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

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

May 9, 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 MAY - 9 PM 3:00  
CHIEF CLERKS OFFICE

Re: **TURNER CREST VILLAGE WASTE WATER COMPANY, LLC**  
**TCEQ DOCKET NO. 2008-0142-MWD**

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Eli Martinez".

Eli Martinez, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

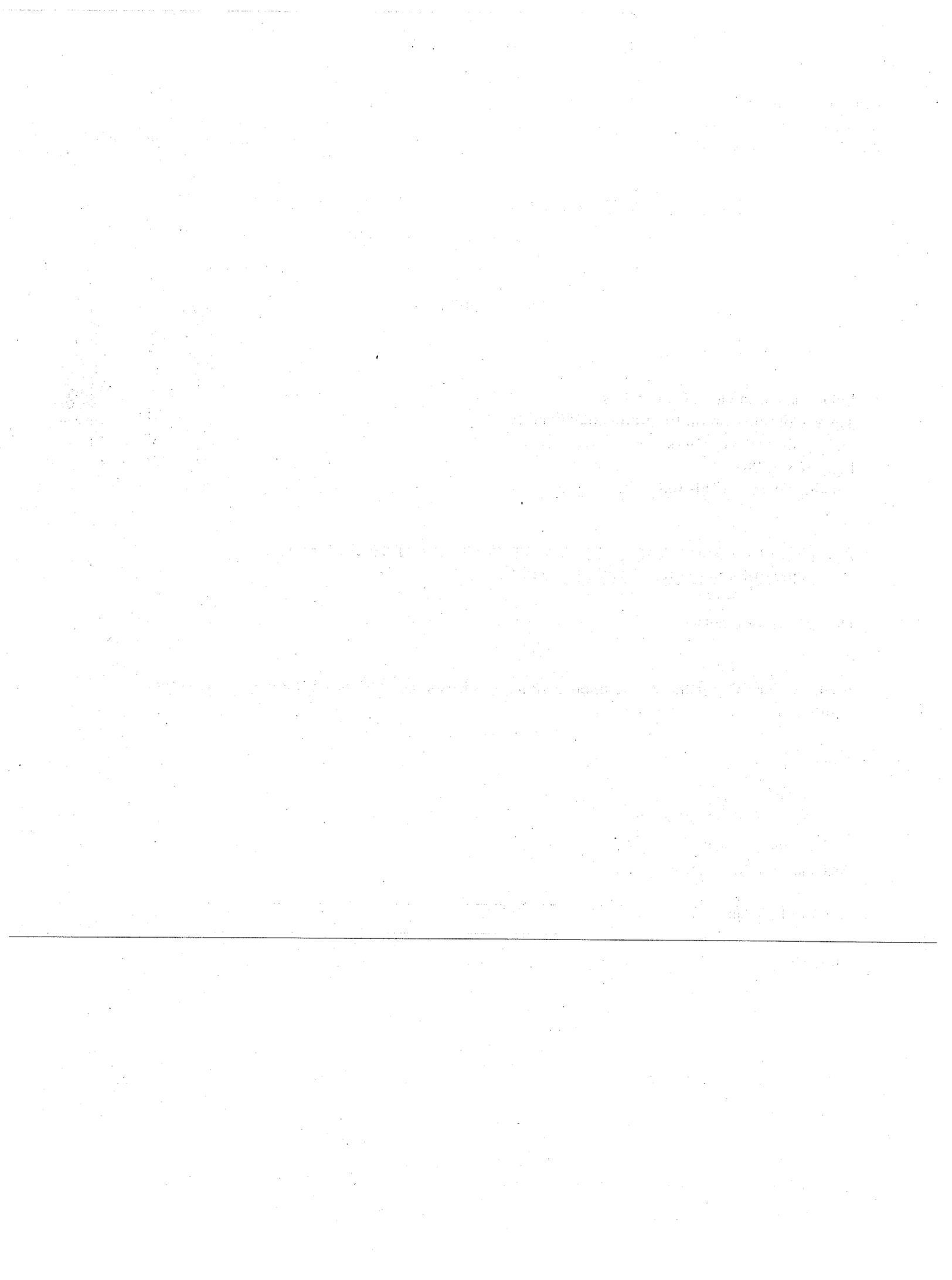
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Enclosure

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

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TCEQ DOCKET NO. 2008-0142-MWD

IN THE MATTER OF THE  
APPLICATION BY  
TURNER CREST VILLAGE  
WASTE WATER COMPANY  
FOR TPDES PERMIT NO.  
WQ0014831001

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BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

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

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 Hearing Request in the above-referenced matter.

**I. INTRODUCTION**

Turner Crest has applied for a new permit to authorize discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The proposed wastewater treatment facility will serve the Turner Crest Village development.

The treated effluent will be discharged to an unnamed drainage channel; thence to an unnamed creek; thence to Morrison Creek; thence to the Lower San Marcos River in Segment No. 1808 of the Guadalupe River Basin. The unclassified receiving water uses are no significant aquatic use for the unnamed drainage channel and high aquatic life use for the unnamed tributary. The designated uses for Segment 1808 are high aquatic life use, public water supply, and contact recreation. The plant site will be located approximately 3.77 miles northeast of the

intersection of Highway 80 and Highway 142 and approximately 3,400 feet southeast of Highway 142 in Caldwell County, Texas.

The application for a new permit was received on July 2, 2007 and declared administratively complete on August 3, 2007. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on August 16, 2007 in the *Lockhart Post-Register* and the alternative language NORI was published in *El Norte* on August 25, 2007. The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published on October 25, 2007 in the *Lockhart Post-Register* and the alternative language NAPD was published in *El Norte* on October 25, 2007. The public comment period ended on November 26, 2007.

## II. REQUIREMENTS OF 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, 76<sup>th</sup> 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 and safety of the person, and on the 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.

### III. DISCUSSION

#### A. Determination of Affected Person Status

The Office of the Chief Clerk received a timely filed request for a contested case hearing on the issuance of Applicant's permit from Aaron Arguien.

Mr. Arguien states that his property lies approximately 1,200 feet from the proposed facility. Mr. Arguien contends that this property is located in a flood plain, and is situated downstream of the discharge route. Mr. Arguien expresses concern that the additional water discharged into Morrison Creek by the Applicant will result in flooding of his property, especially during sessions of heavy rain.

While OPIC is sympathetic to Mr. Arguien's concerns, due to his relative distance from the discharge point—over two stream miles according to the Turner Crest Village Regionalization Map—OPIC cannot find that a reasonable relationship exists between the regulated activity and the interest expressed in Mr. Arguien's hearing request as required by 30 TAC § 55.203. Chapter 26 of the Texas Water Code authorizes the Commission to regulate water quality, not the effect of a proposed discharge on potential flooding. TCEQ does not have the jurisdiction to regulate wastewater discharge applicants based on flooding concerns which have not been clearly tied to concerns about the condition of the receiving discharge route, erosion, turbidity, or water quality. OPIC therefore recommends that a hearing not be granted on Mr. Arguien's behalf.

#### B. Issue Raised in the Hearing Request

Flooding

Ms. Arguien raises the concern that the permitted activity will result in flooding of his property.

**C. Issues raised in Comment Period**

The issue raised in the hearing request was raised in the comment period and has not been withdrawn. 30 TAC §§55.201(c) & (d)(4), 55.211(c)(2)(A).

**D. Disputed Issues**

There is no agreement between Mr. Arguien and the Applicant or Executive Director on the issue raised in the hearing request.

**E. 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. *See* 30 TAC §§55.211(b)(3)(A) and (B). The issue of flooding is an issue of fact.

**F. Relevant and Material Issues**

The hearing request does not 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). Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.<sup>1</sup> In order to refer an issue to the State Office of Administrative Hearings (SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.<sup>2</sup> As discussed *supra*, the issue of flooding falls outside of the scope of

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<sup>1</sup> *Id.*

<sup>2</sup> *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.")

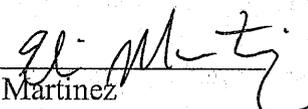
TCEQ jurisdiction to maintain and protect water quality of the state, as implicitly authorized by the Texas Water Code, Chapter 26. Flooding is not addressed by the substantive law governing this application and therefore cannot be considered relevant and material to the Commission's decision. OPIC therefore finds that this issue is inappropriate for referral to the State Office of Administrative Hearings.

#### IV. CONCLUSION

Due to the above-stated deficiencies in the request, OPIC does not recommend referring the matter to SOAH for an evidentiary hearing.

Respectfully submitted,

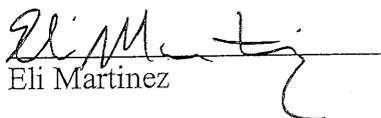
Blas J. Coy, Jr.  
Public Interest Counsel

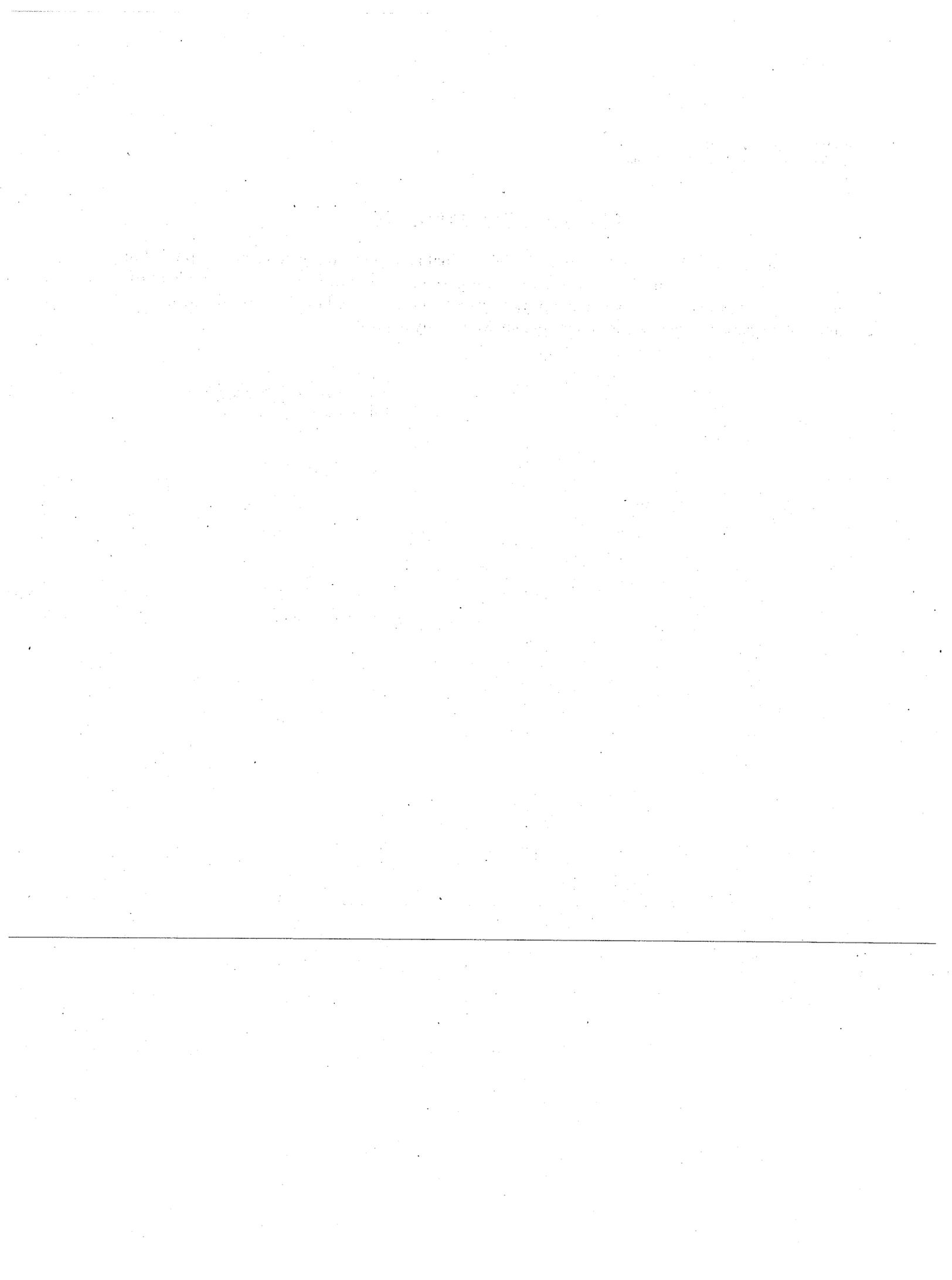
By   
Eli Martinez  
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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2008 the original and eleven true and correct copies of the Office of the Public Counsel's Response to Hearing Request 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



**TURNER CREST VILLAGE WASTE WATER COMPANY, LLC**  
**TCEQ DOCKET NO. 2008-0142-MWD**

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