK
COUNTY FRESH WATER
SUPPLY DISTRICT NO. 2 FOR
APPROVAL OF STANDBY FEES

§
§
§
§
§

BEFORE THE TEXAS COMMISSION
ON
ENVIRONMENTAL QUALITY

2007 APR 15 PM 3:38
CHIEF CLERK'S OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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

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 Hearing in the above-referenced matter, and would respectfully recommend referring this matter to the State Office of Administrative Hearings ("SOAH").

I. INTRODUCTION

Polk County Fresh Water Supply District No. 2 (Applicant or District) has applied to the Texas Commission on Environmental Quality for authority to adopt and impose an annual uniform operations and maintenance standby fee, up to \$24 per equivalent single family connection, on unimproved property within the District.

The application was declared administratively complete on July 14, 2006. On June 29, 2002, the applicant sent notices to all entities affected by the proposed standby fee as required by 30 TAC § 293.145(b). The application was published in the *Polk County Enterprise*, a newspaper generally circulated in Polk County, on May 3, 2007 and May 10, 2007. In response to the notice, the TCEQ received hearing requests from Mr. and Mrs. Watkins and L.D. Smith, Jr.

II. APPLICABLE LAW

Under 30 TAC § 293.145(d), "[T]he commission may act on an application without holding a public hearing if a public hearing is not requested by the commission, the executive director, or an affected person in the manner prescribed by commission rule during the 30 days following the final publication of notice." This application is filed under Chapter 49 of the Texas Water Code and was declared administratively complete on July 14, 2006. Therefore, the hearing request associated with this application is evaluated under Subchapter G of Chapter 55 of the Commission's rules.

The contents of a hearing request concerning the approval of a standby fee is governed by 30 TAC § 55.251, which specifies that:

(c) A hearing request must substantially comply with the following:

- (1) Give the name, address, and daytime telephone number of the person who file the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public;
- (3) request a contested case hearing; and
- (4) provide any other information specified in the public notice of application.

In order to grant an individual's request for a contested case hearing, the Commission must find that the request is made in writing and by an affected person. 30 TAC § 55.251(b).

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." 30 TAC § 55.256(a). This

justiciable interest does not include an interest common to the general public. *Id.* Section

55.256(c) of 30 TAC provides relevant factors that will be considered in determining whether or not a person is affected. These factors include, but are not limited to:

- (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.

Section 55.256(b) of 30 TAC provides that, "Governmental entities, including local governments and public agencies, with authority under state law over issues contemplated by the application may be considered affected persons.

III. HEARING REQUESTS

The Office of the Chief Clerk received a hearing request from Cora M. and Ted J. Watkins on May 25, 2007. A withdrawal of protest letter was subsequently received on August 8, 2008.

L.D. Smith, Jr. also filed a hearing request in this case. Any owner of undeveloped property subject to the proposed fee would have a personal justiciable interest and can be considered an affected person pursuant to 30 TAC §55.256. A standby fee is a charge imposed on undeveloped property for the availability of potable water, sanitary sewer or drainage facilities and services.¹ Although Mr. Smith does not explicitly claim that he owns undeveloped property in the district, he states that the Applicant should not "ask (him) for help." Therefore, it appears that Mr. Smith has been asked to pay the standby fee. As a property owner subject to the proposed standby fee, Mr. Smith is therefore an affected person under applicable law and entitled

¹Tex. Water Code § 231.(a)(1)

to a hearing. If the District shows that Mr. Smith is not subject to the standby fee, OPIC will review that information and reconsider its recommendation.

IV. CONCLUSION

For the reasons set forth above, the OPIC recommends that the Commission find that Mr. L.D. Smith is an affected party in this case and that the Commission refer this case to the State Office of Administrative Hearings.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By Eli Martinez
Eli Martinez
Assistant Public Interest Counsel
State Bar No. 24056591
P.O. Box 13087 MC 103
Austin, Texas 78711
(512) 239-6363 PHONE
(512) 239-6377 FAX

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2008, the original and eleven true and correct copies of the Office of Public Interest Counsel's Response to Request 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 hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

Eli Martinez
Eli Martinez

2008 AUG 15 PM 3:38
CHIEF CLERK'S OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

MAILING LIST
POLK COUNTY FRESH WATER SUPPLY DISTRICT NO. 2
TCEQ DOCKET NO. 2007-1895-DIS

FOR THE APPLICANT:

Bill Blitch
Samco Capital Markets
11111 Katy Fwy Ste. 820
Houston, Texas 77079-2118
Tel: (713) 467-7344
Fax: (713) 467-3448

Julianne Kugle
Coats, Rose, Yale, Ryman & Lee PC
3 Greenway Plz
Houston, Texas 77046-0395

Billy D. Sims
KSA Engineers Inc.
P.O. Box 151508
Lufkin, Texas 75915-1508
Tel: (936) 637-6061
Fax: (936) 637-6239

FOR THE EXECUTIVE DIRECTOR:

William Todd Galiga, Senior 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

Justin Taack, Technical Staff
Texas Commission on Environmental Quality
Water Supply Division, MC-152
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-1122
Fax: (512) 239-2214

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:

L.D. Smith, Jr.
P.O. Box 1455
Onalaska, Texas 77360-1455

Cora M. & Ted J. Watkins
1923 Indian Shores Rd
Crosby, Texas 77532-3228