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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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 NOV 17 PM 2:46
CHIEF CLERKS OFFICE

Re: **CITY OF GALVESTON**
TCEQ DOCKET NO. 2008-1453-MWD

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Requests for Hearing 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. 2008-1453-MWD

IN THE MATTER OF
THE APPLICATION OF
THE CITY OF
GALVESTON FOR
TPDES PERMIT NO.
WQ0010688005

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY

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

CHIEF CLERKS OFFICE

2008 NOV 17 PM 2:26

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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

A. Background of Facility

The City of Galveston ("Galveston" or "Applicant") applied with the Texas Commission on Environmental Quality ("TCEQ") for a major amendment to TPDES Permit No. 10688-005 for the Terramar Wastewater Treatment Facility ("facility"). The facility is located approximately 4.5 miles north of the San Luis Bridge and 1,900 feet west of San Luis Pass Road (Farm-to-Market 3005) in Galveston County, Texas.

The proposed permit would authorize an increase in discharge of treated domestic wastewater from a daily average flow not to exceed 500,000 gallons per day to an annual average flow not to exceed 1,000,000 gallons per day. The facility is an activated sludge

processing plant operated in the extended aeration mode, currently operating in the interim phase of development. Treatment units in the interim and final phases include sequencing batch reactors, sludge digesters, and chlorine contact chambers. Currently the treated effluent is discharged by pipeline into West Bay in Segment No. 2424. Designated uses for Segment No. 2424 are high aquatic life, oyster waters and contact recreation.

Segment No. 2424 is currently listed on the 2004 303(d) list, inventorying the State's impaired and threatened waters. The segment is listed for elevated levels of bacteria associated with oyster water use. The bacterial impairment is in 24.4 square miles at the east end near Galveston Bay and Texas City. The Executive Director ("ED") states that the facility is designed to provide adequate disinfection and when operated properly, should not add to the bacterial impairment.

The facility also currently generates sludge which is hauled by a registered transporter to the City of Galveston Airport Wastewater Treatment Facility, Permit No. WQ0010688002, where it is then digested and transported to the City of Galveston Main Wastewater Treatment Facility, Permit No. WQ0010688001. The proposed permit also authorizes sludge disposal at a TCEQ registered or permitted land application site, commercial land application site, or co-disposal landfill.

B. Procedural Background

TCEQ received the City of Galveston's permit application on February 28, 2007. The ED declared the application administratively complete on May 21, 2007. The Notice of Receipt and Intent to Obtain Water Quality Permit (hereinafter "NORI") was published in *The Galveston County Daily News* on June 15, 2007, in Galveston County, Texas. It was not published in any alternative languages, although the Applicant states the permit application is subject to alternative language public notice requirements for Spanish. In the Public Notice Verification Form, applicant attests that there was no Spanish newspaper or publication found in the area. Applicant also verifies that *The Galveston County Daily News* refused to publish alternative language notice, because the newspaper publishes only in English. Applicant did not verify whether or not it conducted a diligent search for an alternative language newspaper or publication of

general circulation in the area. On July 23, 2007, the Applicant submitted an amended Public Notice Verification Form attesting that a diligent search for an alternative language newspaper or publication of general circulation had occurred, but that no Spanish-language newspapers or publications existed in the Galveston area. In the amended Public Notice Verification Form, Galveston also verifies that the application is not subject to alternative language public notice requirements, although it attests to meeting all of the prerequisites for alternative language publication.

TCEQ issued the Notice of Preliminary Decision (hereinafter "NAPD") on August 9, 2007. The NAPD was published in *The Galveston County Daily News* on September 7, 2007. It was not published in any alternative languages, although the Public Notice Verification Form submitted by Galveston verifies that the permit application is subject to alternative language public notice requirements in Spanish. Applicant attests that there was no Spanish newspaper or publication found in the area. Applicant verifies that *The Galveston County Daily News* refused to publish the notice in English. They also verify that the original tear sheets of the alternative language notice and corresponding affidavits have been sent to the TCEQ, although they are not in the file.

C. Public Comment and Requests for Hearing

The public comment period ended on October 8, 2007, 30 days after the NAPD was published. The ED filed a Response to Comments on December 7, 2007. The deadline for requesting a contested case hearing was January 12, 2008.

Also on December 7, the ED asked the Commission not to schedule this matter for Agenda, pending a conditional no objection letter from the Environmental Protection Agency. On September 9, 2008, the matter was resolved, with changes to the permit to incorporate effluent limits and monitoring requirements for Enterococci bacteria.

TCEQ received two letters during the comment period. On September 10, 2007, Anthony Osso requested a public meeting on behalf of Terramar Home Owners Association. On September 11, 2007, Mark Plagens requested a contested case hearing. As discussed below, OPIC finds that this application has not been noticed as required by the Commission's alternative language requirements. Therefore, OPIC recommends continuing this matter, and allowing the Applicant an opportunity to correct the notice

deficiency. Should the Commission find that notice was sufficient, OPIC recommends denying the contested case hearing request and granting the permit.

II. ALTERNATIVE LANGUAGE NOTICE WAS DEFFICIENT

A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is therefore “subject to Subchapters H - M of [Chapter 39 of Title 30 of the Texas Administrative Code (“TAC”)] (relating to Applicability and General Provisions; Public Notice of Solid Waste Applications; Public Notice of Water Quality Applications and Water Quality Management Plans; Public Notice of Air Quality Applications; Public Notice of Injection Well and Other Specific Applications; and Public Notice for Radioactive Material Licenses).” 30 TAC § 39.403(a). Alternative language publication is required if the Applicant must publish notice under 30 TAC § 39.418 or § 39.419 (requiring publication of a NORI and a NAPD) and the closest elementary school or middle school to the facility is required to provide a bilingual education program. 30 TAC § 39.405(h)(1). Further, students must be enrolled in this program, attend a bilingual program at another location, or the school must waive out under 19 TAC § 89.1205(g).¹

If the facility is required to publish in an alternative language, “notice must be published in a newspaper or publication that is published primarily in the alternative languages in which the bilingual education program is or would have been taught, and the notice must be in those languages.” 30 TAC § 39.405(h)(4). In addition the “newspaper or publication must be of general circulation in the county in which the facility is located.” 30 TAC § 39.405(h)(5).

The requirement for alternative language publication is waived if there is no publication written in the required language or if there is a publication in the required language, yet that publication refuses to publish the notice. 30 TAC § 39.405(h)(8). The

¹ Note that as of November 13, 2008, no current rule entitled 19 TAC § 89.1205(g) exists, according to the Secretary of State’s online version of the Texas Administrative Code.

ED may waive the requirement on a case-by-case basis if the only publication available in the required language is published less than monthly. *Id.*

B. Applicant's Public Notice Verification Form Responses are Inconsistent

First, Galveston responds inconsistently on whether alternative language notice is required. When Galveston submitted documentation that it had published the NAPD and NORI, it also submitted a Public Notice Verification Form ("Notice Form") with each. On July 6, 2007, Galveston submitted a Notice Form in response to the NORI publication. In this document, Galveston certified that it is subject to alternative language requirements. Yet on July 23, 2007, when it submitted an amended Notice Form, Galveston attested that it was *not* subject to alternative language requirements. On September 24, 2007 Galveston submitted a Notice Form in connection with publication of the NAPD. In this form, Galveston attests that alternative language notice is required.

Second, in the Notice form submitted in connection with the NORI on July 6, 2007, the Applicant did not attest to conducting a diligent search for a newspaper or publication of general circulation in both the municipality and county where the facility is located. Instead, the Applicant left this portion of the form blank. But in the amended Notice Form and the Notice Form submitted in connection with the NAPD, the Applicant did attest to this.

In light of the Applicant's inconsistent submittals, OPIC questions whether Applicant understood the alternative language notice requirements and conducted a diligent search for a Spanish-language newspaper or publication.

C. Alternative Language Publications are Available in Galveston County

OPIC conducted a brief search for Spanish-language publications circulated in Galveston County. Although OPIC did not find any Spanish-language newspapers of general circulation in Galveston County, there is at least one Spanish-language publication of general circulation that publishes legal notice. One example that OPIC can offer is *La Subasta*, a Spanish-language advertising publication that is published in

Houston, but widely distributed in the city of Galveston and other areas of Galveston County. *La Subasta* allows publication of legal notices.²

La Subasta is published primarily in Spanish, and is a publication of general circulation within Galveston County. See 30 TAC § 405(h)(5). Therefore OPIC recommends that the application be remanded because of notice deficiencies.³

III. ANALYSIS OF REQUESTS FOR CONTESTED CASE HEARINGS

Should the Commission find that notice was sufficient, OPIC provides an analysis of the requests for a contested case hearing on this matter.

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

² See *LaSubasta's* website at www.lasubasta.com. The *Galveston County News* often directs individuals to this publication, when the newspaper receives inquiries as to whether it publishes notices in Spanish. In addition, *The Post*, an English-language newspaper serving Texas City, La Marque, Dickinson, and League City, all within Galveston County, will publish notices in Spanish within their classified section. See *The Post's* website at www.thepostnewspaper.net.

³ OPIC notes this application was noticed prior to Hurricane Ike's impact on Galveston. Given current circumstances, if publications are not currently being distributed or circulated in Galveston, such circumstances could be documented through the submittal of the required forms following remand.

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 two letters regarding this matter. Anthony Osso, on behalf of Terramar Home Owners Association, requested a public meeting on September 10, 2007. Mark Plagens requested a contested case hearing on September 11,

2007. Both these requests were made during the comment period, which ended October 10, 2007.

During the comment period, Mark Plagens submitted a request for a contested case hearing. In the letter he states that he owns property at 3803 Laguna Dr., Galveston Texas, within the Terramar Beach Subdivision. This property is less than one-half mile from the facility, according to Google Maps and the map Applicant submitted with the permit application. He also states that he would like a public hearing on the proposed discharge. But because he mentions no personal justicable interest, OPIC concludes that he is not affected. 30 TAC § 55.203(a) and (c).⁴

C. Issues Raised in the Hearing Requests

The hearing requestor does not raise any issues that the Commission can refer to SOAH.

D. Issues raised in Comment Period

On September 10, 2007, Anthony Osso, on behalf of Terramar Home Owners Association, submitted a comment and public meeting request to the TCEQ. In his letter, he states several concerns with the Applicant's permit request. He states that the residents of the Terramar subdivision are concerned with the quality of existing treatment at the facility, and the compliance history of the plant in light of recent plant failures resulting in the release of odors, solid waste and other raw sewage. Citizens of the subdivision are also concerned with whether the area's high aquatic life uses were considered when setting the effluent limits, and whether recreational contact with the surrounding waterways was taken into account.

E. Disputed Issues

There are no disputed issues raised in the hearing requests.

F. Issues of Fact

⁴ Should the hearing requestor explain his personal justicable interest (or reason for objecting to the proposed permit), OPIC may reconsider its position on this matter.

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. There have been no issues raised in the hearing request, though. *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.⁵ Relevant and material issues are those governed by the substantive law under which this permit is to be issued.⁶

The hearing request submitted by Mark Plagens did not raise any relevant and material issues.

H. Issues Recommended for Referral

OPIC does not recommend the Commission refer any disputed issues of fact to the State Office of Administrative Hearings for a contested case hearing.

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

⁵ *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.")

⁶ *Id.*

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, should one be granted, would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

III. CONCLUSION

Due to insufficient alternative-language notice, OPIC recommends remanding this application to the executive director so that alternative language notice requirements may be satisfied. In the alternative, if the Commission disagrees with OPIC's conclusion regarding the sufficiency of notice, OPIC recommends denying the hearing request of Mark Plagens.

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 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 NOV 17 PM 2:46
CHIEF CLERKS OFFICE

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TCEQ DOCKET NO. 2008-1453-MWD**

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