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

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

October 27, 2008

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 OCT 27 PM 1:30  
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: **MONTGOMERY COUNTY UTILITY DISTRICT NO. 2**  
**TCEQ DOCKET NO. 2008-0927-MWD**

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive that reads "Eli Martinez" with "by jlc" written below it.

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

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**TCEQ DOCKET NO. 2008-0927-MWD**

2008 OCT 27 PM 1:30

**IN THE MATTER OF THE  
APPLICATION BY MONTGOMERY  
COUNTY UTILITY DISTRICT NO. 2  
FOR PERMIT NO. WQ0011271001**

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**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

CHIEF CLERKS OFFICE

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

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, and would respectfully show the following.

**I. INTRODUCTION**

Montgomery County Utility District No. 2 (hereinafter "Applicant" or "the District") is seeking a major amendment to TPDES Permit No. WQ0011271001 to authorize an increase in the discharge of treated domestic wastewater to a daily average flow not to exceed 550,000 gallons per day and to change the outfall location. The current permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 250,000 gallons per day. The existing wastewater treatment facility serves Seven Coves Subdivision and a portion of the Far Hills Utility District.

The treated effluent is discharged to an unnamed creek; thence to an unnamed tributary of Lake Conroe; thence to Lake Conroe in Segment No. 1012 of the San Jacinto River Basin. The unclassified receiving water uses are no significant aquatic life uses for the unnamed tributary of Lake Conroe. The designated uses for Segment No. 1012 are high aquatic life uses, public water supply and contact recreation. In accordance with 30 TAC §307.5, and the TCEQ implementation procedures (January 2003) for the Texas Surface Water Quality Standards, an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review

preliminarily determined that existing water uses will not be impaired by this permit action. A Tier 2 review was also performed, and likewise preliminarily determined that no significant degradation of water quality is expected in Lake Conroe (Segment No. 1012), which has been identified as having high aquatic life uses. The facility is located on the east side of Lake Conroe, immediately south of Farm-to-Market Road 830 and approximately 500 feet east of Kingston Cove Lane in Montgomery County, Texas.

The TCEQ received this application on September 25, 2007, and the Executive Director ("ED") declared the application administratively complete on October 22, 2007. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published on November 11, 2007, in the *Houston Chronicle* in English and October 31, 2007 in *La Voz De Houston* in Spanish. The Notice of Application and Preliminary Decision (NAPD) was published on February 7, 2008 in the *Houston Chronicle* in English, and February 6, 2008 in *La Voz De Houston* in Spanish. The public comment period ended March 10, 2008. The ED issued a Response to Public Comment on May 7, 2008. The period for requesting a hearing ended on June 6, 2008.

The TCEQ received a timely hearing request from Mr. John DeCesare on January 18, 2008. Based on the information submitted in the request and a review of the information available in the Chief Clerk's file on this application, OPIC recommends denying this request.

## II. 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).

The Commission has also set forth specific criteria for judging whether a group or organization should be considered an "affected person." 30 TAC § 55.205(a) states that a group or association may request a hearing if:

- 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.

Any group or association which meets all of these criteria shall be considered an "affected person."

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**

Mr. DeCesare raises several concerns in his hearing request related to the Applicant's wastewater treatment activities. According to Mr. DeCesare, silt has collected at the Section 4, Block 12 location along the Green Belt reserves to a depth of 3-4 feet. Mr. DeCesare attributes this phenomenon to the District's operations. The silt buildup and accompanying debris has clogged the flow of the creek into Lake Conroe and prevents boats from entering the cove in this

location. The silt occlusion has caused the creek water to stagnate—posing a health risk, causing a foul odor, and fostering mosquito swarms Mr. DeCesare fears may carry transferable diseases.

Although the issues raised by Mr. DeCesare are protected by the law under which the application will be considered,<sup>1</sup> Mr. DeCesare has not shown that he has a personal justiciable interest<sup>2</sup> uncommon to members of the general public.<sup>3</sup> Mr. DeCesare speaks generally about health risks to residents “in the immediate vicinity of the creek” without specifically stating whether or not he is among those residents. Mr. DeCesare did not provide information about the location of his residence in relation to the treatment facility, the effluent discharge point, or the proposed discharge route. Furthermore, a review of the landowners list provided by the District shows that Mr. DeCesare is not listed as an adjacent landowner. Without additional information detailing whether or not Mr. DeCesare himself is personally affected by the permitted activities, OPIC cannot find that Mr. DeCesare is an affected person. Should Mr. DeCesare file a reply providing location information, OPIC may reconsider its recommendation.

Mr. DeCesare may have intended to file his request as the representative of a group or association of landowners in stating that he writes “on behalf of the residents of Seven Coves.” If this was Mr. DeCesare’s intent, the request likewise falls short of meeting the requirements of the Texas Administrative Code. 30 TAC § 55.205(a) details the requirements for group or associational standing, and requires that the request identify one or more members of the group who would have standing in their own right. Mr. DeCesare identifies no such members. Furthermore, the articulated purpose of the group must be germane to the interests raised in the request. If Mr. DeCesare does indeed represent a group or association, the purpose of the group

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<sup>1</sup> 30 TAC § 55.203(c)(1).

<sup>2</sup> 30 TAC § 55.203(a)

<sup>3</sup> 30 TAC § 55.203(c)

was not provided in the hearing request. Should Mr. DeCesare file a reply providing additional information in this respect, OPIC may reconsider its recommendation.

While sympathetic to the concerns raised in his hearing request, OPIC cannot find that Mr. DeCesare in his individual capacity or as representative of a homeowner group is an affected person under the applicable statutes, and therefore cannot recommend granting his request.

Should the Commission determine that Mr. DeCesare is an affected person, OPIC provides the following analysis and recommendation for proceedings before the State Office of Administrative Hearings (SOAH).

**B. Issues Raised in the Hearing Requests**

- 1) Mr. DeCesare asserts that the permitted activities will result in further accumulation of settleable solids obstructing the watercourse.
- 2) Mr. DeCesare asserts that the permitted activities pose a health risk.
- 3) Mr. DeCesare asserts that the permitted activities pose an odor nuisance.
- 4) Mr. DeCesare asserts that the permitted activities pose an insect nuisance.

**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 requestors 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 issues of settleable solids accumulation, health risks, odor and insect nuisances are all issues of fact properly referable to SOAH.

**F. Relevant and Material Issues**

Mr. DeCesare's concern with silt accumulation is addressed by the Commission rule that "surface waters shall be essentially free of settleable solids conducive to changes in flow characteristics of stream channels or the untimely filling of surface water in the state."<sup>4</sup> Likewise, public health issues,<sup>5</sup> odor nuisance,<sup>6</sup> and the proliferation of mosquitoes or other nuisance insects<sup>7</sup> are specifically addressed by Commission regulations applicable to the proposed permit and constitute relevant and material issues properly referable to SOAH.

**G. Issues Recommended for Referral**

Should the Commission find that Mr. DeCesare is an affected person, 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 operations under the proposed permit result in accumulation of settleable solids that will change flow characteristics of stream channels along the effluent route?
- 2) Will operations under the proposed permit adversely affect human health?
- 3) Will operations under the proposed permit pose an odor nuisance?
- 4) Will operations under the proposed permit pose an insect nuisance?

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<sup>4</sup> 30 TAC § 307.4(b)(3) (2006).

<sup>5</sup> TEX. WATER CODE §§ 26.003; 26.027(a) (2006).

<sup>6</sup> 30 TAC section 309.13(e) and (g).

<sup>7</sup> *Id.*

#### H. Maximum Expected Duration of Hearing

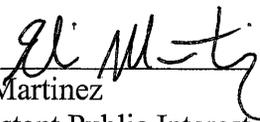
Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer 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 cannot find that Mr. DeCesare has demonstrated that he is an affected person. However, should the Commission find that Mr. DeCesare is an affected person, 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 October 27, 2008 the original and seven true and correct copies of the Office of the Public Counsel's Response to Hearing Request 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.

  
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Eli Martinez

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
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CHIEF CLERKS OFFICE

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**TCEQ DOCKET NO. 2008-0927-MWD**

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