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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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October 10, 2008

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
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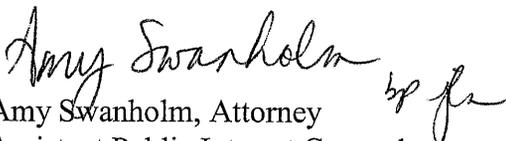
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 OCT 10 PM 3:53
CHIEF CLERK'S OFFICE

Re: **WYA AUTUMNWOOD, LTD.**
TCEQ DOCKET NO. 2008-0751-MWD

Dear Ms. Castañuela:

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

Sincerely,


Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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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**

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

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 Requests for Hearing in the above-referenced matter.

I. INTRODUCTION

On September 20, 2007, WYA Autumnwood, Ltd. (hereinafter "Autumnwood" or "Applicant") applied to the TCEQ for a new permit on a proposed wastewater treatment facility to serve the Hardin Store Road MUD. The proposed permit would authorize the discharge of treated domestic wastewater, with an interim daily average flow not to exceed 100,000 gallons per day. The final volume will have an average daily flow not to exceed 200,000. The proposed plant site will be located approximately 2.3 miles southwest of the intersection of Hardin Store Road and Farm-to-Market Road 2978, on the north side of Hardin Store Road, east of Mill Creek, in Montgomery County, Texas.

The discharge route of the treated effluent will pass via pipe to Mill Creek, then to Neidigk Lake, then to Mill Creek, then to Spring Creek in Segment No. 1008 of the San Jacinto River Basin. Segment No. 1008 has a designated use for high aquatic life, public water supply, and contact recreation. Mill Creek is designated for use by intermediate aquatic life. Because of these uses, an antidegradation review of the receiving waters was performed, in accordance with 30 Texas Administrative Code (TAC) § 307.5 and TCEQ implementation procedures (January 2007) for the Texas Surface Water Quality Standards. The Tier 1 antidegradation review determined preliminarily that this action will not impair existing water quality uses. A Tier 2 review determined preliminarily that there is no significant degradation expected. According to the Executive Director's (hereinafter "ED") Technical Summary, all existing uses will be protected in both waterways.

Segment No. 1008 is listed as an impaired and threatened waterway, on the 2004 and 2006 Clean Water Act Section 303(d) lists. The segment has depressed dissolved oxygen concentrations and elevated levels of bacteria from Field Store Road to SH 249, and elevated bacteria levels from SH 249 to IH 45 to the confluence with Lake Houston. The proposed discharge point for this facility is downstream of the segment that has depressed dissolved oxygen concentrations, and will not, according to the ED, affect dissolved oxygen levels in the impaired portion.

The effluent limits for both phases of the proposed permit are, based on a 30 day average, 10 mg/l CBOD₅, 15 mg/l NH₃-N and 4.0 mg/l minimum dissolved oxygen. The chlorine residual shall remain between at least 1.0 mg/l and 4.0 mg/l after a detention time of at least 20 minutes, based on peak flow. The draft permit also contains sludge provisions, authorizing sludge disposal at a TCEQ authorized land application site or co-disposal landfill.

TCEQ received Autumnwood's permit application on September 20, 2007. The ED declared the application administratively complete on October 31, 2008. The Notice of Receipt and Intent to Obtain Water Quality Permit (hereinafter "NORI") was published in *The Courier* on November 16, 2007, in Montgomery County, Texas. It was also published in *El Sol*, a Spanish language newspaper in Montgomery County, Texas, on November 16, 2007. On December 7, 2007, the NORI was republished in *El Sol*,

because the earlier bilingual notice had the wrong permit number on it. TCEQ issued the Notice of Preliminary Decision (hereinafter "NAPD") on December 27, 2007, and again on January 17, 2008, with an updated address for Autumnwood. The NAPD was published in *The Courier* and *El Sol* on February 1, 2008. The public comment period ended on March 3, 2008, 30 days after the NAPD was published. The ED filed a Response to Comments on March 28, 2008, and the deadline for requesting a contested case hearing was May 5, 2008.

TCEQ received one comment on February 19, 2008. TCEQ also received one hearing request on March 28, 2008, from Kathleen Oates, on behalf of the Residents of Precinct 66, a group of roughly 280 citizens living near the proposed discharge site who all signed the petition attached to Kathleen Oates' letter. On April 9, 2008, TCEQ received a letter from Kathleen Oakes requesting a public meeting. She does not withdraw her hearing request, but explicitly reserves the right to a hearing. Based on the information submitted in the request and the information available in the Chief Clerk's file on this application, OPIC recommends granting the hearing request.

II. ANALYSIS OF REQUESTS FOR CONTESTED CASE HEARINGS

A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 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 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, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The Commission shall grant an affected person’s timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission’s decision on the application. 30 TAC §55.211(c).

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal

letter with the chief clerk prior to the filing of the Executive Director's response to Comment;

- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

B. Determination of Affected Person Status

The Office of the Chief Clerk received one hearing request on March 21, 2008, from the Residents of Precinct 66, a group spearheaded by Kathleen Oates. Kathleen, in her cover letter, requests a hearing for those neighbors "who would be affected by any such permit," and further states that the "signatories live within the vicinity of the waterways that would be utilized for this proposed system." The letter supported by the 280 individuals states they live close to the proposed facility and believe their "area will be highly impacted by this project." They specifically mention that "treated sewage will be dumped into certain existing lakes [sic] already utilized for the same [purpose]."

Most of the Residents of Precinct 66 reside within a radius of three miles from the proposed facility. Over 75 of them live within a one-mile radius.¹ Several are located downstream of the discharge point, within one river-mile, and many live near Neidigk Lake, which begins a little over a mile downstream of the discharge route. Kathleen Oates is listed on the Affected Landowner List submitted by the Applicant. So are J. Ross Nichols and Elaine Nichols, the individuals who submitted the comment and are also members of the Residents of Precinct 66. Furthermore, the following individuals are listed both as adjacent landowners and members of the Residents of Precinct 66; Neeli Anderson, Tom and Elizabeth Bergeron, Merry Brow, Deborah Harvill, and Diane Neidigk. Their concerns relate to adverse health and environmental effects that could arise from their proximity to the proposed discharge.

Therefore OPIC concludes that Kathleen Oates and the Residents of Precinct 66 raise health and environmental issues not common to members of the general public. A reasonable relationship exists between the interests claimed and the impact of the

¹ The ED provides a map of the discharge route along with the approximate location of each requester, as Attachment A to their Response to Hearing Requests.

proposed permit on those interests. OPIC recommends the Commission find they are “affected persons.”

C. Issues Raised in the Hearing Requests

The hearing requestors raise the issue of what impact the discharge will have upon “certain existing lakes” along the discharge route. Although the hearing request offers little detail on this topic, OPIC interprets the hearing requestors as expressing concern regarding the cumulative health and environmental effects of the proposed discharge, when examined in light of existing discharges into the same waterways, including Neidigk Lake, which is on the discharge route.

D. Issues raised in Comment Period

The one comment letter submitted by J. Ross and Elaine J. Nichols focuses primarily on possible flooding, should the water level in Mill Creek rise due to the proposed discharge. Although this is slightly different than the concerns expressed in the hearing request, both the comment and the widely supported hearing request express concern about possible negative impacts upon the surrounding waterways, from the proposed discharge.

In addition, Kathleen Oates submitted a letter on April 9, 2008, after she submitted the hearing request. This letter clarifies that her earlier letter requests a public meeting, but does not withdraw her request for a contested case hearing. She explicitly states that she reserves the right to a contested case hearing, despite her request for a public meeting. Therefore, the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c) and (d)(4), 55.211(c)(2)(A).

E. Disputed Issues

There is no agreement between Requesters and the applicant or Executive Director on the issues raised in the hearing requests.

F. 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. All of the issues raised are issues of fact. *See* 30 TAC §55.211(b)(3)(A) and (B).

G. 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). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.² Relevant and material issues are those governed by the substantive law under which this permit is to be issued.³

The following issues raised by the hearing requesters are relevant and material: whether the proposed permit will adversely impact water quality in the surrounding waterways and the health of individuals living near the facility. 30 TAC § 307.1.

H. Issues Recommended for Referral

OPIC recommends the Commission refer the following disputed issues of fact to the State Office of Administrative Hearings for a contested case hearing:

1. Will the proposed discharge adversely affect water quality?
2. Will the proposed discharge adversely affect the health of the requesters?

I. 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

² *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.”)

³ *Id.*

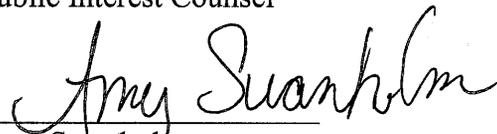
decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required 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.

III. CONCLUSION

OPIC recommends granting the hearing request of Kathleen Oates and the Residents of Precinct 66. OPIC further recommends referring this matter to SOAH for an evidentiary hearing on the issues recommended above with a hearing duration of nine months.

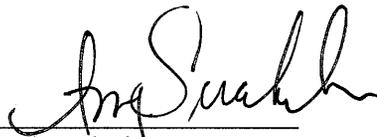
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2008 the original and seven true and correct copies of the Office of the Public Interest 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.



Amy Swanholm

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 OCT 10 PM 3:53

CHIEF CLERKS OFFICE

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