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October 13, 2008

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

**VIA FACSIMILE
AND FIRST-CLASS MAIL**

Re: In the Matter of the Application of WYA Autumnwood, Ltd. for TPDES
Permit No. WQ0014853001
TCEQ Docket No. 2008-0751-MWD
(2855-0)

Dear Ms. Castañuela:

Enclosed please find the original and twelve (12) copies of Applicant's Response to Request for Hearing in the above-referenced matter. Please file stamp one copy of this document and return it to me in the enclosed self-addressed, stamped envelope. Thank you for your attention to this matter.

Sincerely,


Martin C. Rochelle

MCR/ldp
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ENCLOSURES

cc: Service List

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
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CHIEF CLERKS OFFICE

TCEQ DOCKET NO. 2008-0751-MWD

IN THE MATTER OF THE APPLICATION OF WYA AUTUMNWOOD, LTD FOR TPDES PERMIT NO. WQ0014853001

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BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

APPLICANT'S RESPONSE TO REQUEST FOR HEARING

TO THE HONORABLE COMMISSIONERS:

COMES NOW, WYA Autumnwood, Ltd., (the "Applicant") and files this response to letters and documents filed by the Kathleen Oates ("Ms. Oates") on behalf of Residents of Precinct 66 (the "Residents") in the above-referenced matter, which letters and petitions may be considered "requests for hearing" by the Commission. If so, Ms. Oates' and the Residents' requests for hearing should be denied because (1) Ms. Oates does not qualify as an "affected person, (2) the Residents do not meet the requirement of hearing requests by associations or groups, (3) no personal justiciable interest is identified in the alleged hearing requests, (4) a request for a contested case hearing is not clearly requested, and (5) no relevant and material disputed issues are listed to provide a basis for any alleged hearing request.

I. INTRODUCTION

WYA Autumnwood, Ltd. applied to the Texas Commission on Environmental Quality ("TCEQ") on September 20, 2007 for a new permit, Texas Pollutant Discharge Elimination System ("TPDES") Permit No. WQ 0014853001. The new permit will authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day.

The treated effluent will be discharged into Mill Creek; then to Neidigk Lake; then to Mill Creek; then to Spring Creek in Segment No. 1008 of the San Jacinto River Basin.

TCEQ declared the permit application administratively complete on October 31, 2007. The Notice of Receipt and Intent to Obtain a Water Quality Permit ("NORI") was published on November 16, 2007. The Notice of Application and Preliminary Decision ("NAPD") was published on February 1, 2008. On February 19, 2008, J. Ross and Elaine J. Nichols provided comments to the proposed draft permit but did not request a hearing. The public comment period ended on March 3, 2008. On March 25, 2008 TCEQ received a letter from Ms. Oates and a petition from the Residents dated March 21, 2008. The Executive Director (the "ED") provided its Response to Public Comment on March 28, 2008, responding only to the timely received comments received from the Nichols. On April 2, 2008 and April 8, 2008, Ms. Oates mailed letters to TCEQ clarifying that an informal public meeting was being requested to discuss the permit and not a contested case hearing.

Pursuant to the analysis provided below, the Applicant recommends denying Ms. Oates's and the Residents' request for a hearing and issuing the Applicant's requested TPDES permit.

II. APPLICABLE LAW

This application was declared administratively complete on October 31, 2007. As the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Title 30, Chapter 55, Subchapter G, §§ 55.200-55.211 of the Texas Administrative Code ("TAC").

A. Requirements for Requesting a Hearing

Under the provisions in 30 TAC §§ 55.200-211, a hearing requestor must make his or her request no later than 30 days after the chief clerk mails the ED's decision and response to comments. A contested case hearing may only be requested by the commission, the ED, the applicant or an affected person. 30 TAC § 55.201(b). An affected person must make a request in writing and may not be based on an issue that was raised solely by a withdrawn comment. 30 TAC § 55.201(c). To properly request a hearing, a requestor must substantially comply with the following requirements. First, a requestor or group of requestors must provide the required contact information as set forth in 30 TAC § 55.201(d)(1). The requestor must identify his or her personal justiciable interest affected by the application, specifically noting the "requestor's location and distance relative to the activity" and "how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public." 30 TAC § 55.201(d)(2). Additionally, a statement must clearly express that the requestor is requesting a contested case hearing. 30 TAC § 55.201(d)(3). Finally, the request for hearing must "list all relevant and material disputed issues of the fact that were raised during the public comment period and that are the basis of the hearing request." 30 TAC § 55.201(d)(4).

B. Requirements for Affected Person

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." 30 TAC § 55.203(a). 30 TAC § 55.203(c) provides relevant factors that will be considered in determining whether a person is affected. These factors include, but are not limited to:

- (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, 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.

30 TAC § 55.203(c). In addition, governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.203(b).

The Commission shall grant a request for a contested case hearing if (1) the request is made by an affected person, (2) the request is timely filed with the chief clerk, (3) the request is made pursuant to a right to hearing authorized by law, and (4) the request complies with the provision of 30 TAC § 55.201. 30 TAC § 55.211(c).

C. Requirements for Responses to Requests for Hearing

A response to a request for hearing must specifically address the following:

- (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 of 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.

Based on the following reasons, the Commission should deny Ms. Oates request for a contested case hearing.

III. HEARING REQUEST

A. Requirement of Affected Person Status and Personal Justiciable Interest

Pursuant to 30 TAC § 55.203(c), a number of factors are evaluated to determine whether a requestor qualifies as an "affected person." Due to Ms. Oates failure to provide information required for a valid request for hearing under 30 TAC § 55.201(d)(2), Ms. Oates does not qualify as an "affected person." The definition of an "affected person" includes "one who has a personal justiciable interest" and the first three factors for determining whether a requestor is an "affected person" address the requestor's claimed personal justiciable interest. In the request for a hearing, Ms. Oates had to set forth a personal justiciable interest including:

a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the public. 30 TAC § 55.201(d)(2).

Ms Oates's request does not provide *any* personal justiciable interest claims or possible *adverse* impacts, but only indicates that the requestors will be "affected by any such permit," the requestors "live close the indicated proposed facility," and the requestor's "area will be highly impacted." Therefore, not only does Ms. Oates and the Residents fail to set forth a personal justiciable interest as required under 30 TAC § 55.201(d)(2), Ms. Oates does not qualify as an "affected person" under 30 TAC § 55.203(c).

Furthermore, additional requirements exist when a request is made by a group or an association. 30 TAC § 55.205(a). First, one or more members of the group must have standing to request a hearing in his or her own right. 30 TAC § 55.205(a)(1). As discussed above, Ms. Oates herself does not qualify as an affected person and none of the other Residents of Precinct 66 have established any personal justiciable interest to qualify as an affected person. Second, the

interest of the group must seek to protect an interest germane to the organization's purpose. 30 TAC § 55.205(a)(2). Because of Ms. Oates's and the Residents' failure to assert an "interest," the request fails under this requirement, as well. Finally, neither the claim asserted nor the relief requested must require the participation of the individual members in this case. 30 TAC § 55.205(a)(3). This requirement is not met either because Ms. Oates and the Residents provided inadequate information within their request for hearing as to whether the individual participation of residents is required. Because Ms. Oates and the Residents do not qualify as an "affected person," the request for hearing should be denied.

B. Requirement of a Clear Request for a Contested Case Hearing

Another requirement under 30 TAC § 55.201(d)(3) includes the clear expression of a request for a contested case hearing. However, Ms. Oates's and the Residents' request for a hearing is anything but clear. On March 21, 2008, Ms. Oates mailed a letter to TCEQ requesting "a hearing" and included additional letters signed by the Residents requesting a "contested case hearing." Then in a letter to TCEQ dated April 2, 2008, Ms. Oates indicated that she was not requesting "a hearing," but was instead merely requesting a "public meeting." A final letter to TCEQ from Ms. Oates dated April 9, 2008 reaffirmed her desire to hold an "informal public meeting," but not a contested case hearing. Ms. Oates' and the Residents' request for hearing should be denied on these grounds as well because they were, in fact, requesting a public meeting and not a contested hearing, thereby failing to meet the requirement under 30 TAC § 55.201(d)(3).

C. Issues Raised in the Request for Hearing

In order to make a request for hearing, all relevant and material disputed issues raised during the public comment period, and the basis of the request for hearing, must be provided. 30 TAC § 55.201(d)(4). The Nichols raised the only issue during the public comment period as to the possibility of flooding—this issue was not discussed by Ms. Oates and the Residents and the Nichols did not request a hearing on the issue of flooding. The ED responded to the comment by the Nichols and indicated that the issue of flooding is not addressed by TCEQ "in the wastewater permitting process unless there is a potential impact to water quality." Executive Director's Response to Public Comment, Page 2. The ED also negated the possibility of any flooding problems that might result from the issuance of the new permit. Aside from the issue on flooding, no other issues have been raised by any person or association. Ms. Oates and the Residents only indicate that they will be "affected" and "impacted" by the new permit—as to how, one can only guess. The requirements for making a request for hearing require an affected person to list the relevant and material disputed issues. Without providing any relevant or material disputed issues for the contested case hearing, the request for hearing must be denied.

D. Maximum Expected Duration of Hearing

Under 30 TAC § 55.209(d)(7), responses to requests for hearing must address a maximum expected duration for any contested case hearing that Commissioners may determine to be appropriate. While the Applicant asserts that no valid hearing request has been filed by a person affected by the agency's action on its TPDES application, in order to comply with this rule the Applicant anticipates that the maximum expected duration of a hearing on this

application should be no longer than six months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

For the reasons set forth above, WYA Autumnwood, Ltd. respectfully recommends that the Commission deny Ms. Oates's and the Residents' contested case hearing request and not refer this matter to SOAH for a contested case hearing and to issue WYA Autumnwood, Ltd.'s requested TPDES permit.

Respectfully submitted,

**LLOYD GOSSELINK BLEVINS
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By: 
MARTIN C. ROCHELLE
State Bar No. 17126500

**ATTORNEYS FOR
WYA AUTUMNWOOD, LTD.**

CERTIFICATE OF SERVICE

I hereby certify that on this the 13th day of October, 2008, a true and correct copy of the foregoing was sent via first-class mail, electronic mail, facsimile, or hand-delivery to the following persons:

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October 13, 2008

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To: Ms. Kerric Jo Qualtrough (MC 173)	Firm: TCEQ
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To: Mr. Larry Diamond (MC 148)	Firm: TCEQ
Verification Phone No.: 239-0037	Telecopy No.: 239-4430
To: Ms. Bridget Bohac (MC 108)	Firm: TCEQ
Verification Phone No.: 239-4000	Telecopy No.: 239-4007
To: Mr. Kyle Lucas (MC 222)	Firm: TCEQ
Verification Phone No.: 239-4010	Telecopy No.: 239-4015
To: Ms. LaDonna Castañuela (MC 105)	Firm: TCEQ
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From: Martin C. Rochelle	

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