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

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

May 23, 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

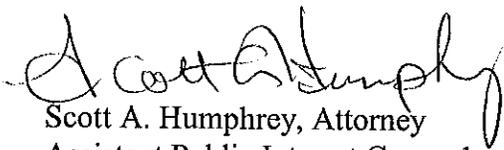
TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 MAY 23 PM 3:37  
CHIEF CLERKS OFFICE

**RE: WISE SERVICE COMPANY WATER  
TCEQ DOCKET NO. 2008-0294-MWD**

Dear Ms. Castañuela:

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

Sincerely,

  
Scott A. Humphrey, 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

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2008 MAY 23 PM 3: 37

**TCEQ DOCKET NO. 2008-0294-MWD**

**IN THE MATTER OF THE  
APPLICATION BY WISE  
SERVICE COMPANY WATER  
FOR PROPOSED TPDES PERMIT  
NO. WQ0014708001**

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§

**BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY**

CHIEF CLERKS OFFICE

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

**TO THE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL  
QUALITY:**

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing and Reconsideration in the above-referenced matter and would respectfully show the following:

**I. INTRODUCTION**

Wise Service Company Water (Wise or Applicant) has applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) Permit to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 75,000 gallons per day. The wastewater treatment plant would serve the Canyon Springs Subdivision. The Canyon Springs Wastewater Treatment Facility would be an activated sludge process plant operated in the extended aeration mode. Treatment units would include bar screens, an aeration basin, a clarifier, a sludge digester and a chlorine contact chamber. The facility has not been constructed.

The plant site would be located approximately 3.75 miles north northwest of the intersection of U.S. Highway 380 and Farm-to-Market Road 730 and approximately 1.4 miles east of the intersection of U.S. Highway 287 and Country Road 2175 in Wise County, Texas. Treated effluent would be discharged via pipeline: to an unnamed tributary; then to an unnamed

reservoir; then to an unnamed tributary; then to Watson Branch; then to Sandy Branch; and then to West Fork Trinity River below Bridgeport Reservoir in Segment No. 0810 of the Trinity River Basin. The unclassified receiving water uses are no significant aquatic life use for the unnamed tributary and high aquatic life use for the unnamed reservoir. The designated uses for Segment No. 0810 are high aquatic life use, public water supply and contact recreation.

Wise submitted the application to the TCEQ on April 20, 2006, and the Executive Director (ED) declared the application administratively complete on July 20, 2006. On August 10, 2006, the Notice of Receipt of Application and Intent to Obtain a Water Quality Permit was published in the *Wise County Messenger*. The Notice of Application and Preliminary Decision was published on October 8, 2006 in the *Wise County Messenger*. The TCEQ held a public meeting on April 3, 2007 in Decatur, Texas. The public comment period ended on April 3, 2007.

In response to the various notices, the TCEQ received several requests for hearing and reconsideration of the ED's decision. OPIC recommends granting several of the hearing requests and denying the requests for reconsideration.

## **II. REQUIREMENTS OF APPLICABLE LAW**

### **A. Requests for Contested Case Hearing**

This application was declared administratively complete on July 20, 2006. Because the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Texas Health & Safety Code § 382.056 and 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 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 restriction 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. Request for Reconsideration**

House Bill 801 created a procedural mechanism, the Request for Reconsideration, that allows for the Commission's review of the Executive Director's decision on an application. A person may file a request for reconsideration, contested case hearing or both no later than 30 days after the chief clerk's transmittal of the Executive Director's decision and Response to Comments. TEXAS WATER CODE § 5.556; 30 TAC § 55.201(a) and (e).

Any person may file a Request for Reconsideration of the Executive Director's Decision. 30 TAC § 55.201(e). The Request for Reconsideration must state the reasons why the decision should be reconsidered. 30 TAC § 55.201(e). Responses to requests for reconsideration should address the issues raised in the request. 30 TAC § 55.209(f).

**III. DISCUSSION**

The TCEQ received the following individual requests for a contested case hearing: Lou Bridges, President of Wise County Water Control & Improvement District (WCID) 1; Nancy F.

Carnahan of Carnahan Thomas LLP; Althea Forbis; Cathy Russell & Dr. Richard W. Fothergill; Rob & Stephanie Fothergill; Ann Jolley; Thomas N. Long, MD; Gordon J. & Roxie L. Ploeger; Catherine Russell; Kevin Smith; Deborah White; Jana Woodruff; and Joylynn Woodruff. In addition, the hearing requests submitted by Lou Bridges and Nancy Carnahan also contained Requests for Reconsideration.

**A. Determination of Affected Person Status**

**1. Wise WCID No. 1**

President Lou V. Bridges has filed a hearing request on behalf of the WCID. Among the WCID's stated purposes are to control erosion, flooding and water levels throughout the district and to protect the integrity of the watershed projects and improvements it has sponsored, including the Big Sandy Watershed Lake No. 35 (Watershed). According to the WCID, the Watershed is the "unnamed reservoir" into which the Applicant proposes to dump effluent in connection with its proposed sewer treatment plant. In addition, the acreage upon which the proposed sewer plant will reside, as well as the Forbis Farm upon which the Big Sandy Watershed Lake No. 35 sits, are both subject to easements in favor of the WCID, which gives the WCID sole right to control the level of both the receiving waters and the Watershed. The WCID is charged with specific responsibilities in connection with controlling and regulating the water level, soil erosion and flooding in the area concerned. The discharge route proposed in the application attempts to affect the water levels, as well as the water quality of the Watershed. Furthermore, with respect to the Watershed, the WCID is concerned that the granting of the permit will negatively impact water quality, fish and wildlife habitat, environment and the

surrounding areas.

For purposes of evaluating a request for a contested case hearing, OPIC views the WCID as a governmental entity. Since the WCID is charged with controlling erosion and water levels, as well as protecting the integrity of watersheds within the district, OPIC concludes that the WCID has established an interest in issues relevant to the application. Therefore, the WCID is a governmental entity that is an affected person entitled to a contested case hearing.

**2. Nancy F. Carnahan**

Ms. Carnahan owns an undivided interest in the property which abuts the proposed sewer treatment facility. Furthermore, the “unnamed reservoir” (the above-described Watershed) into which the Applicant proposed to dump 75,000 gallons of water daily is located entirely on her property. Ms. Carnahan also states that her property, Forbis Farm, and the Watershed, which is a federally constructed conservation lake, will be directly and materially adversely affected by the construction of the proposed sewer plant and the proposed permit. The Watershed, which Ms. Carnahan refers to as “Conservation Lake,” is intended to control soil erosion and flood waters on the surrounding lands. The lake also acts as a wildlife refuge for deer, raccoons, fish, wild turkeys, various waterfowl, including wood ducks, and acts as a potable water source for cattle that graze on her property. She is concerned about the children who play around and wade in the lake as well as potential adverse effects on the surrounding wildlife. Ms. Carnahan believes the permit should be denied for several reasons, including: (1) proper notice was not provided to all adjacent and directly affected property holders; (2) the application makes material misrepresentations regarding the nature, characteristics and quality of the lake; (3) the Applicant

has not undertaken sufficient studies of the effects on the quality of water in the lake; (4) the Applicant has not undertaken sufficient studies of the effects of such a sewer plant and the level of water it will discharge on the watershed/erosion control purpose of the lake; (5) the discharge of effluent by the Applicant pursuant to the proposed permit would constitute a clear trespass onto her adjacent property; (6) any discharge of effluent by the Applicant would violate the easement of record that currently exists on the proposed sewer plant site; and (7) insufficient safeguards have been put in place for the Applicant's proposed permit.

Because Ms. Carnahan owns land that abuts the proposed wastewater treatment site and the reservoir/lake into which the Applicant proposes to discharge is located on her property, OPIC concludes that she is an affected person entitled to a contested case hearing. Her concerns regarding the adequacy and accuracy of the application and the potential contamination from the discharge on the quality of the water are interests protected by the law under which this application will be considered. A reasonable relationship exists between the interest claimed and the activity regulated, and there is a likely impact of the regulated activity on the health, safety, and use of property as well as a likely impact of the regulated activity on use of the impacted natural resource (the lake). Therefore, OPIC recommends a finding that Nancy Carnahan is an affected person entitled to a contested case hearing.

### **3. Althea Forbes**

Ms. Forbes also states that the "unnamed reservoir" is a conservation lake (and she also agrees with the WCID that it is Big Sandy Creek Water Control No. 35). She states that she and

her children (presumably the above-named Ms. Carnahan is one of them) own the farm on which the lake is located. She states the Watershed was built by the federal government to protect the land from erosion. She is concerned about how the discharge will affect the wildlife and cattle and how the lake will suffer adversely from wastewater pumped into it. She does not believe it is appropriate to allow the Applicant to be permitted to pollute private property.

Since Ms. Forbes is also one of the owners of the land upon which the Watershed (conservation lake) is located, OPIC concludes that she is an affected person entitled to a contested case hearing. Her concerns regarding the potential contamination from the discharge on the quality of the water located on her property is an interest protected by the law under which this application will be considered. Her identification of the wildlife and cattle that rely on the lake water establishes a reasonable relationship between the interest claimed and the activity regulated, and there is a likely impact of the regulated activity on the health, safety, and use of property as well as a likely impact of the regulated activity on use of the impacted natural resource (the lake). Therefore, OPIC recommends a finding that Althea Forbis is an affected person entitled to a contested case hearing.

**4. Cathy Russell & Dr. Richard W. Fothergill**

Ms. Russell and Dr. Fothergill own land that adjoins the west and south of the proposed site, and the "unnamed tributary and reservoir" (the Watershed or the lake) is on the north border of their land. They raise beef cattle and have water wells for both human and animal consumption. They are concerned that the pollutants from the proposed plant will make their water unsafe. Since the lake is not a moving body of water, pollutants from the plant would

remain stagnant in the lake and cause danger to wildlife and livestock. They have worked with the WCID to help fight erosion and replant grass. Additionally, the Lyndon B. Johnson National Grasslands are located directly north of the proposed sewer site. The construction and completion of the sewer plant would adversely impact wildlife on the Grasslands, their farm and the conservation lake.

Because they are owners of land adjoining the proposed site, Ms. Russell and Dr. Fothergill are affected persons entitled to a contested case hearing. Their concerns regarding contamination of water, and adverse impacts of livestock, wildlife and nearby grasslands are interests protected by the law under which this application will be considered. They have established a reasonable relationship between the interest claimed and the activity regulated, and there is a likely impact of the regulated activity on the health, safety, and use of property as well as a likely impact of the regulated activity on use of the impacted natural resource (the lake, water from wells and grasslands). Therefore, OPIC recommends a finding that Cathy Russell and Richard Fothergill are affected persons entitled to a contested case hearing.

#### **5. Rob & Stephanie Fothergill**

The Fothergills' family owns adjoining property directly south and west of the proposed site. The family operates a farm primarily for beef cattle production, and the Fothergills are building a home on the site. They state that the permit application does not provide accurate information. For example, they also point out that the "unnamed tributary" is the Watershed constructed to control erosion and provide a sanctuary for wildlife. They also mention that the conservation lake does not flow, and discharge permitted would stay in the lake and taint the

water for the wildlife and grazing cattle. They are concerned that the sewer site would make the LBJ Grasslands unattractive for many visitors and displace wildlife that exist on the land. They also address that the proposed operators of the facility, Wise Electric Cooperative, have no experience running such a system. Furthermore, the value and quality of the land will be adversely affected by the proposed facility, and the facility could displace many of the species on the land. They are also concerned about how the air quality may be tainted and make it unbearable to enjoy their homes.

Because the Fothergills own land adjacent to the facility and expressed concerns showing the facility's potential impact to their protected interest, OPIC concludes they are affected persons entitled to a contested case hearing. Their concerns regarding displacement of species in the grasslands and near the lake, ability of the Applicant to operate the facility properly, representations in the application and use and enjoyment of property are interests protected by the law under which this application will be considered. They have established a reasonable relationship between the interests claimed and the activity regulated, and there is a likely impact of the regulated activity on the health, safety, and use of property as well as a likely impact of the regulated activity on use of the impacted natural resource (the lake and the grasslands). Therefore, OPIC recommends a finding that the Fothergills are affected persons entitled to a contested case hearing.

**6. Ann Jolley**

Ms. Jolley lives about 0.5 miles from the proposed site, and the lake is less than 0.5 miles north of her home and land. She also points out that the "unnamed reservoir" is the

Watershed/conservation lake and that a dam was built to stop erosion and water flow as well as provide a habitat for migrating ducks, birds, wild turkey and deer. She is concerned that not all landowners received proper notice. Locating the facility on former Caddo-LBJ Grasslands less than 0.25 miles from the dammed lake does not make sense since it could destroy what has been put in place for flood control, erosion checks and habitat for wildlife. If the permit is issued, wastewater will not flow onto the Applicant's land but onto other private lands and home areas. This area would be flooded with waste water and not be aerated such that the water in the surrounding area, used for recreation, wildlife and aquatic life, would be impaired.

Based on Ms. Jolley's proximity to the proposed facility and her stated concerns, OPIC concludes she is an affected person entitled to a contested case hearing. Her concerns regarding potential water contamination and adverse effects on wildlife are interests protected by the law under which this application will be considered. She has established a reasonable relationship between the interest claimed and the activity regulated, and there is a likely impact of the regulated activity on the health, safety, and use of property as well as a likely impact of the regulated activity on use of the impacted natural resource (the lake). Therefore, OPIC recommends a finding that Ann Jolley is an affected person entitled to a contested case hearing.

**7. Dr. Thomas N. Long**

Dr. Long owns an undivided interest in the 200 acres immediately west or downstream of the discharge point for the proposed sewage plant. He is concerned that even with the completed dam, the lake has fallen below conservation levels, and the lake is home to standard deer and turkey populations, with the addition of beaver and migratory ducks. He is concerned about how

the discharge of effluent will affect the nearby tributary. Furthermore, he notes many inaccuracies and concerns in the application, including: no clear owner named in the application (it states “Larry Cole–Purchase is in Negotiation”); the point of discharge lacks an inaccurate description because is it not an “unnamed tributary”; the application states it will not flow into a flood control drainage ditch, whereas it will; surrounding property owner boundaries are omitted; there are errors regarding receiving waters descriptions; and notice was insufficient.

Based on Dr. Long’s location with respect to the discharge point and his stated concerns, OPIC concludes that he is an affected person entitled to a contested case hearing. His concerns regarding the integrity of the lake and accuracy of the applications are interests protected by the law under which this application will be considered. He has identified a reasonable relationship between the activity regulated and its impact on a natural resource (the lake). Therefore, OPIC recommends a finding that Dr. Long is an affected person entitled to a contested case hearing.

**8. Gordon J. & Roxie L. Ploeger**

The Ploegers state they purchased a home where they could raise cattle and horses. They enjoy the wildlife in the lake area and grasslands and are concerned about the impact on the wildlife from the proposed plant and its discharge.

OPIC cannot determine where the Ploegers are located with respect to the discharge route. Moreover, based on the map provided by the ED, it appears they are not on the discharge route. Therefore, OPIC cannot recommend at this time that the Ploegers are affected persons entitled to a contested case hearing. If they provide any additional information, OPIC will reconsider its recommendation.

**9. Catherine Russell Fothergill**

Ms. Fothergill states she owns the land that adjoins the west and south of the proposed site, and the site of the proposed treatment plant is only a few feet from her property line. She opposes the application for the following reasons: (1) the proposed site would cut off wildlife from most of the grasslands, and the discharge will make the tributary unsuitable for cattle and wildlife; (2) the tributary does not flow, thereby making it more susceptible to contamination; (3) the application does not properly identify the tributary; (4) the discharge will prevent use and enjoyment of her property; and (5) the proposed operators are not qualified to run the plant.

Based on Ms. Fothergill's location of land adjacent to the proposed site and her stated concerns, OPIC concludes she is an affected person entitled to a contested case hearing. Her concerns regarding contamination of the lake and impact on wildlife and use and enjoyment of her property, as well as concerns regarding the accuracy of the application and qualifications of the operators are interests protected by the law under which the application will be considered. She had identified a reasonable relationship between the activity regulated and its impact on a natural resource (the lake and grasslands). Therefore, OPIC recommends a finding that Ms. Fothergill is an affected person entitled to a contested case hearing.

**10. Kevin Smith**

Mr. Smith states he lives between 0.25 and 0.5 miles from the proposed facility but did not receive notice of the application. His letter is virtually the same as the one submitted by Rob Fothergill.

It appears to OPIC that based on the map provided, Mr. Smith's home is located in the

opposite direction of the discharge route. Therefore, based on the information provided, OPIC cannot at this time recommend finding that Mr. Smith is an affected person entitled to a contested case hearing. If he provides additional information describing how he may be personally affected by this application, OPIC will reconsider its recommendation.

**11. Deborah J. White**

Ms. White states she did not receive personal notice of the application. She expresses concerns regarding the effects on the lake and grasslands, as well as potential odors.

Based on her letter, OPIC cannot identify Ms. White's location with respect to the facility or discharge point. Moreover, based on the map provided, it appears her home is located in the opposite direction of the discharge route. Therefore, OPIC cannot at this time recommend a finding that Ms. White is an affected person entitled to a contested case hearing. If she provides additional information, OPIC will reconsider its recommendation.

**12. Jana Woodruff**

Ms. Woodruff states that the proposed site is close to her land. She did not receive personal notice. She expresses concerns regarding contamination of the lake, adverse effects on wildlife and accuracy of the application.

Based on her letter, OPIC cannot identify the location of Ms. Woodruff's home with respect to the facility or discharge point. Based on the available map, it appears that her home is located in the opposite direction of the discharge point. Therefore, OPIC cannot recommend at this time that Ms. Woodruff is an affected person entitled to a contested case hearing. If she can provide additional information, OPIC will reconsider its recommendation.

**13. Joylynn Woodruff**

Ms. Woodruff is a biologist who is concerned about the additional development in the area. She is concerned about how the proposed plant could adversely affect the lake, grasslands and wildlife.

Based on her letter, OPIC cannot identify the location of Ms. Woodruff's home with respect to the facility or discharge point. Based on the available map, it appears that her home is located in the opposite direction of the discharge point. Therefore, OPIC cannot recommend at this time that Ms. Woodruff is an affected person entitled to a contested case hearing. If she can provide additional information, OPIC will reconsider its recommendation.

**B. Issues Raised in the Hearing Requests**

The hearing requests raise the following issues: whether notice was adequate; whether the application meets the requirements with respect to accuracy and completeness; whether the applicant has identified a qualified operator for the facility; whether the Applicant has the necessary easements to operate its facility; whether the Applicant is permitted to discharge in the proposed reservoir; whether the discharge will contaminate the conservation lake; whether the proposed permit will adversely affect the grasslands; whether the proposed permit will adversely impact nearby livestock and wildlife; and whether the proposed discharge will impact use and enjoyment of property.

**1. Issues Disputed**

All of the issues remain disputed. With respect to notice, the ED states the Applicant complied with providing notice to adjacent landowners and those on either side of the receiving

stream for approximately one mile downstream from the point of discharge. With respect to completeness and accuracy of the application, the ED acknowledges that the Applicant failed to identify by name Big Sandy Creek Watershed Site No. 35; however, the Applicant's identification of the Watershed as an "unnamed reservoir" did not affect the staff's analysis of the wastewater's impact on the reservoir. With respect to having a qualified operator, the ED states the TCEQ will require the Applicant to maintain the facility by a qualified operator holding a Category C license or higher. With respect to easements and property rights, the ED states the Applicant is required to obtain whatever property rights may be necessary to use the discharge route and that the permit would not grant the Applicant the right to use private or public property for conveyance of wastewater along the discharge route. With respect to potential harm to wildlife and grasslands, the ED states that the permit was developed to meet Texas Surface Water Quality Standards and that the permit would be protective of the environment, water quality, aquatic and terrestrial life and human health. Finally, regarding use and enjoyment of property, the ED states that TCEQ rules require domestic wastewater treatment facilities to meet buffer zone requirements for the abatement and control of nuisance odors pursuant to 30 TAC § 309.13(e)

## **2. Issues of Fact**

All of the following are questions of fact appropriate for referral to the State Office of Administrative Hearings (SOAH): whether notice was adequate; whether the application meets the requirements with respect to accuracy and completeness; whether the applicant has identified a qualified operator for the facility; whether the Applicant has the necessary easements to operate

its facility; whether the Applicant is permitted to discharge in the proposed reservoir; whether the discharge will contaminate the conservation lake; whether the proposed permit will adversely affect the grasslands; whether the proposed permit will adversely impact nearby livestock and wildlife; and whether the proposed discharge will impact use and enjoyment of property.

### **3. Issues Raised During the Comment Period**

Questions regarding notice, accuracy and completion of the application, qualification of the operators of the facility, necessity of easements, legality of the discharge point, potential water contamination, adverse effects on grasslands, adverse impacts on livestock and wildlife, and potential adverse impacts on use and enjoyment of property were all raised in a timely manner during the comment period.

### **4. Relevant and Material Issues**

The hearing requests raises 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). Before the Commission issues the permit, it must ensure that proper notice was provided and that the application is complete and accurate. The permit must comply with Texas Surface Water Quality Standards for the protection of the environment , water quality, aquatic and terrestrial life and human health. The Commission requires the Applicant to have the facility maintained by a qualified operator pursuant to 30 TAC Chapter 30. The Commission requires the Applicant to abate and control nuisance odors pursuant to 30 TAC § 309.13(e). With respect to property rights issues and the issues of necessary easements, OPIC notes that 30 § 305.122(b) & (c) expressly provide that issuance of the permit neither conveys property rights nor authorizes infringement of the property

rights of others. Therefore, OPIC concludes that this issue is not relevant and material to the Commission's decision on this application.

#### **5. Issues Recommended for Referral to Hearing**

In light of the requirements of 30 TAC §§ 50.115(b) and 55.211(b)(3)(A)(I), OPIC recommends that the Commission refer the following disputed issues of fact to SOAH:

1. Did the Applicant comply with the notice requirements?
2. Is the application complete and accurate?
3. Will the Applicant have a qualified operator for the facility?
4. Will the proposed discharge cause water contamination in the Watershed?
5. Will the proposed discharge adversely affect livestock and wildlife?
6. Will the proposed discharge adversely affect the LBJ Grasslands?
7. Will the proposed discharge adversely impact use and enjoyment of private property?

#### **C. Maximum Expected Duration of Hearing**

Commission rule 30 TAC § 50.115(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 TAC § 55.209(e)(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. REQUEST FOR RECONSIDERATION**

The hearing requests submitted by the WCID and Ms. Carnahan also contained requests for reconsideration of the ED's Decision. As discussed *supra*, the hearing requests contain many

relevant and material issues, and OPIC is requesting those issues be referred for a contested case hearing. However, in the absence of an evidentiary record, OPIC cannot recommend reconsideration of the ED's decision.

#### IV. CONCLUSION

OPIC recommends granting the following hearing requests with the above-referenced issues: Wise WCID No. 1; Nancy F. Carnahan; Althea Forbes; Cathy Russell and Dr. Richard W. Fothergill; Rob and Stephanie Fothergill; Ann Jolley; Dr. Thomas N. Long; and Catherine Russell Fothergill. OPIC recommends a hearing duration of nine months. OPIC further recommends denying the remaining requests for a contested case hearing and the requests for reconsideration.

Respectfully submitted,

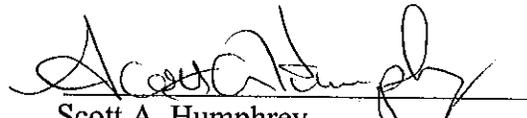
Blas J. Coy, Jr.  
Public Interest Counsel

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TEXAS  
COMMISSION  
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QUALITY  
MAY 23 PM 3:17  
CHIEF CLERKS OFFICE

#### CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2008 the original and eleven true and correct copies of the foregoing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via facsimile transmission, and Inter-Agency Mail or by deposit in the U.S. Mail.

  
Scott A. Humphrey

**MAILING LIST**  
**WISE SERVICE COMPANY WATER**  
**TCEQ DOCKET NO. 2008-0294-MWD**

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**FOR ALTERNATIVE DISPUTE  
RESOLUTION:**

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