

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*



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

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

July 14, 2008

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 JUL 14 PM 4: 25  
CHIEF CLERKS OFFICE

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

Re: **SOUTH CENTRAL WATER COMPANY**  
**TCEQ DOCKET NO. 2008-0473-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 that reads "Eli Martinez".

Eli Martinez, 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

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: [www.tceq.state.tx.us](http://www.tceq.state.tx.us)

TCEQ DOCKET NO. 2008-0473-MWD

IN THE MATTER OF THE  
APPLICATION BY  
SOUTH CENTRAL WATER  
COMPANY FOR TPDES  
PERMIT NO. WQ0014804001

§  
§  
§  
§  
§

BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

2008 JUL 14 PM 4:26

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**

South Central Water Company has applied for a new permit that would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 75,000 gallons per day (gpd) in Phase I, a daily average flow not to exceed 150,000 gpd in Phase II, and a daily average flow not to exceed 950,000 gpd in the final phase. The wastewater treatment plant will serve the Dolphin Cove development service area.

The treated effluent will be discharged to an unnamed tidal tributary; then to Dickinson Bayou Tidal in Segment No. 1103 of the San Jacinto-Brazos Coastal Basin. The unclassified receiving water uses are high aquatic life use for the unnamed tidal tributary. The designated uses for Segment No. 1103 are high aquatic life uses and contact recreation. The facility will be

located approximately 300 yards east the intersection of 29<sup>th</sup> Street and Avenue S, on the north side of Avenue S in Galveston County, Texas.

The application for a new permit was received on May 8, 2007 and declared administratively complete on July 10, 2007. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on August 16, 2007 in the *Houston Chronicle*. On August 15, 2007, the alternative language NORI was published in *La Voz De Houston*. The TCEQ Executive Director completed the technical review of the application, and prepared a draft permit. The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published on October 18, 2007 in the *Houston Chronicle*. On October 17, 2007, the alternative language NAPD was published in *La Voz De Houston*. The public comment period ended on November 19, 2007. Two letters were filed by Phillip Livingston on behalf of Richard T. Gustafson, and Mr. and Mrs. Robinson. Only the Robinsons requested a contested case hearing on this application. OPIC recommends the Robinsons' hearing request be granted.

## 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 attorney Phillip R. Livingston on behalf of Roy B. Robinson and Kathleen Robinson.

Mr. and Mrs. Robinson own two pieces of property that they claim are affected by the proposed facility. One seven-acre parcel includes five acres utilized for marine and construction businesses, and two additional acres constituting restored wetlands which lie some 100 yards downstream of the discharge point. The second parcel of land is a residential homestead within a mile of the proposed facility.

The Robinsons' request raises the concern of potential effects on the water quality of Dickinson Bayou and Redfish Cove, where the effluent will empty after crossing the Robinsons' property. The Robinsons are also concerned about potential negative impacts on the plant and animal life subsisting on or near Dickinson Bayou and Redfish Cove, including those species residing on the two acres of property that have been restored to natural wetlands pursuant to an order by the United States government at the Robinsons' expense. Thirdly, Mr. and Mrs. Robinson specifically object to the fact that the effluent produced by the Applicant's activities will flow over the Robinsons' private property, which they claim will constitute a trespass.

Further, the requestors also state that drainage complications will occur if the effluent in fact flows as currently routed because "discharge into the ditch while the tide is rising will result in standing treated sewage water."

The Robinsons take issue with the location of the plant, noting that it is intended to serve a real estate development area known as "Dolphin Cove" located in Salt Bayou. They contend that the plant should be moved to within that real estate development. Finally, Mr. Livingston states that the "Notice of Application" contained an incomplete ZIP code for the TCEQ address. This defect, he continues, may "affect the ability of some commentors or requestors to properly deliver their comments in a timely manner."

The Robinsons' request raises interests protected by the law under which the application will be considered and their property lies in close proximity to the discharge route. Therefore, a reasonable relationship exists between the interests claimed and the activity regulated,<sup>1</sup> and OPIC finds that Mr. and Mrs. Robinson are affected persons in accordance with 30 TAC § 55.203.

## **B. Issues Raised in the Hearing Request**

### Pollution of Water Sources

Mr. and Mrs. Robinson are concerned that the permitted effluent will result in contamination of the Dickinson Bayou and Redfish Cove waters after passing as outflow through the Robinsons' property.

---

<sup>1</sup> See 30 TAC 55.203

Destruction of Plant and animal life

Mr. and Mrs. Robinson are concerned the permitted activity will result in destruction of plant and animal life subsisting on or near Dickinson Bayou and Redfish Cove, including the two acres of land the Robinsons have restored to wetlands.

Trespass over Private Property

Mr. and Mrs. Robinson object to the discharge route flowing over their private property.

Drainage

Mr. and Mrs. Robinson are concerned that the discharge route will not flow as expected and result in nuisance conditions on the Robinsons' property by creating standing pools of treated wastewater.

Facility Location

Mr. and Mrs. Robinson assert that a superior location for the facility is the Dolphin Cove real estate development.

Notice

Mr. and Mrs. Robinson are concerned that the TCEQ's ZIP code was improperly printed on required notice, diverting comments and requests that would otherwise have been received.

**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 Ms. Brauer and the Applicant or Executive Director on the issues 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 facility location is one of policy rather than fact, and is not appropriate for referral.

After reviewing the NORI and NAPD notices published in the *Houston Chronicle* and *La Voz De Houston*, OPIC finds that the correct ZIP code for the TCEQ was provided in all instances. Based on this information, OPIC finds that no issue of fact remains to be adjudicated regarding sufficiency of notice.

**F. Relevant and Material Issues**

The hearing request raised 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>2</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

---

<sup>2</sup> *Id.*

issue or deny this permit.<sup>3</sup> 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 and the propagation and protection of terrestrial and aquatic life. Therefore, the issues concerning the permitted activity's affect on water quality, plant, and animal life are relevant and material to the Commission's task to maintain water quality in its permitting decisions. The Code also specifically addresses nuisance conditions that may occur as the result of improper functioning of the discharge route as modeled.<sup>4</sup> OPIC therefore finds that the above issues of water quality, plant and animal life, and nuisance conditions created by poor drainage are all relevant and material to this Commission's decision on the application and appropriate for referral to SOAH.

Conversely, OPIC agrees with the Executive Director's opinion that protestant's remaining issue of trespass falls outside of the scope of TCEQ jurisdiction to maintain and protect water quality of the state, as implicitly authorized by the Texas Water Code Chapter 26. Although the Applicant must first secure all necessary property rights before discharging effluent across personal property, these rights are not addressed by the substantive law governing this application and therefore are not relevant and material to the Commission's decision. OPIC therefore finds that the trespass issue is inappropriate for referral to the State Office of

---

<sup>3</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.")

<sup>4</sup>Section 307.4 of 30 TAC provides general water quality standards for waste discharges, including prohibitions on discharges resulting in offensive odors arising from the wastewater. Section 307.1 of 30 TAC requires the TCEQ to maintain the quality of the water in the state consistent with public health and enjoyment.

Administrative Hearings. Furthermore, under 30 TAC §305.122(c), the issuance of a permit does not authorize any injury to persons or property or an invasion of other property rights.

**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) Does the permit adequately protect against contamination of the Dickinson Bayou and Redfish Cove waters?
- 2) Will the permitted activities result in the destruction of plant and animal life subsisting on or near Dickinson Bayou and Redfish Cove?
- 3) Will the permitted activities result in standing pools of water that create nuisance conditions on the Robinsons' property due to improper functioning of the discharge route?

**H. Maximum Expected Duration of Hearing**

Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

#### 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.

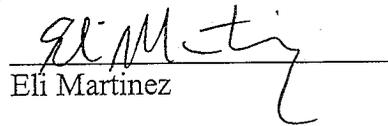
Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
Eli Martinez  
Assistant Public Interest Counsel  
State Bar No. 24056591  
(512)239.3974 PHONE  
(512)239.6377 FAX

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2008, the original and eleven true and correct copies of the Office of the Public Counsel's Response to Hearing Request for 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

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 JUL 14 PM 4:26  
CHIEF CLERKS OFFICE

**MAILING LIST**  
**SOUTH CENTRAL WATER COMPANY**  
**TCEQ DOCKET NO. 2008-0473-MWD**

FOR THE APPLICANT:

Jeff Goebel  
South Central Water Company  
P.O. Box 570177  
Houston, Texas 77257-0177  
Tel: (713) 783-6919  
Fax: (713) 862-9587

FOR THE EXECUTIVE DIRECTOR:

Robert Brush, Staff Attorney  
Texas Commission on Environmental Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-0600  
Fax: (512) 239-0606

Larry Diamond, Technical Staff  
Texas Commission on Environmental Quality  
Water Quality Division, MC-148  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-0037  
Fax: (512) 239-4430

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director  
Texas Commission on Environmental Quality  
Office of Public Assistance, MC-108  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4000  
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE  
RESOLUTION:

Kyle Lucas  
Texas Commission on Environmental Quality  
Alternative Dispute Resolution, MC-222  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4010  
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela  
Texas Commission on Environmental Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-3300  
Fax: (512) 239-3311

REQUESTER:

Phillip Livingston  
Livingston & Livingston  
1770 St. James Place, Ste. 100  
Houston, Texas 77056-3405