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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 2, 2009

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

2009 JAN - 2 PM 2: 29
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**Re: RMD CONSTRUCTION, INC. AND CITY OF PFLUGERVILLE
TCEQ DOCKET NO. 2008-1082-MWD**

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanholm".

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2008-1082-MWD

2009 JAN -2 PM 2:29

IN THE MATTER OF
THE APPLICATION OF
RMD CONSTRUCTION,
INC. AND THE CITY OF
PFLUGERVILLE FOR
TPDES PERMIT NO.
WQ0014642001

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BEFORE THE TEXAS
CHIEF CLERKS OFFICE
COMMISSION ON
ENVIRONMENTAL
QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUEST 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) with a Response to Requests for Hearing in the above-referenced matter.

I. INTRODUCTION

A. Background of Facility

RMD Construction, Inc. and the City of Pflugerville (Applicant) have applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to Texas Pollution Discharge Elimination System (TPDES) Permit No. WQ0014642001. The facility is located 2,500 feet east of the intersection of Farm-to-Market Road 973 and New Sweden Church Road in Travis County, Texas.

The current permit authorizes a daily average flow not to exceed 150,000 gallons per day (gpd) in the interim phase I, 475,000 gpd in the interim phase II, 950,000 gpd in the interim phase III (the current phase). This amendment would increase the discharge

of domestic treated wastewater to an annual average flow not to exceed 3,000,000 gpd in the final phase. The current discharge route runs from the plant site to an unnamed tributary; thence to Cottonwood Creek; thence to Wilbarger Creek; thence to Colorado River above La Grange, at Segment No. 1434 of the Colorado River Basin. Designated uses for the receiving waters are; limited aquatic life for the unnamed tributary; exceptional aquatic life, public water supply, and contact recreation for Segment No. 1434. A Tier I antidegradation review determined, preliminarily, that existing water quality uses would not be impaired by the proposed permit. No Tier II degradation review was conducted, because the Tier I review concluded that no water bodies with exceptional, high, or intermediate aquatic life uses are present within the stream reach assessed.

An endangered aquatic-dependent species of critical concern, the Houston Toad, occurs within the watershed of Segment No. 1434. But, according to EPA and TCEQ, the portion of the watershed that is known to house the Houston Toad is a separate subwatershed, not directly connected to the subwatershed where the proposed discharge will enter. Based on this, the ED has determined that the proposed discharge will not impact the Houston Toad and that the EPA does not need to review the proposed permit regarding the presence of endangered or threatened species.

The proposed facility (which has not been built yet) will be an activated sludge processing plant operated in the single stage nitrification mode. Treatment units include biological nutrient removal, aeration, clarification, aerobic digestion, filtration, and chlorination, adding dechlorination in the final phase. The proposed permit also authorizes the disposal of sludge at a TCEQ authorized land application site or co-disposal landfill.

The proposed effluent limits for all phases are, based on a 30 day average, 5 mg/l daily average for Carbonaceous Biochemical Oxygen Demand, 5 mg/l daily average for Total Suspended Solids, 2 mg/l daily average for Ammonia Nitrogen, 1 mg/l daily average for Phosphorus, and a minimum of 4.0 mg/l of dissolved oxygen.

B. Procedural Background

TCEQ received this application on July 16, 2007. On October 26, 2007, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain Water Quality Permit (NORI) was published in *The Pflugerville Pflag* on November 8, 2007, in Travis County, Texas and in Spanish in *El Mundo* on November 12, 2007. The Notice of Application and Preliminary Decision (NAPD) was published in *The Pflugerville Pflag* on February 28, 2008 and in Spanish in *El Mundo* from February 28, 2008 to March 5, 2008. The public comment period ended on March 31, 2008 and the deadline to request a contested case hearing was July 3, 2008.

TCEQ received requests for a contested case hearing from Ismael Guzman submitted on December 10, 2007 and June 30, 2008. Based on Mr. Guzman's timely hearing requests, OPIC recommends referring this application to SOAH for a contested case hearing.

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 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 a request for a contested case hearing in the form of identical letters from Ismael Guzman submitted on December 10, 2007 and

June 30, 2008, both before the July 3, 2008 deadline for submitting a request for a contested case hearing.

In his letter, Ismael Guzman states that he owns property at 12001 New Sweden Church Rd., in Manor, Texas, 78653 and “would like to request a contested case hearing involving” this proposed permit. He states that his property is located 300 yards downstream from the proposed facility, and he will be adversely affected by the proposed discharge.¹ If the permit is granted, he believes the increased discharge will impact his livestock’s ability to cross the unnamed tributary bisecting his property. It will, he claims, make the back portion of his property inaccessible. Further, the increase in flow to this tributary, he claims, will create soil erosion leading to property damage like broken fences and loose cattle.

Therefore, OPIC concludes Ismael Guzman has interests related to his economic interests and use and enjoyment of property, which are not common to members of the general public. We find a reasonable relationship between the interests claimed and the impact of the proposed permit on those interests. OPIC recommends the Commission find Ismael Guzman an “affected person.”

C. Issues Raised in the Hearing Requests

In both of his hearing requests, Ismael Guzman states that because the unnamed tributary bisects his land, and the discharge could be up to 3 million gallons per day, granting the permit amendment will render the back fifteen acres of his property inaccessible to his livestock. Should this permit be granted, his cows will be unable to cross the tributary. The tributary currently contains dry areas that allow the cows to safely cross. But should the permit be granted, the dry areas will be filled with water which will cut off the cows’ access to a clean water supply and shelter in the barn. In addition, Ismael Guzman states that during nominal rains, the back of his property overflows with excess water. If there is more water released along with rain, he will have devastating soil erosion on his property, leading to damaged fences and loose cattle. In his first hearing request filed on December 10, 2007, Mr. Guzman also raises the issue of whether the applicant needs the requested permit amendment.

¹ Ismael Guzman’s proximity to the proposed discharge route is confirmed by the ED’s map.

D. Issues raised in Comment Period

Ismael Guzman's first letter, dated December 10, 2007, was submitted before the comment period ended on March 31, 2008. Therefore all of the issues raised in his hearing request were also raised during the comment period.

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

Hearing requests may raise 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

Whether the proposed discharge may interfere with Ismael Guzman's economic interest in using his land for raising livestock is also a relevant and material issue. Mr.

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.*

Guzman's hearing request states that the proposed permit will interfere with his ability to use his land for livestock grazing by raising the level of the creek that bisects his land thereby making it impossible for the livestock to cross. The increased discharge may also damage his fences, leading to wayward livestock. One of the charges of 30 TAC § 307.1 is to "maintain the quality of water in the state consistent with public health and enjoyment." 30 TAC § 307.1 states that the purpose of the Texas Surface Water Quality Standards are to maintain "operation of existing industries" and further "economic development." Therefore this is a relevant and material issue.

Whether the proposed facility will be located on an unsuitable or inappropriate site because of potential erosion is a relevant and material issue. According to 30 TAC § 307.5(b)(1), when authorizing waterwater discharges, it is TCEQ rule to maintain existing uses and sufficient water quality to protect those uses. In addition, when evaluating the site of a proposed facility, TCEQ prohibits the "issuance of a permit for a facility to be located in an area determined to be unsuitable or inappropriate, unless the design, construction, and operational features of the facility will mitigate the unsuitable site characteristics." 30 TAC § 309.10. Further, in determining whether the proposed site minimizes surface and groundwater contamination, the Commission may consider active geologic processes and climatological conditions. 30 TAC § 309.12(1) and (4). Active geologic processes include "[a]ny natural process which alters the surface and/or subsurface of the earth, including, but not limited to, *erosion* (including shoreline erosion along the coast), *submergence*, subsidence, faulting, karst formation, *flooding in alluvial flood wash zones*, *meandering river bank cutting*, and earthquakes." 30 TAC § 309.11(1) (emphasis added). Therefore these are relevant and material issues.

Whether the Applicants show a need for the proposed flow increase is a relevant and material issue. As addressed in the ED's Response to Comments, part of the permitting process when evaluating an amendment to an existing permit involves evaluating the need for additional flows and determining if there will be any adverse impacts upon the receiving waters.⁴ Also, 30 TAC § 309.10, states that the issuance of wastewater permits and permit amendments is conditioned upon meeting such requirements as minimizing possible surface and groundwater contamination and

⁴ ED's Response to Public Comments (RTC), response 7, dated June 3, 2008.

avoiding nuisance conditions. This presumably includes the avoidance of permitting large amounts of unnecessary discharge. Therefore this is a relevant and material issue.

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 permit amendment adversely affect Ismael Guzman's use and enjoyment of his property and his economic interests by interfering with his ability to raise livestock on his property?
2. Will the proposed permit amendment contribute to erosion?
3. Have the Applicants shown a need for the proposed flow increase?

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 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 Ismael Guzman's hearing request, and referring the above-referenced issues to the State Office of Administrative Hearings.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2009 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

2009 JAN -2 PM 2: 29
CHIEF CLERKS OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

MAILING LIST
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TCEQ DOCKET NO. 2008-1082-MWD

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