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

March 10, 2008

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 MAR 10 PM 4:01
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: **CITY OF WALNUT SPRINGS**
TCEQ DOCKET NO. 2007-1941-MWD

Dear Ms. Castañuela:

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

Sincerely,

Christina Mann by jh

Christina Mann, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2007-1941-MWD

IN THE MATTER OF THE APPLICATION OF CITY OF WALNUT SPRINGS FOR WATER QUALITY PERMIT NO. WQ0013436001	§ § § § § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO REQUESTS 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 Requests for Hearing in the above-referenced matter.

I. INTRODUCTION

The City of Walnut Springs (Applicant) has applied to TCEQ for a major amendment to authorize a change in the method of disposal from irrigation to discharge of treated domestic wastewater at a daily average flow not to exceed 65,000 gallons per day. The current Texas Land Application Permit (TLAP) authorizes the disposal of treated effluent via irrigation of 60 acres of non-public access land at a daily average flow of 65,000 gallons per day.

The treated effluent is proposed to be discharged to Steele Creek; thence to Whitney Lake in Segment No. 1203 of the Brazos River Basin. TCEQ staff has found that the unclassified receiving water uses are limited aquatic life use for Steele Creek, while the designated uses for Segment No. 1203 are high aquatic life uses, public water supply and contact recreation. The domestic wastewater treatment facility is located

approximately 1,500 feet east of the crossing of State Highway 144 over Steele Creek in the City of Walnut Springs in Bosque County, Texas. The currently permitted irrigation site is located approximately one mile west-southwest of the intersection of Farm-to-Market Road 927 (Texas Street) and State Highway 144.

The application was received on June 21, 2006 and was declared administratively complete on September 5, 2006. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published in the *Bosque County News* on September 13, 2006. The Executive Director (ED) completed the technical review of the application and prepared a draft permit. The Notice of Application and Preliminary Decision (NAPD) was published in the *Bosque County News* on March 21, 2007. The chief clerk of the TCEQ mailed the Final Decision of the Executive Director and the Executive Director's Response to Comments (RTC) on November 5, 2007.

The TCEQ received timely hearing requests from Bruce Flowers, representing the Russell Family Trust, Steele Creek Ranch, L.P., Lindsay Russell, Sam Irizarry and Ann Irizarry, Phillip B. Butler, Trustee of the Lucille C. Butler Revocable Family Trust, and the Sztamenitis Family Limited Partnership. TCEQ also received a timely request from Clay Humphries.

II. ANALYSIS OF REQUESTS FOR CONTESTED CASE HEARINGS

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 requests dated March 23, 2007 and December 4, 2007, from attorney Bruce Flowers, on behalf of multiple clients (the Russell Family Trust, Steele Creek Ranch, L.P., Lindsay Russell, Sam Irizarry and Ann Irizarry, Phillip B. Butler, Trustee of the Lucille C. Butler Revocable Family Trust, and the Sztamenitis Family Limited Partnership). In each of his filings, Mr. Flowers states that his clients are "respectively owners of tracts of land which abut Steele Creek" and that a "significant portion of Steele Creek runs through [his] client's properties."[1] His clients' interests include the use and enjoyment of the creek and health and safety concerns as they personally use the creek.

Mr. Flowers identifies an interest which is protected by the law under which the application will be considered identifies, namely health and safety concerns related to the discharge in the creek which his clients actively utilize. He does not include physical

[1] See page 1 of Mr. Flowers' hearing requests dates March 23, 2007 and December 4, 2007.

addresses or detailed descriptions of his clients' properties locations relative to the discharge point. He states that Steele Creek (the receiving water) runs through his clients property and the proposed activities will have an adverse impact on his clients and their families, as well as other downstream landowners.

From the above information, OPIC understands that Mr. Flowers' clients own property downstream of the discharge point, along the discharge route. OPIC does not know how far downstream any particular client is located, however. After reviewing the file, it does not appear that any of his clients appeared on the mailing list of adjacent landowners. Without more specific information about each individual client's location, it is difficult for OPIC to make a recommendation for any of the individuals Mr. Flowers represents. Therefore, OPIC cannot recommend that the Commission find the following persons to be affected: the Russell Family Trust, Steele Creek Ranch, L.P., Lindsay Russell, Sam Irizarry and Ann Irizarry, Phillip B. Butler, Trustee of the Lucille C. Butler Revocable Family Trust, and the Sztamenitis Family Limited Partnership. Mr. Flowers or any of his clients may file a reply and provide additional information. OPIC may revise its recommendation, if warranted. In addition, OPIC provides analysis of the issues raised in Mr. Flowers' hearing requests below, in the event the Commission disagrees with OPIC affected person analysis or more specific information is received.

Clay Humphries submitted a hearing request dated September 20, 2006. He states that he owns 77.38 acres on Steele Creek approximately six miles downstream from the discharge point. The Executive Director (ED) has prepared a map which verifies Mr. Humphries' location. He describes his family's recreational use of Steele Creek. Mr. Humphries and his family and friends spend a great deal of time with full contact with the

receiving water: swimming, wading, fishing, and tubing.[2] He raises concerns that his family's historic use and enjoyment of Steele Creek will be adversely affected by the proposed activities. Mr. Humphries also states concerns related to potential groundwater contamination and environmental impacts of the discharge in the surface water, particularly during periods of drought. Because of the historic high contact use of Steel Creek described by Mr. Humphries and the potential impact of the proposed discharge on Steele Creek, OPIC concludes that there is a reasonable relationship between the interests claimed and the activity regulated. Therefore, OPIC recommends the Commission find Clay Humphries to be an affected person.

C. Issues Raised in the Hearing Requests

1. Legal access for the Applicant to discharge to Steele Creek[3]
   Does Applicant have the legal authority to discharge into Steele Creek?

2. Alternatives to discharging into Steele Creek[4]
   Has the Applicant appropriately investigated whether land application would be more appropriate?

3. Use and Enjoyment[5]
   Will the proposed activities negatively affect Mr. Humphries' use and enjoyment of Steele creek? Will the proposed activities impact the ability of the Humphries to swim, fish, wade, and tube in Steel Creek?

4. Property Value[6]
   Will the proposed discharge negatively impact property value of requestors?

5. Surface water quality and environmental concerns[7]
   Will the proposed activities negatively impact surface water, aquatic life and water used for irrigation and livestock watering (particularly during low flow conditions)?

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[2] See hearing request of Clay Humphries, dated September 20, 2006, page 1. Also see attached photographs of Mr. Humphries' family's use of Steele Creek,
[3] See Hearing request of Clay Humphries.
[4] *Id.*
[5] See Hearing requests of Mr. Flowers and Mr. Humphries.
[6] *Id.*
[7] Id.

6. Groundwater Concerns[8]
Will the proposed activities negatively impact groundwater quality since Steele Creek in spring fed?

7. Antidegradation Review[9]
Has Steele Creek been accurately identified as having only limited aquatic uses? Have known historic uses of Steele Creek been incorporated into TCEQ's analysis? Has TCEQ conducted an adequate and appropriate antidegradation review of the receiving waters?

D. Issues raised in Comment Period

All of the issues raised in the hearing requests 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 Requestors and the applicant or Executive Director on the issues raised in the hearing requests.

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. The issue related to whether the Applicant should look to other discharge options such as land application is not an issue of fact appropriate for referral to hearing. TCEQ only evaluates wastewater applications as submitted, and cannot require an applicant to choose a different discharge location or method. The Commission evaluates information and can deny the application if warranted. All of the remaining issues raised are issues of fact. *See* 30 TAC §55.211(b)(3)(A) and (B).

G. Relevant and Material Issues

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[8] Id.
[9] See Mr. Flowers' hearing requests.

The hearing requests raise 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.[10] Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.[11] The issue related to whether or not the Applicant has legal authority to discharge into Steele Creek is not relevant to the decision on the application. The permit does not convey any property rights and would not supersede any private property rights. Therefore, it is the responsibility of the Applicant to acquire any property rights to use the proposed discharge route.

Issues related to property values are not relevant and material to the Commissions decision on the application. TCEQ does not have jurisdiction to consider the impacts of regulated activities on property values.

The remaining issues are all relevant and material. Issues concerning the permitted activity's effect on surface and ground water quality are relevant and material to the Commission's decision. In addition, issues related the Executive Director's antidegradation review are relevant and material to the Commission's decision on the application. Potential impacts on the use and enjoyment of requestors' property are also relevant and material to the Commission's decision on this application.

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[10] *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.")

[11] *Id.*

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. Use and Enjoyment
   Will the proposed activities negatively affect Mr. Humphries' use and enjoyment of Steele creek? Will the proposed activities impact the ability of the Humphries to swim, fish, wade, and tube in Steel Creek?

2. Groundwater Concerns
   Will the proposed activities negatively impact groundwater quality since Steele Creek is spring fed?

3. Surface water quality and environmental concerns
   Will the proposed activities negatively impact surface water, aquatic life and water used for irrigation and livestock watering (particularly during low flow conditions)?

If the Commission finds one or more of Mr. Flowers' clients to be affected persons, OPIC recommends the following issue related to the ED's antidegradation review also be referred:

4. Antidegradation Review
   Has Steele Creek been accurately identified as having only limited aquatic uses? Have known historic uses of Steele Creek been incorporated into TCEQ's analysis? Has TCEQ conducted an adequate and appropriate antidegradation review of the receiving waters?

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

III. 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

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CERTIFICATE OF SERVICE

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

Christina Mann
Christina Mann

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TCEQ DOCKET NO. 2007-1941-MWD

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