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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 SEP 15 PM 4:02
CHIEF CLERKS OFFICE

September 15, 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

RE: **AQUA UTILITIES, INC.**
TCEQ DOCKET NO. 2008-0486-MWD

Dear Ms. Castañuela:

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

Sincerely,

Scott A. Humphrey by fax

Scott A. Humphrey, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

TCEQ DOCKET NO. 2008-0486-MWD

2008 SEP 15 PM 4:02
CHIEF CLERKS OFFICE

IN THE MATTER OF THE APPLICATION BY AQUA UTILITIES, INC. FOR TPDES PERMIT NO. WQ0014754001	§ § § § §	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO REQUESTS FOR HEARING AND RECONSIDERATION OF EXECUTIVE DIRECTOR'S DECISION

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 of the Executive Director's (ED's) Decision in the above-referenced matter, and would respectfully show the following:

I. INTRODUCTION

Aqua Utilities, Inc. (Aqua or Applicant) has applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ001475001 to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day (gpd) in the interim I phase, 100,000 gpd in the interim II phase and 150,000 gpd in the final phase. The proposed wastewater treatment facility would serve the Nolan Park residential subdivision. The proposed facility would be located one mile north of Highway 377 on M&M Ranch Road in Hood County, Texas.

The Nolan Park Wastewater Treatment Facility would be an activated sludge process operated in the extended aeration mode. Treatment units would include a lift station, bar screen, flow equalization basin, aeration basin, clarifier, digester and a chlorine contact chamber. The

Applicant has not constructed the facility. The draft permit would authorize the disposal of sludge at a TCEQ authorized land application site or co-disposal landfill.

The effluent limitations in all phases of the draft permit, based on a 30-day average, are 10mg/l Carbonaceous Biochemical Oxygen Demand ($CBOD_5$), 15 mg/l Total Suspended Solids (TSS), 3.0mg/l Ammonia-Nitrogen (NH_3-N) and 4.0mg/l minimum dissolved oxygen (DO). The effluent shall contain a chlorine residual of at least 1.0mg/l and shall not exceed a chlorine residual of 4.0mg/l after a detention time of at least 20 minutes based on peak flow. The treated effluent will be discharged through a pipe to Rucker Creek and then to Lake Granbury in Segment No. 1205 of the Brazos River Basin. The unclassified receiving water uses are no significant aquatic life uses for Rucker Creek.

However, the designated uses for Segment No. 1205 are high aquatic life, public water supply and contact recreation. According to the ED, a Tier 1 antidegradation review has preliminarily determined that this permit action will not impair existing water quality uses. The ED further states that this review has preliminarily determined that no water bodies with exceptional, high or intermediate aquatic life uses are present within the stream reach assesses; therefore, no Tier 2 degradation determination is required. The ED concluded that no significant degradation of water quality is expected in water bodies with exceptional, high or intermediate aquatic life uses downstream, and existing uses will be maintained and protected.

Aqua filed the application with the TCEQ on October 25, 2006, and the ED declared the application administratively complete on January 9, 2007. The Notice of Application and Intent to Obtain a Water Quality Permit was published on February 24, 2007 in the *Hood County News*.

The Notice of Application and Preliminary Decision was published on May 5, 2007 in the *Hood County News*. The TCEQ held a public meeting on October 16, 2007 and the public comment period ended at the close of the meeting.

In response to the notices, the TCEQ received requests for a contested case hearing from the following: Ray & Sandra Carson; Mark D. Clark; R.B. & Vickie Coleman; Paula & Richard N. Eldred; Greg & Joni Frazier; Dan Loomis; Mr. & Mrs. L.L. Lowack, Jr.; John L. Meche; James & Susan Norton; G. Stephen Parrott; Alan H. Plummer, Jr.; Kelly & Laura Reed; Bruce & Joyce Ring; Carolyn & Larry Sadlowski; Loretta A. & Myron Sherar; David & Patricia Siedal; Debbie & James Sims; Brian & Donna Smith; Connie & Joby Soileau; Patricia & Tom Tigner, Jr.; and Roger D. Wiley. In addition, the TCEQ received requests for reconsideration of the ED's decision from the following: Hood County Commissioner Steve Berry; Phil, Rachel & Tracey Ferrero; Carroll & Vikki Gilbreath; Leonard Heathington; Anita A. & Thomas N. Lawrence; Dan Loomis; Dick Roan; and Mike Sympson. OPIC recommends granting all of the hearing requests and denying all the requests for reconsideration.

II. REQUIREMENTS OF APPLICABLE LAW

A. Contested Case Hearing

Because the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Texas Water Code Chapter 5, Subchapter M, Environmental Permitting Procedures, §§5.551 to 5.556, added by Acts 1999, 76th Leg., ch. 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a person requesting a hearing must file the request in writing with the chief clerk no later than 30 days after

the chief clerk's transmittal of the executive director's response to comments. 30 TEX. ADMIN. CODE (TAC) §55.201(a). The request must also 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© 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.

In addition, 30 TAC § 55.205(a) sets forth the following requirements that a group or association

must meet in order to request a hearing:

(1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
(2) the interests the group or association seeks to protect are germane to the organization's purpose; and
(3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

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).[1]

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.

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[1] A hearing request can not be based on an issue raised solely in comments that have been withdrawn by written letter filed with the chief clerk prior to the filing of the executive director's response to comments. 30 TAC §55.211(c)(2)(A).

B. Request for Reconsideration

The Request for Reconsideration 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

A. Determination of Affected Person

1. Group Hearing Request

The following submitted virtually identical hearing requests: Sandra & Ray Carson; R.B. & Vickie Coleman; Greg & Joni Frazier; Susan & James Norton; Kelly & Laura Reed; Bruce & Joyce Ring; Larry & Carolyn Sadlowski; David & Patricia Siedal; James & Debbie Sims; Brian & Donna Smith; Jobie & Connie Soileau; and Tom & Patricia Tigner. They all claim either that their home is on Rucker Creek or very nearby Rucker Creek, and those that do not have a home on Rucker Creek state they have a boat slip either in the marina of Rucker Creek Cove or at Mallards Point where Rucker Creek joins Lake Granbury. They raise issues related to the Applicant's compliance record, the adequacy of the sampling requirements, the adequacy of the modeling,

regionalization, and the accuracy of the application. The letters also express general concerns regarding their right to use and enjoy Rucker Creek without being concerned about the quality of the water, contact recreation and adverse health impacts. They also are concerned about their property values.

Each of these hearing requesters states that they have either property along Rucker Creek or a boat slip that gives them access to the creek for fishing or sailing. The executive director's map indicates that all of the hearing requestors in this matter are located slightly more than three miles away from the proposed facility, near the point where Rucker Creek flows into Lake Granbury. Given their proximity to the discharge route, and the concerns expressed in their hearing requests, OPIC concludes that each of these hearing requesters has identified an interest not common to the members of the general public. Issues such as water quality, adverse health impacts, regionalization, sampling and monitoring requirements and accuracy of the application are interests protected by the law under which this application will be considered. A reasonable relationship exists between the interests claimed and the activity regulated. The regulated activity is likely to impact a natural resource used by the requesters. Therefore, OPIC recommends a finding that all of the above hearing requesters are affected persons entitled to a contested case hearing.

2. Dan Loomis, on behalf of Mallard Pointe Property Owners Association

Mr. Loomis' hearing request on behalf of Mallard Point Property Owners Association (Mallard Pointe) is virtually identical to the group hearing request described above in terms of the concerns expressed. The primary difference between his letter and the letters from the others is

that he states he is authorized to address this matter on behalf of the 346 property owners of Mallard Pointe. Since the body of Mr. Loomis' hearing request mirrors the requests described in the group request discussed above, Mallard Pointe should also be found to be an "affected person" entitled to a contested case hearing if the request meets the requirements for a group or an association. Mr. Loomis states: "We are a diverse group with new families to retired adults wishing to live on Lake Granbury and enjoy all that lake living has to offer." Mr. Loomis is a member of the group and, as reflected by the executive director's map, he is one of the residents with property located along the discharge route as Rucker Creek enters Lake Granbury. Therefore, OPIC is satisfied that he has met the requirements of 30 TAC § 55.205(a)(1). Mallard Pointe's concerns regarding health and welfare and protecting contact recreation participants from danger are germane to the organization's purpose of enjoying living by the lake. Finally, Mr. Loomis' personal participation would not be required with respect to Mallard Pointe's claim asserted or relief requested. Therefore, OPIC recommends a finding that Mallard Pointe is an affected person entitled to a contested case hearing.

3. Mark D. Clark, Ph.D.

Dr. Clark is a nine-year resident of Mallard Pointe and has lake access via Rucker Creek. Since he has lived there, he has observed a decline in a water quality, increased silt-sediment, decreased oxygen, increased odor, golden algae blooms and fish kills. He expresses concerns regarding the level treatment (BOD, COD, TSS, Nitrogen and Phosphorus) that would be implemented under the proposed permit. He notes that the Brazos River Authority continues conducting lake-sampling to identity non-point sources of pollution in order to control golden

algae via implementation of a comprehensive Water Shed Protection ane Management Plan.

Based on Dr. Clark's proximity of his residence to Rucker Creek, OPIC concludes that he is an affected person entitled to a contested case hearing. His concerns regarding the level of treatment under the proposed permit are protected by the law under which this application will be considered. There is a likely impact of the regulated activity on his use of the creek. Therefore, OPIC recommends a finding that Dr. Clark is an affected person entitled to a contested case hearing.

4. Paula & Richard Eldred

The Eldreds own a home located in close proximity to the discharge route as confirmed by the executive director's map. They express concerns regarding water quality, how the treated water could reduce the dissolved oxygen in Rucker Creek thereby impacting fish and other wildlife as well as produce offensive odors, the potential for how discharged bacteria could impact swimming, the possible increase in aquatic weeds and its impact on boating and fishing and lower property values. They recommend conveying the wastewater to the City of Granbury's system.

Because of the Eldreds' location in relation to the discharge route, OPIC concludes they are affected persons entitled to a contested case hearing. Their concerns about water quality impacts, use and enjoyment of property and suggestion for regionalization are protected by the law under which this application will be considered. There is a likely impact of the regulated activity on their use of the creek. Therefore, OPIC recommends a finding that the Eldreds are affected persons entitled to a contested case hearing.

5. Mr. & Mrs. L.L. Lowack, Jr.

The Lowacks express concern about the ultimate size of the discharge. Like the Eldreds, they also suggest that this developer convey its wastewater to the City of Granbury. The map provided by the ED shows that the Lowacks are located in the Mallard Pointe area along Rucker Creek amidst the cluster of homes of the other hearing requesters. Given the location of their home downstream from the discharge and the relative size of the discharge, OPIC recommends a finding that the Lowacks are affected persons entitled to a contested case hearing. Their concern regarding regionalization is an interest protected by the law under which this application will be considered. Therefore, OPIC recommends finding that the Lowacks are affected persons entitled to a contested case hearing.

6. John L. Meche

Mr. Meche states he lives about two miles downstream from the proposed sewage treatment plant. The executive director's map shows Mr. Meche as being located along with the other Mallard Pointe requestors slightly more than 3 miles downstream in close proximity to the discharge route. His family uses Rucker Creek for contact recreation, fishing and irrigation of their lawn and garden. He recommends that the Applicant use a sewer line owned by the City of Granbury located 0.5 miles away as the city has the capacity and is willing to accept the discharge into its system. He also expresses about the ED's responses with respect to increased levels of *E. coli* and other pathogens, increased levels of phosphorus and nitrogen, buffer zone requirements, modeling, regionalization and flow fluctuation.

Given Mr. Meche's location of his home downstream from the discharge point, OPIC

concludes he is an affected person entitled to a contested case hearing. His concerns regarding treatment levels, buffer zone requirements, modeling and regionalization are interests protected by the law under which this application will be considered. There is a likely impact of the regulated activity on the use of the creek. Therefore, OPIC recommends a finding that Mr. Meche is an affected person entitled to a contested case hearing.

7. Stephen Parrott, on behalf of Gwendolyn Massey Findley & Mary Massey Props

Rucker Creek runs through property owned by the Masseys, and their land is located one mile north of Highway 377 near the M&M Ranch. They disagree with the ED's response to comments regarding whether the discharge will be harmful to aquatic life and human health and the environment (including in the receiving waters), whether the discharge will contribute to surface erosion of the lands abutting the receiving waters and whether there is a better alternative for the proposed discharge.

Based on the Masseys' proximity of their property to the creek and how close they are to the point of discharge, OPIC concludes they are affected persons entitled to a contested case hearing. The impacts of the discharge to aquatic life and human health as well as regionalization issues are interests protected by the law under which this application will be considered. There is a likely impact of the regulated activity on the creek. Therefore, OPIC recommends a finding that the Masseys are affected persons entitled to a contested case hearing.

8. Alan H. Plummer, Jr.

Mr. Plummer owns property downstream of the proposed discharge adjacent to the Rucker Creek Cove area. While Mr. Plummer acknowledges that his property is approximately 5 miles

downstream, he emphasizes that his area of Ruckers Creek includes the transition zone where the creek flows into Lake Granbury and affects water quality and aquatic life. He expresses concern regarding the impact of the discharge on contact recreation, the addition of nutrients that will lead to an increase of golden algae and fish kills. Mr. Plummer recommends the developer pursue obtaining service from the City of Granbury.

Given Mr. Plummer's interests in the discharge route and transition zone of the creek as it flows into Lake Granbury, OPIC concludes he is an affected person in a manner not common to the general public. His concerns regarding the impact of the discharge on contact recreation and its impact on the creek and its fish, as well as his proposal regarding regionalization, are interests protected by the law under which this application will be considered. There is a likely impact of the regulated activity on the creek. Therefore, OPIC recommends a finding that Mr. Plummer is an affected person entitled to a contested case hearing.

9. Myron & Loretta Sherar

The Sherars live on Rucker Creek Cove approximately 3 miles downstream from the proposed facility, as confirmed by the executive director's map. They express concerns about sampling requirements, the compliance history classification, the discharge of bacteria into the creek and the information provided in the application.

Based on the Sherars' location of their home downstream of the discharge, OPIC concludes they are affected persons with interests not common to the members of the general public. Their concerns regarding testing requirements, accuracy of the application and compliance history are all interests protected by the law under which this application will be

considered. There is a likely impact of the activity regulated on the creek. Therefore, OPIC recommends a finding that the Sherars are affected persons entitled to a contested case hearing.

10. Roger D. Wiley, P.E.

Mr. Wiley's home is in Mallard Pointe, and he has a boat slip that provides access to Rucker Creek. He expresses concerns about water quality, impact on health and contact recreation and property values. He suggests that the Applicant hook up to the City of Granbury's system. Given the location of Mr. Wiley's home in Mallard Point approximately 3 miles from the proposed facility, and his use of the creek downstream from the discharge point, OPIC concludes that he is an affected person with interests not common to members of the general public. His concerns regarding the impact of the discharge on human health, water quality and contact recreation, as well as his regionalization issue, are interests protected by the law under which this application will be considered. There is a likely impact of the regulated activity on the use of the creek. Therefore, OPIC recommends finding that Mr. Wiley is an affected person entitled to a contested case hearing.

B. <u>Issues Raised in the Hearing Requests</u>

The hearing requests raise the following issues: whether the Applicant's compliance history warrants denial of the permit; whether the sampling requirements are adequately protective of human health; whether the modeling accurately predicts the discharge's impact; whether the application is complete and accurate; whether the discharge will adversely impact water quality; whether the discharge will adversely impact contact recreation; whether the discharge will adversely impact human health; whether the proposed facility is consistent with regionalization;

whether the proposed facility will adversely impact property values; whether the character and quantity of the discharge will adversely impact the species in the creek; whether the discharge will result in nuisance odors; and whether the discharge will contribute to surface erosion.

1. Issues Disputed

All of the issues remain in dispute. With regard to the compliance issue, the ED notes that since this would be a new facility, there are currently no compliance issues. Furthermore, the classification for this Applicant with respect to its entire compliance history is average with a rating of 0.96. Concerning sampling requirements, the ED replies that the Applicant will have to collect and analyze all samples according to 30 TAC Chapter 319, Subchapter A. In addition, the draft permit requires the Applicant to sample the flow five times per week by instantaneous measurement. The Applicant must sample $CBOD_5$, TSS, NH_3-N and DO once per week, the chlorine residual five times per week and the pH once per month by grab sample. Regarding modeling, the ED states the DO modeling predicts that the proposed 150,000 gpd discharge will maintain the 2.0 DO criterion of Rucker Creek, as well as be at background levels for oxygen demanding constituents before reaching Lake Granbury and the 693-foot contour. Lake Granbury currently meets water quality standards and is not on the State's inventory of impaired and threatened waters, and TCEQ staff did not observe any detectable bacteria level at the upstream and main stem of the lake. With respect to inaccuracy in the application (regarding flow fluctuations), the ED indicates that the Applicant misinterpreted that portion of the application, and TCEQ staff gained first-hand knowledge of the flow fluctuations. Based on the first-hand information plus the water quality monitoring results, the ED believes that the proposed effluent

set is adequate to ensure that the dissolved oxygen will be maintained above the criterion established for Rucker Creek and Lake Granbury. With regard to water quality, the ED responds that the effluent discharge into water in the state from facilities regulated under TPDES must meet the Texas Surface Water Quality Standards (TSWQS). The ED does not anticipate adverse effects on water quality because the draft permit meets TSWQS. Concerning contact recreation, the ED states that the effluent limits are set to be protective of the receiving water's uses, which in this case includes contact recreation. With respect to regionalization, the ED says the Applicant indicated that it would cost fifty percent more to connect the line with the City of Granbury's collection system and it would take eighteen months to obtain the permit to bore a hole under the railway system that separates the proposed development from the City's sewer collection system. In terms of property values, the ED points out that the water quality permitting process is limited to controlling the discharge of pollutants into the water in the state and protecting the water quality of the state's rivers, lakes and coastal waters. The TCEQ cannot consider property values when reviewing wastewater applications and preparing draft permits. Concerning species in the creek, the ED does not expect the discharge to affect federal endangered or threatened aquatic or aquatic dependent species or proposed species or their critical habitat. The United States Fish and Wildlife Service's biological opinion on the State of Texas authorization of the TPDES is the basis for this determination, which is subject to re-evaluation upon subsequent updates or amendments. With respect to nuisance odors, the ED says that TCEQ rules require domestic wastewater treatment facilities to meet buffer zone requirements for the abatement and control of nuisance odors. The Applicant meets the buffer zone requirements by owning the buffer zone in

accordance with the requirements of 30 TAC Section 309.13(a). Concerning surface erosion, the proposed final phase flow of 150,000 gpd, which is equal to a flow of 0.23 cubic feet per second (cfs) will have a velocity that is significantly less than the minimum scouring velocity used in the design of sewer lines, *i.e.*, less than 2 cfs. Therefore, the ED does not anticipate that the discharge of wastewater at the final phase flow will contribute to surface erosion.

2. Issues of Fact

Whether the Applicant's compliance history warrants denial of the permit is an issue of fact appropriate for referral to the State Office of Administrative Hearings (SOAH). Whether the sampling requirements are adequately protective of human health is an issue of fact appropriate for referral to SOAH. Whether the modeling accurately predicts the discharge's impact is an issue of fact appropriate for referral to SOAH. Whether the application is complete and accurate is an issue of fact appropriate for referral to SOAH. Whether the discharge will adversely impact water quality is an issue of fact appropriate for referral to SOAH. Whether the discharge will adversely impact contact recreation is an issue of fact appropriate for referral to SOAH. Whether the discharge will adversely impact human health is an issue of fact appropriate for referral to SOAH. Whether the proposed facility is consistent with regionalization is an issue of fact appropriate for referral to SOAH. Whether the character and quantity of the discharge will adversely impact the species in the creek is an issue of fact appropriate for referral to SOAH. Whether the discharge will result in nuisance odors is an issue of fact appropriate for referral to SOAH. Whether the discharge will contribute to surface erosion is an issue of fact appropriate for referral to SOAH.

3. Issues Raised During the Comment Period

All of the issues described above were raised during the comment period.

4. Relevant and Material Issues

The Applicant's compliance history is a relevant and material issue. Pursuant to 30 TAC § 60.1(a)(1)(A), the Commission may consider an applicant's compliance history in the issuance of a permit. Whether the permit contains appropriate requirements regarding sampling is a relevant and material issue. The Applicant is subject to 30 TAC Chapter 319, Subchapter A, which sets out the requirements for collection and analysis of all samples. Whether the permit contains appropriate requirements for modeling is a relevant and material issue. The ED uses modeling data to predict the impact on receiving waters, and that information is used to determine whether the application complies with TCEQ rules and requirements. The completeness and accuracy of the application is a relevant and material issue because the Commission uses the information in the application to determine whether the proposed permit will meet the TCEQ requirements. Whether the proposed discharge will adversely impact water quality is a relevant and material issue. The proposed discharge must meet the requirements set out in 30 TAC Chapter 307, Texas Surface Water Quality Standards (TSWQS). Whether the proposed discharge will adversely impact human health is a relevant and material issue. According to 30 TAC § 307.1, TSWQS require that water quality be maintained in a manner consistent with public health. Whether the proposed facility is consistent with regionalization is a relevant and material issue. Tex. Water Code § 26.003 encourages and promotes the use of area-wide and regional collection systems. Whether the quantity of the discharge will adversely impact the species in the creek is a relevant

and material issue. According to 30 TAC § 307.6(b), water shall not be acutely toxic to aquatic life. Whether the discharge will result in nuisance odors is a relevant and material issue. According to 30 TAC § 309.13(e), the facility must meet requirements for the abatement and control of nuisance odors. Whether the discharge may contribute to erosion is a relevant and material issue. According to 30 TAC § 307.5(b)(1), existing uses and sufficient water quality to protect those uses must be maintained. Whether property values are maintained, however, is not a relevant and material issue. The Commission has no jurisdiction regarding the protection of property values.

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 issue of fact to SOAH:

1. Does the Applicant's compliance history warrant denial of the permit?

2. Are the sampling requirements adequately protective of human health?

3. Does the modeling accurately predict the discharge's impact?

4. Is the application complete and accurate?

5. Will the proposed discharge adversely impact water quality?

6. Will the proposed discharge adversely impact contact recreation?

7. Will the discharge adversely impact human health?

8. Is the proposed facility consistent with regionalization?

9. Will the character and quantity of the proposed discharge adversely impact the species in the creek?

10. Will the proposed discharge result in nuisance odors?

11. Will the proposed discharge contribute to surface erosion?

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.

D. Requests for Reconsideration

The TCEQ received requests for reconsideration of the ED's decision from the following: Hood County Commissioner Steve Berry; Phil, Rachel & Tracey Ferrero; Carroll & Vikki Gilbreath; Leonard Heathington; Anita A. & Thomas N. Lawrence; Dan Loomis; Dick Roan; and Mike Sympson 's decision. The concerns expressed in those filings concerning water quality in Rucker Creek and Lake Granbury are significant issues that may be addressed by the Commission, however, an evidentiary record would be necessary before the Office of Public Interest Counsel could make a recommendation to the Commission based on these concerns. Therefore, OPIC cannot support granting the requests for reconsideration. As noted above, OPIC is recommending that hearing requests be granted so that such an evidentiary record on these water quality issues may be developed through the State Office of Administrative hearings.

III. CONCLUSION

OPIC recommends granting all of the hearing requests and refer the above-referenced issues to the State office of Administrative hearings. OPIC further recommends denying all requests for reconsideration of the Executive Director's decision.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

for By _____
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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2008 the original and eleven true and correct copies of the above-referenced matter 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.

2008 SEP 15 PM 4:02
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

for _____
Scott A. Humphrey

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TCEQ DOCKET NO. 2008-0486-MWD

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FOR THE CHIEF CLERK:
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REQUESTERS:
See attached list.

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GRANBURY TX 76049-5559

PHIL FERRERO
2003 GREEN WING DR
GRANBURY TX 76049-5576

RACHEL FERRERO
2003 GREEN WING DR
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TRACEY FERRERO
2003 GREEN WING DR
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LORETTA A & MYRON D SHERAR
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