

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

June 18, 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 JUN 18 AM 11:00
CHIEF CLERKS OFFICE

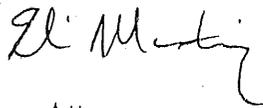
RE: H Bowers, Inc.
TCEQ Docket No. 2008-0423-IWD

Dear Ms. Castañuela:

The Public Interest Counsel requests leave to submit this correction to its previous filing in the above matter entitled "The Office of the Public Interest Counsel's Response to Hearing Request," dated June 16, 2008. A revised first page of the filing is attached containing the correct caption. OPIC further notes that a public meeting was not held in this matter, and the deadline for filing hearing requests was March 17, 2008.

We apologize for this inconvenience and the errors in our initial filing.

Sincerely,



Eli Martinez, Attorney
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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TCEQ DOCKET NO. 2008-0423-IWD

IN THE MATTER OF THE
APPLICATION BY
H BOWERS, INC.
FOR TPDES PERMIT NO.
WQ0004815000

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

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

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

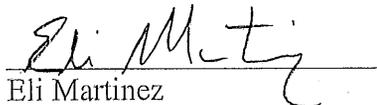
COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Response to Hearing Requests in the above-referenced matter.

I. INTRODUCTION

Applicant has applied to the TCEQ for a new permit, Proposed Permit No. WQ0004815000, to authorize the disposal of process wastewater from a fish and shrimp processing facility via on-site irrigation of 36.5 acres of Coastal Bermuda and Rye grasses. The volume of effluent routed to the irrigation holding pond system will not exceed a daily average flow of 102,740 gallons per day. The hydraulic application rate will not exceed 3.2 acre-inches per acre irrigated per month. The permit will not authorize discharge of pollutants into waters of the State. The facility is located 3.5 miles north of the City of Palacios, Texas on Highway 35, 1000 feet south of the intersection of Highway 35 and FM 521, Matagorda County, Texas. The facility and disposal site are located in the drainage area of Tres Palacios/Turtle Bay in Segment No.2452 of the Bays and Estuaries.

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2008 the original and eleven true and correct copies of the Office of the Public Counsel's Supplemental Filing 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

MAILING LIST
H BOWERS, INC.

DOCKET NO. 2008-0423-IWD; PERMIT NO. WQ0004815000

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*See attached for a list of Requesters and
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PALACIOS TX 77465-3009

DANNY & JULIE SILVA
RR 1 BOX 482
PALACIOS TX 77465-9318

JEANETTE & WESLEY BATCHELDER
551 COUNTY ROAD 348
PALACIOS TX 77465-6690

DANIEL R & SANDRA G TUCKER
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OE MORTON
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TCEQ DOCKET NO. 2008-0423-IWD

2008 JUN 16 PM 4:34

IN THE MATTER OF THE
APPLICATION BY
TCB RENTAL, INC.
FOR TPDES PERMIT NO.
WQ0014725001

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§
§

BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

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

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 Requests in the above-referenced matter.

I. INTRODUCTION

Applicant has applied to the TCEQ for a new permit, Proposed Permit No. WQ0004815000, to authorize the disposal of process wastewater from a fish and shrimp processing facility via on-site irrigation of 36.5 acres of Coastal Bermuda and Rye grasses. The volume of effluent routed to the irrigation holding pond system shall not exceed a daily average flow of 102,740 gallons per day. The hydraulic application rate shall not exceed 3.2 acre-inches per acre irrigated per month. The permit will not authorize discharge of pollutants into water in the State. The facility is located 3.5 miles north of the City of Palacios, Texas on Highway 35, 1000 feet south of the intersection of Highway 35 and FM 521, Matagorda County, Texas. The facility and disposal site are located in the drainage area of Tres Palacios/Turtle Bay in Segment No.2452 of the Bays and Estuaries.

The application for a new permit was received on November 21, 2006 and declared administratively complete on February 5, 2007. The Executive Director completed technical review of the application on July 12, 2007 and prepared a draft permit. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on March 4, 2007 in the *Bay City Tribune*. The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Land Application of Industrial Wastewater Permit was published on August 19, 2007 in the *Bay City Tribune*. A public meeting was held on September 17, 2007. The Executive Director's Decision and Response to Comments was mailed February 14, 2008, extending the deadline for requests for reconsideration or a contested case hearing thirty calendar days to March 15, 2008¹. Since this application was administratively complete after September 1, 1999, it is subject to the procedural requirements of House Bill 801 (76th Legislature, 1999).

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, 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

¹ 30 TAC §55.201(a)

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 fourteen timely-filed requests for a contested case hearing on the issuance of Applicant's permit.² Each of the above requests included relevant contact information and raised disputed issues outlining why the requestors would be adversely affected by the proposed activity.

I. Resident Proximity to Application Zone and Affected Person Status

As stated *supra*, 30 TAC §55.203(c)(3) requires that a reasonable relationship exist between the interests raised in a hearing request and the activity the commission is regulating.³ The proposed activity must furthermore affect the requestors in a manner not common to members of the general public. Proximity to the facility or land application zone has an important bearing on whether a reasonable relationship exists between the requestors' concerns and the regulated activity, as well as the determination as to whether the requestor is affected in a manner not common to the general public. In many instances, properties within a one-mile radius are found to have met both requirements, while properties outside of that parameter are ordinarily found not to be affected in a manner greater than any other member of the general public.

² To wit: Jaime Alanis; Geraldine Batchelder; Jeanette & Wesley Batchelder; Kimberly & Stephen Cooper; Gloria & Mike Hunter; Carolyn Into; Geraldine Jones; Paula Jones-Carlson; Sally & Scott Kurtz; Charles & Mary Parker; Thelma Lee Rackley; David & Suzanne Salinas; Danny & Julie Silva; and Daniel & Sandra Tucker.

³ 30 TAC § 55.203(c)(3).

According to the aerial map provided by the executive director, requestors Scott and Sally Kurtz; Paula Jones-Carlson; Geraldine Jones; and David and Suzanne Salinas are well outside the 1-mile radius of the land application area.⁴ The public interest counsel finds that the relative distance of these requestors from the land application zone precludes a finding of affected person status. Requestors Stephen and Kimberly Cooper gave only a PO Box address and neither the executive director nor the public interest counsel were able to determine their respective distance from the land application site. Because the relative distance of the Coopers' property from the affected area cannot be established from the request as it now stands, OPIC recommends the Commission find the Coopers are not affected persons. The remaining requestors all have property at least partially within one-mile of the land application site.

II. Jaime Alanis & Thelma Lee Rackley

Requestors Jaime Alanis & Thelma Lee Rackley both raise the concerns that the permitted activity will result in an odor nuisance and precipitate health problems for residents near the application area. These issues are protected by the law under which the application will be considered.⁵ Jaime Alanis & Thelma Lee Rackley also raise the concerns that the permitted activity will result in drainage problems and will devalue their property. OPIC recommends to the Commission that Jaime Alanis & Thelma Lee Rackley be found affected persons.

III. Charles & Mary Parker

Requestors Charles and Mary Parker raise the concern of odor nuisance. This issue is protected by the law under which the application will be considered.⁶ OPIC therefore

⁴ See map entitled "H Bowers, Inc." produced June 10, 2008.

⁵ 30 TAC § 55.203(c)(1).

⁶ Id.

recommends to the Commission Charles and Mary Parker be found affected persons. The Parkers also raise concerns that the permitted activity may increase the amount of alligators in the area, and will devalue their property.

VI. Jeanette, Wesley, & Geraldine Batchelder

Requestors Jeanette, Wesley, and Geraldine Batchelder share the above concerns over odor nuisance, health concerns, drainage complications, and devaluation of property. To this list the Batchelders add the concern that the permitted activity will result in contamination of local water sources. Because some of these issues are protected by the law under which the application will be considered,⁷ OPIC recommends to the Commission that Jeanette, Wesley, and Geraldine Batchelder be found affected persons.

V. Carolyn Into

Requestor Carolyn Into also raises the issues of odor nuisance, health concerns, devaluation of property, and water source contamination. Ms. Into also states that she was not properly notified of the applicant's permitting efforts. Because the issues of odor nuisance, health concerns, and water source contamination are protected by the law under which the application will be considered,⁸ OPIC recommends to the Commission that Carolyn Into be found an affected person.

VI. Gloria & Mike Hunter

Requestors Gloria & Mike Hunter raise the issues of odor nuisance, health concerns, drainage complications, devaluation of property, and improper notice. Other than the property value concern, these issues are protected by the law under which the application will be

⁷ 30 TAC § 55.203(c)(1).

⁸ 30 TAC § 55.203(c)(1).

considered.⁹ Therefore, OPIC recommends to the Commission that Gloria & Mike Hunter be found affected persons.

VII. Danny & Julie Silva

Requestors Danny & Julie Silva raise the issues of odor nuisance, health concerns, devaluation of property, and improper notice. To this list they add the concern that the permitted activity will result in an increase in flies and maggots in the affected areas. The issues of odor, health concerns, and notice are protected by the law under which the application will be considered,¹⁰ and OPIC recommends to the Commission that Danny and Julie Silva be found affected persons.

VIII. Daniel & Sandra Tucker

Requestors Daniel & Sandra Tucker join other requestors in their concerns over odor nuisance, health concerns, drainage complications, devaluation of property, improper notice, and contamination of local water sources. To this list they add the concern that the permitted activity will affect the use and enjoyment of their property, as well as the issue that no cleanup fund is provided for if and when the applicant's business closes. Except for the issue regarding property devaluation, these issues are protected by the law under which the application will be considered.¹¹ OPIC recommends to the Commission that Daniel & Sandra Tucker be found affected persons.

B. Issues Raised in the Hearing Request

Odor Nuisance

⁹ 30 TAC § 55.203(c)(1).

¹⁰ 30 TAC § 55.203(c)(1).

¹¹ 30 TAC § 55.203(c)(1).

Each Protestant raises the concern that Applicant's activities will present an odor nuisance.

Devaluation of Property

Each Protestant raises the concern that Applicant's activities will result in the devaluation of their property.

Health Concerns

Protestants Jaime Alanis, Thelma Lee Rackley, Geraldine Batchelder, Jeanette & Wesley Batchelder, Carolyn Into, Gloria & Mike Hunter, Danny & Julie Silva, Daniel & Sandra Tucker raise the concern that the Applicant's activities will result in health complications for affected residents.

Drainage

Protestants Jaime Alanis, Thelma Lee Rackley, Geraldine Batchelder, Jeanette & Wesley Batchelder, Gloria & Mike Hunter, and Daniel & Sandra Tucker raise the concern that the Applicant's activities will aggravate already present drainage problems.

Wildlife Nuisance

Protestants Charles & Mary Parker and Danny & Julie Silva raise the concern that the applicant's activities will result in a wildlife nuisance.

Water Source Contamination

Protestants Geraldine Batchelder, Jeanette & Wesley Batchelder, Carolyn Into, and Daniel & Sandra Tucker raise the concern that the Applicant's activities will affect the quality of local water sources.

Notice Deficiency

Protestants Carolyn Into, Gloria & Mike Hunter, Danny & Julie Silva, and Daniel & Sandra Tucker raise the concern that local residents were not given proper notice of the permit application.

Use and Enjoyment of Property

Protestants Daniel & Sandra Tucker raise the concern that the applicant's activities will result in loss of the use and enjoyment of their property.

Lack of Cleanup Provisions

Protestants Daniel & Sandra Tucker raise the concern that the applicant's activities should not be permitted by the commission due to a lack of adequate cleanup provisions in the permit.

C. Issues raised in Comment Period

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c) & (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

There is no agreement between the Applicant, the Executive Director, and the Requestors on the issues presented above.

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 issues concerning odor nuisance, devaluation of property, health concerns, drainage, wildlife nuisance, water source contamination, notice deficiency, use and enjoyment of property, and lack of cleanup provisions are all issues of fact.

F. Relevant and Material Issues

The hearing request 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). Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.¹² 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.¹³

Several issues raised by the protestants are not within the Commission's jurisdiction, and therefore not relevant and material to the permitting decision. Drainage problems, when referring specifically to flooding issues, are not regulated by the commission and not appropriate for referral to SOAH. Likewise, devaluation of property falls outside of the scope of the TCEQ jurisdiction to maintain and protect water quality of the state, as implicitly authorized by the Texas Water Code Chapter 26. An increase in alligators is an issue that should not be referred in this instance because the permit does not authorize the discharge of pollutants into waters of the state, and over-application of wastewater which would result in stagnant ponding of wastewater

¹² See 30 TAC §55.209(e)(6)

¹³ 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.")

in the irrigation area is prohibited.¹⁴ The lack of cleanup provisions contained in a permit is furthermore not relevant to the permitting decision, which focuses instead on facility operation. Finally, the applicant has complied with publication requirements as discussed, supra. Because OPIC finds that these issues are not relevant and material to the commissions decision, OPIC recommends that the commission not refer these issues to a contested case hearing.

Conversely, several issues raised by the protestants are both material and relevant to the permitting decision. The possibility of odor nuisance and the proliferation of mosquitoes or other nuisance insects is specifically addressed by 30 TAC section 309.13(e) and (g). The use and enjoyment of Protestants' property¹⁵ and the protection of their health, is also specifically protected by the code.¹⁶ Pursuant to Texas Water Code sections 26.027(a) and 26.003, the Commission may issue permits for wastewater discharges based upon the draft permit's effectiveness in maintaining the water quality of the state. Water source contamination is therefore a relevant and material issue to the permitting process, and OPIC recommends that this issue be referred.

G. 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) Will the applicant's activities result in an odor or insect nuisance?
- 2) Will the applicant's activities affect the use and enjoyment of protestants' property?
- 3) Will the applicant's activities adversely affect protestants' health?
- 4) Will the applicant's activities result contamination of local water sources?

H. Maximum Expected Duration of Hearing

¹⁴ See Executive Director's "Response to Comments," Response 3.

¹⁵ 30 TAC § 55.203(c)(4).

¹⁶ See Water Code §26.003.

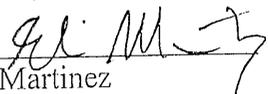
Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer 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.

IV. 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.

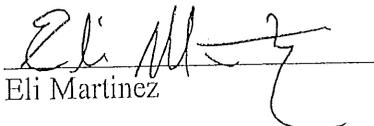
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2008 the original and eleven true and correct copies of the Office of the Public 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.


Eli Martinez

MAILING LIST
H BOWERS, INC.
TCEQ DOCKET NO. 2008-0423-IWD

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FOR ALTERNATIVE DISPUTE

RESOLUTION:

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