

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 MAY 23 PM 3:27
CHIEF CLERKS OFFICE



FRITZ, BYRNE, HEAD & HARRISON, LLP
Attorneys at Law

May 23, 2008

VIA FACSIMILE NO. 239-3311
- and -
U. S. FIRST CLASS MAIL

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

Re: In Re the Application of Wise Service Company Water; TCEQ Docket No. 2008-0294-MWD

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 MAY 23 PM 3:26
CHIEF CLERKS OFFICE

Dear Ms. Castañuela:

Enclosed are an original and twelve copies of Applicant's Response to Requests for Hearing which we respectfully request be filed among the other papers in the above-referenced proceeding. Please return a file-stamped copy of the Response to me in the self-addressed, postage prepaid envelope provided for your convenience.

A copy of the Response is being forwarded to all parties of interest as set forth below. Thank you for your assistance in this matter.

Very truly yours,

FRITZ, BYRNE, HEAD & HARRISON, PLLC

By: Ann M. Devers

Ann M. Devers
Assistant to Bob Renbarger

Enclosures

cc: See, Certificate of Service

Value Driven...Client Oriented



TCEQ DOCKET NO. 2008-0294-MWD

IN RE THE APPLICATION OF
WISE SERVICE COMPANY WATER
PERMIT NO. WQ0014708-001

§ BEFORE THE TEXAS COMMISSION
§
§ ON ENVIRONMENTAL QUALITY

2008 MAY 27 AM 10:12
CHIEF CLERKS OFFICE

APPLICANT'S RESPONSE TO REQUESTS FOR HEARING

Applicant, Wise Service Company Water ("WSCW") file this its Response to Requests for Hearing pursuant to 30 T.A.C. § 55.209(d) and other applicable rules of the Texas Commission on Environmental Quality ("TCEQ" or "Commission"), and respectfully shows as follows:

I. Introduction

On April 20, 2006, WSCW filed an application for a new TPDES Permit No. WQ0014708-001 to authorize discharge of municipal wastewater. The proposed wastewater treatment facility will serve the Canyon Springs Subdivision, a planned residential development immediately adjacent to the facility. The application was deemed administratively complete on July 20, 2006 and notice of the application was subsequently mailed to adjacent landowners and interested persons. Notices of the Executive Director's Preliminary Decision was published on October 8, 2006 and the initial public comment period ended on November 7, 2006. A public meeting was scheduled for April 3, 2007. The Executive Director's response to public comments were published on or about January 17, 2008, and all requests for hearing or reconsideration were due no later than February 19, 2008. Consistent with the above procedural schedule, the Chief Clerk received fifteen (15) written responses which it determined to meet the requirements of timely-filed hearing requests.

II. Applicable Legal Requirements

The Commission may not grant a request for a contested case hearing unless the Commission determines that the request was filed by an “affected person.”¹ The Commission may not refer an issue to the State Office of Administrative Hearings (“SOAH”) for a hearing unless the Commission determines that the issue: (1) involves a disputed issue of fact; (2) was raised during the public comment period; and (3) is relevant and material to the decision on the application.² The Texas Water Code defines an “affected person” as one with a justiciable interest related to a legal right, duty, privilege, power, or economic interest different than that of the general public.³

In determining whether a person is an affected person, all factors shall be considered, including but not limited to, the following:

1. whether the interest claimed is one protected by 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 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

¹ See, TEXAS WATER CODE ANN. § 5.556(c).

² *Id.* § 5.556(d).

³ See, TEXAS WATER CODE § 5.115(a) and 30 T.A.C. § 55.203(a).

6. for governmental entities, their statutory authority over an interest in the issues relevant to the application.⁴

Just because a person may be considered an “affected person” does not necessarily determine whether a contested case hearing will be granted. In addition to being an affected person, a prospective party must show that there has been a timely-filed request for hearing which substantially meets the following criteria:

1. give the name, address, daytime telephone number, and when possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and when possible, fax number who shall be responsible for receiving all official communications and documents for the group;
2. identify the person’s justiciable interests affected by the application, including a brief, but specific, written statement explaining in plain language the requestor’s location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
3. request a contested case hearing;
4. list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the Commission’s determination of the number and scope of the issues to be referred to hearing, the requestor should, to the extent possible, specify any of the Executive Director’s responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
5. provide any other information specified in the public notice of application.⁵

⁴ See, 30 T.A.C. § 55.203(c). It is further acknowledged that TCEQ policy for review of wastewater discharge applications generally views persons residing or owning property either adjacent to or within one mile downstream of the discharge point as potentially affected persons.

⁵ See, 30 T.A.C. § 55.201(d).

III. Analysis of Hearing Requests/Affected Person Status

As indicated earlier, the Chief Clerk identified fifteen (15) requestors who timely submitted requests for a contested case hearing. WSCW has attempted to analyze those requests in the context of the applicable legal requirements and available public information concerning the ownership of potentially affected properties. For purposes of this response, WSCW groups the requests into the following categories:

1. Gordon and Roxie Ploeger
2. Mrs. Deborah White
3. Mr. Kevin Smith
4. Mrs. Ann Jolley
5. Wise County Water Control & Improvement District #1
6. Forbis Group - consisting of Althea Forbis, Nancy Forbis Carnahan, Jana Woodruff, Joylynn Woodruff, Thomas N. Long, M.D.
7. Russell Group - consisting of Catherine Russell, Dr. Richard and Cathy Russell Fothergill, Rob and Stephanie Fothergill

It should be noted at the outset that it was a difficult task to attempt to ascertain the true ownership status of the requestors with the exception of Gordon and Roxie Ploeger and Cathy Russell Fothergill. Based on a review of the land ownership records contained in the Wise County Appraisal District and the Applicant's amended landowners' list and map submitted in July, 2007, only these two landowners appeared to be owners of record. With respect to the Forbis Group and the Russell Group, the hearing requests suggest that there may be some relationships to the landowners of record based on either family ties or marriage. However, the Appraisal District records available at the time did not identify such claimed ownership interests. Accordingly, WSCW does not contest the

“affected person” status of Gordon and Roxie Ploeger and Cathy Russell Fothergill. Similarly, Ms. Catherine Russell claims to reside on the Cathy Russell Fothergill tract and WSCW does not contest her affected person status. Based on the documents provided by the Chief Clerk, WSCW objects to the “affected person” status of the remaining requestors for the reasons stated below.

Mrs. Deborah White - Mrs. White’s “hearing request” consists of a letter date-stamped October 30, 2006 and some comments apparently provided at the April 3, 2007 public meeting conducted for this application. Nowhere in these documents does Mrs. White identify any distance of her property or residence from the proposed facility. Her stated concerns involve the correct names of the receiving stream and a watershed lake downstream of the proposed facility. She also expresses concerns for the LBJ Grasslands, wildlife, odors, erosion, water wells within ½ mile of the project and floodplain issues. As Mrs. White did not provide sufficient information to determine the location of her property in relation to the proposed facility, she failed to meet the location requirements set forth in the hearing request rules. In failing to satisfy these specific requirements, she further failed to demonstrate how she would be affected in a way different from the general public. Mrs. White failed to meet her burden under 30 T.A.C. §55.201(d) and should not be granted “affected person” status.

Mr. Kevin Smith - Mr. Smith’s hearing request is date-stamped November 7, 2006 and is based on his claim that his house is within ¼ to ½ mile radius of the proposed facility. His stated issues included concerns about the correct name of the receiving stream and downstream watershed reservoir, effects on groundwater, effects on LBJ Grasslands, competency of the facility’s owner/operator, wildlife that use the downstream watershed lake and air quality impacts. Based on records received from the Chief Clerk, there is no indication that Mr. Smith timely filed any public

comments. As WSCW could not identify the location of his residence from available Appraisal District records, WSCW objects to his “affected person” status.

Mrs. Ann Jolley - Mrs. Jolley timely filed a hearing request and public comments regarding the subject application. She identified a number of issues in her filings including an objection to the use of the receiving stream, identification of potentially affected landowners, potential effects on LBJ Grasslands, air quality impacts, correct name of a downstream watershed lake and effects on wildlife. Mrs. Jolley claims that her residence is approximately ½ mile south of the watershed lake and dam for which she expresses concerns. WSCW objects to her party status as its earlier review of the Appraisal District records does not identify her property to be adjacent to the receiving stream and her property description places her approximately one mile or more from the proposed facility. In any event, taken her claimed property location at face value, her residence is not on the discharge route within one mile of the facility and hence WSCW opposes her claim of being an “affected person.”

Wise County Water Control & Improvement District #1 (“Wise Co. WCID #1”) - Wise Co. WCID #1 timely filed a hearing request and public comments in opposition to the proposed facility. Wise Co. WCID #1 claims it has a justiciable interest in the pending application due to the stated purposes of the District, its previous “sponsorship” of constructing a downstream watershed lake and its right to control the level of water in such impoundment pursuant to a recorded easement with a prior upstream landowner. The District does not suggest that it owns property adjacent to the receiving stream or the watershed lake but does claim certain rights pursuant to its easement. It identifies issues relating to water quality of the lake, and the fish and wildlife habitats related to the subject watershed lake. The District further cites issues involving the correct name of the receiving

stream and affected water bodies, plant location, and modeling of the water quality in the watershed lake. WSCW objects to Wise Co. WCID #1's "affected person" status based on its lack of ownership in the property wherein it claims these interests. Upon information and belief, the property comprising the location of the referenced watershed lake was identified in the Wise County Appraisal District's records as belonging to either Cathy Russell Fothergill or James E. Forbis. The referenced easement purports on its face to reserve to Wise Co. WCID #1 the "right to control the level of water impounded by the above-described works of improvement." WSCW submits, as a matter of law, that the proposed discharge of up to 75,000 gallons of treated effluent per day does not interfere with any right claimed under this easement. Wise Co. WCID #1 may store or release water coming into the "impoundment" as it sees fit and as environmental conditions dictate for the District's stated purposes . . . i.e., "to control erosion, flooding and water levels throughout the district." The District does not allege that the proposed volume of discharge in any way affects the integrity of the dam or otherwise compromises its erosion or flood control purposes. Rather, the District takes a very expansive view of its easement rights to control water levels in the impoundment by asserting it may control discharges related to an upstream residential property development. The easement simply does not authorize the District to engage in such land use regulation. While WSCW does not object to any legitimate landowner asserting its interests based on property adjacent to the receiving stream or its proposed facility, it does object to Wise Co. WCID #1 seeking "affected person" status vis-a-vis the interests stated in its hearing request.

Forbis Group - WSCW objects to the "affected person" status of Althea Forbis, Nancy Forbis Carnahan, Jana Woodruff, Joylynn Woodruff and Thomas N. Long, M.D. based on its prior review of the Wise County Appraisal District records. WSCW identified two tracts of land either adjacent

to or within one mile of the proposed facility's drainage route which were deeded to either James Forbis or James E. Forbis. The hearing request filed by Althea Forbis indicated that she and her family owned a watershed lake approximately 7/10th of one mile downstream from the proposed facility. Similarly, Nancy Forbis Carnahan, Jana Woodruff and Thomas N. Long, M.D. claimed some ownership interest in the subject land and/or tract of land upon which the lake is located. None of the requestors claimed to reside on this property. Ms. Joylynn Woodruff submitted a letter file-stamped October 18, 2006 and expressed concerns about the potential effects of the proposed facility but neither claims ownership of the land adjacent to or within the one-mile drainage nor did she request a contested case hearing. WSCW concludes that Ms. Joylynn Woodruff has failed to meet her burden under 30 T.A.C. § 55.201(d) to be considered an "affected person" and objects to her status as same.

The remaining members of the Forbis Group assert a variety of issues including water quality of the subject lake, proper identification of the receiving stream and downstream lake, plant location, water modeling assumptions, legality of using the receiving stream's drainage route, competency of owner/operator based on perceived inaccuracies in the application, effects on and integrity of the subject watershed lake's dam, effects on local water table and local water wells, odor controls and effects on wildlife and livestock. Due to the proposed joint ownership of land claimed by the Forbis Group (with the exception of Joylynn Woodruff), WSCW respectfully requests that should any of these remaining requestors be able to demonstrate sufficient ownership in the referenced lake property to achieve "affected person" status, that the Commission determine the real party or parties-in-interest for purposes of any subsequent SOAH hearings.

Russell Group - As previously noted, WSCW does not object to a finding of “affected person” status with respect to Ms. Catherine Russell and Mrs. Cathy Russell Fothergill based on review of Appraisal District records and Ms. Russell’s assertion that she resides on the Cathy Russell Fothergill tract. WSCW does not, however, currently have sufficient information to verify the claimed real estate ownership interest of Rob and Stephanie Fothergill.

In their joint hearing request, Rob and Stephanie Fothergill claim to own a 14 acre tract which is completely surrounded by the property owned by Mrs. Cathy Russell Fothergill and upon which they are building a house. Mr. and Mrs. Fothergill identify issues of concern including the accuracy of representations in the application, whether the applicant has identified all water wells in the vicinity, aesthetic effects related to the LBJ Grasslands and, in previous comments, the correct name of the receiving stream and downstream lake, competency of owner/operator, effects of the discharge on wildlife using the downstream lake and air quality impacts. Assuming, for the sake of argument, that the Fothergills do own a 14 acre tract completely surrounded by the Cathy Russell Fothergill property, they do not own or possess property adjacent to the subject drainage route. Accordingly, WSCW objects to their “affected person” status.

Ms. Catherine Russell and Mrs. Cathy Russell Fothergill cite as issues the potential effects on livestock and wildlife, flooding, adverse effects on the use of the property, odors, water quality impacts on the receiving stream, accuracy of representations in the application, adequacy of stream modeling, easement restrictions held by Wise Co. WCID #1, location of plant site, ownership of buffer zone, sufficiency of water well inventory, sufficiency of landowners’ list and proper characterization of the receiving stream.

IV. Relevant Material Issues

WSCW objects to all issues raised in the referenced hearing requests as disputed issues of fact. However, should the Commission determine that this application be referred to SOAH for a contested case hearing, pursuant to 30 T.A.C. § 55.209 WSCW respectfully requests that such hearing be limited to consideration of the following relevant and material issues presented by the bonafide hearing requestors:

1. Whether the application and proposed draft permit meet the applicable water quality standards of the TCEQ;
2. Whether the application and proposed draft permit will prevent the creation of nuisance odors;
3. Whether the applicant has sufficiently identified uses and classification of the receiving stream;
4. Whether the applicant possesses sufficient property interests in the plant site and the 150 foot buffer zone surrounding the proposed plant site;
5. Whether the applicant has accurately identified the location of the proposed plant site;
6. Whether the applicant has correctly determined that the proposed plant site is greater than 500 feet from a public water well and greater than 250 feet from a private water well;
7. Whether proper modeling was used to predict the effects of the proposed discharge on downstream water quality; and
8. Whether the applicant and the proposed draft permit contain adequate provisions for the removal and disposal of wastewater treatment sludges.

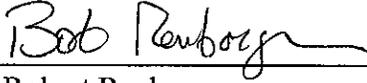
WSCW respectfully requests that the Commission reject referral of any issues related to potential downstream flooding risks, effects on the upstream LBJ Grasslands, effects on the water table, enforceability of easements held by third parties, notice issues unrelated to identified hearing requestors, whether the applicant may lawfully discharge into the receiving stream, competency of

the owner/operator to operate the proposed facility and dam safety issues. These issues are not relevant and material to the subject application and/or they relate to issues not raised by appropriate parties before the Commission.

Notwithstanding the positions taken by WSCW with respect to the pending hearing requests, WSCW fully reserves its rights to object to and challenge the standing of any person or entity appearing before SOAH seeking party status should this matter be referred for a contested case hearing. Should this application be referred to SOAH, WSCW further requests that the duration between preliminary hearing and the presentation of a proposal for decision before the Commission not exceed six (6) months. WSCW further requests that any and all requests for reconsideration not addressed in the hearing requests be denied.

Respectfully submitted,

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By: 
Robert Renbarger
State Bar No. 16768100

ATTORNEYS FOR WISE SERVICE
COMPANY WATER

CERTIFICATE OF SERVICE

By my signature above, I hereby certify that a true and correct copy of the foregoing document has been served this 23rd day of May, 2008, via U.S. First Class mail to the following:

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