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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 17, 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

2008 NOV 17 PM 2:45
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Re: **VAL VERDE DEVELOPMENT CO.**
TCEQ DOCKET NO. 2008-0943-MWD

Dear Ms. Castañuela:

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

Sincerely,

Garrett Arthur by *gla*
Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2008-0943-MWD

VAL VERDE DEVELOPMENT CO. § BEFORE THE
PROPOSED TPDES PERMIT NO. § TEXAS COMMISSION ON
WQ0014777001 § ENVIRONMENTAL QUALITY

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

2008 NOV 17 PM 2:45
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

To the members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the "Commission") files this response to a hearing request.

I. Introduction

On January 25, 2007, Val Verde Development Co. ("Val Verde" or the "Applicant") applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) permit. The permit would authorize the construction and operation of a new municipal wastewater treatment plant. Under the proposed permit, the facility would be allowed to discharge treated domestic wastewater at a daily average flow not to exceed 0.33 million gallons per day in the interim I phase, a daily average flow not to exceed 0.66 million gallons per day in the interim II phase, and a daily average flow not to exceed 0.99 million gallons per day in the final phase. The proposed facility would be located between the City of Del Rio and Laughlin Air Force Base, approximately 1,000 feet northwest of U.S. Highway 277 and approximately 500 feet west of Spur 317, in Val Verde County. The effluent would be discharged to an unnamed tributary of Zorro Creek, then to Zorro Creek, then to the Rio Grande below Amistad Reservoir in Segment No. 2304 of the Rio Grande Basin. The unclassified receiving water uses are no significant

aquatic life use for the unnamed tributary and Zorro Creek. The designated uses for Segment No. 2304 are high aquatic life use, public water supply, and contact recreation.

Val Verde's application was declared administratively complete February 20, 2007. The first notice was published March 8, 2007 in the *Del Rio News – Herald*, and the second notice was published May 27, 2007 in the same newspaper. On March 6, 2008, a public meeting was held in the City of Del Rio. The Executive Director's (ED) Response to Comments (RTC) was mailed May 14, 2008, and the deadline for hearing requests was June 13, 2008.

The TCEQ received timely hearing requests from Ronald C. Burton and the Department of the Air Force. The Department of the Air Force subsequently withdrew its hearing request. OPIC recommends that the Commission deny Mr. Burton's hearing request.

II. Applicable Law

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, 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 general public;
- (3) request a contested case hearing;

- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

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. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to 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.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief

clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;

- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

Section 55.209(e) states that a response 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 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.

III. Analysis of Hearing Requests

A. Whether the requestor is an affected person

Mr. Burton states that his hearing request is based on the lack of public information concerning the development plans of Val Verde or SE Ranch Holdings, Ltd. and the adverse effect this development may have upon Laughlin Air Force Base ("Laughlin"). He further states that no discussion has been held concerning the compatibility of the proposed plant with the current and future missions at Laughlin. Finally, Mr. Burton notes that if the proposed project has an impact on Laughlin, it impacts the residents of the City of Del Rio, Val Verde County, and Kinney County.

Mr. Burton's hearing request fails to demonstrate that he qualifies as an affected person. An affected person is defined as a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. 30 TAC § 55.103. An interest common to members of the general public does not qualify as a personal justiciable interest. *Id.* Mr. Burton's stated interest is the potential impact of the proposed plant on Laughlin, but he does not assert a personal justiciable interest which will be affected by this application. When he states that any impact on Laughlin impacts the residents of Del Rio, Val Verde County, and Kinney County, he is stating an interest which is common to members of the general public, not a personal justiciable interest. OPIC finds that Mr. Burton does not meet the definition of an affected person.

B. Which issues raised in the hearing requests are disputed

Mr. Burton's hearing request does not indicate which issues are disputed or dispute specific issues addressed in the ED's RTC.

C. Whether the dispute involves questions of fact or of law

Because Mr. Burton is not disputing specific issues, OPIC cannot state whether any dispute involves questions of fact or law.

D. Whether the issues were raised during the public comment period

The issues contained in Mr. Burton's hearing request were raised during the public comment period.

E. Whether the hearing request is based on issues raised solely in a public comment which has been withdrawn

The hearing request is not based on issues raised solely in a public comment which has been withdrawn.

F. Whether the issues are relevant and material to the decision on the application

Mr. Burton does not raise any issues which are relevant and material to the decision on this application.

G. Maximum expected duration for the contested case hearing

OPIC is not recommending a hearing. However, should a hearing be granted, OPIC expects a maximum duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

IV. Conclusion

Under 30 TAC § 55.211(c)(2), a hearing request can only be granted if the request is made by an affected person. Having found that Mr. Burton does not qualify as an affected person, OPIC respectfully recommends the Commission deny Mr. Burton's hearing request.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2008, the original and seven true and correct copies of the foregoing document were filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.


Garrett Arthur

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
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CHIEF CLERKS OFFICE

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TCEQ DOCKET NO. 2008-0943-MWD**

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