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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

March 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

CHIEF CLERKS OFFICE

2009 MAR - 2 PM 2:40

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

RE: **WOOD-OAK HOLLOW, LLC**  
**TCEQ DOCKET NO. 2008-1700-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, appearing to read "Vic McWherter".

Vic McWherter, Senior Attorney  
Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2008-1700-MWD

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IN THE MATTER OF THE  
APPLICATION OF WOOD-OAK  
HOLLOW, LLC FOR  
TPDES PERMIT NO. WQ0010495109

§  
§  
§  
§

BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY  
CHIEF CLERKS OFFICE

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

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 Requests in the above-referenced matter, and would respectfully recommend referring this matter to the State Office of Administrative Hearings ("SOAH").

**I. INTRODUCTION**

Wood-Oak Hollow, LLC ("Wood-Oak" or "Applicant") has applied to the Texas Commission on Environmental Quality ("TCEQ" or "Commission") for a new water quality permit to authorize the disposal of treated domestic wastewater at a maximum daily average flow of 0.25 million gallons per day ("MGD") in the interim phase and a daily average flow not to exceed 0.5 MGD in the final phase. Under this permit, Applicant would construct and operate the Northwest-Anna Oak Ridge wastewater treatment facility located approximately 1,000 feet south and 1,996 feet west of the intersection of Highway 285 and County Highway 827 in Collin County, Texas. The facility would be operated as an activated sludge process plant in the conventional aeration mode. Treatment units in each phase would include a bar screen, aeration basin, final clarifier, aerobic sludge digester and chlorine contact chamber. The permit would authorize the disposal of sludge at a TCEQ-authorized land application site or co-disposal landfill. in the final phase via surface irrigation.

The facility's treated effluent would be discharged to a ditch, then flow through an unnamed tributary to East Fork Trinity River. These receiving waters then flow into Lake Lavon in the Trinity River basin. The unclassified receiving water uses are no significant aquatic life use for the ditch and the unnamed tributary. The East Fork Trinity River is designated as high aquatic life use. Lake Lavon is designated for high aquatic life use, public water supply and contact recreation. The Executive Director (ED) has conducted tier 1 and tier 2 antidegradation reviews which preliminarily conclude that existing uses will be maintained and no significant degradation of water quality is expected.

Wood-Oak applied for this permit on February 19, 2008. The ED declared the application administratively complete on March 4, 2008. The Applicant published Notice of Receipt of Application and Intent to Obtain a Water Quality Permit on March 18, 2008, in the *Dallas Morning News* and on April 21, 2008 in *Al Dia*. The Applicant published Notice of Application and Preliminary Decision on June 23, 2008 in the *Dallas Morning News* and *Al Dia*. The public comment period ended July 23, 2008. The Chief Clerk mailed the ED's decision and Response to Comments on September 25, 2008. The North Texas Municipal District filed timely requests for contested case hearing by letters submitted on July 3, 2008 and October 24, 2008. The City of Anna filed timely hearing requests by letters dated July 1, 2008 and October 24, 2008. For the reasons discussed below, OPIC recommends granting both of these requests.

## II. APPLICABLE LAW

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 the application. . 30 TEXAS ADMIN. CODE ("TAC") § 55.201(d).

Under 30 TAC Section 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. *Id.* Relevant factors that will be considered in determining whether a person is affected 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.

30 TAC § 55.203(c).

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, 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.

30 TAC § 55.209(e).

### III. DISCUSSION

#### **A. Affected Person Analysis**

The North Texas Municipal District is a regional agency that provides sewer service from District-owned or District-operated wastewater treatment plants located north and east of Dallas. The District states that many of its plants operate in the same river basin as the proposed facility. Many of these facilities are located downstream of Applicant's proposed discharge point. The District is concerned that the proposed plant's operations would result in increased nutrient and contaminant loading in the watershed where the District's plants now operate. The District notes that the proliferation of additional wastewater treatment plants within a single watershed increases the potential for poor operations to create adverse environmental consequences and nuisance odors. The District asserts that regional wastewater services are currently available in this area of the proposed plant. For these reasons, the District questions whether the permitting of this facility complies with the Commission's regionalization policy.

The District is a conservation and reclamation district and political subdivision of the State of Texas, created and functioning under Article XVI, Section 59, of the Texas Constitution, pursuant to Chapter 62, Acts of 1951, 52<sup>nd</sup> Legislature of Texas. The District's enabling legislation authorizes it to acquire, treat, and distribute potable water, and to collect, treat and dispose of wastes, both liquid and solid, in order to reduce pollution, and conserve and develop the natural resources of Texas. The District carries out its duties and provides regional wastewater in the basin where the Applicant proposes to operate and discharge its effluent. The

District is a governmental entity with authority over the protection of this basin and an interest in regionalization and thereby meets the requirements of 30 TAC section 55.203(a)(6). For these reasons, the District is an affected person.

The City of Anna ( the "City") states that it would be adversely affected by Wood-Oak's operations under the proposed permit. The City states that the proposed operations are within its extraterritorial jurisdiction (ETJ). The City further contends that it is a regional retail sewer service provider with the technical, managerial and financial ability to provide sewer service to the area proposed to be served by Wood-Oak's new plant.. The City contends that it is in a better position than Wood-Oak to provide service to areas within its ETJ. The City asserts that it is working with the City of Melissa and the North Texas Municipal Water District to develop a regional solution to wastewater needs in the area proposed to be serviced by Wood-Oak. The City asserts that it has spent millions of dollars to develop such a solution. The City further expresses an interest in ensuring that the proposed facility's discharge parameters are protective of the environment, the receiving stream and the life, safety and welfare of its residents.

Cities have statutory authority to protect public health, to protect water supplies, and to prevent water pollution within their jurisdiction, including their ETJ. Texas Water Code §§ 26.001(17), 26.177; Texas Health & Safety Code §§ 121.003, 341.037. Accordingly, the City is an affected person because it is a governmental entity with statutory authority over issues or interests relevant to this application. Moreover, as a sewer service provider in the area, the City has an interest in regionalization which can be addressed under Texas Water Code Section 26.0282, a statute that applies to this application. Because of the City's stated interests and plans in developing regional solutions to sewer service needs in the area, there is a reasonable relationship between the interest claimed and the activity regulated. 30 TAC §55.203(c)(3).

## **B. Issues Analysis**

The hearing requests raise the following issues:

- 1) Is there a need for the proposed facility and will operation of the proposed plant be consistent with the Commission's regionalization policy?
- 2) Will the facility's operations have an adverse impact on water quality?
- 3) Will the facility's operations under the permit cause offensive odors?
- 4) Will the facility's operations under the permit have an adverse impact on human health?
- 5) Who will own and operate the proposed facility?

### **1. The hearing requestors raise issues disputed by the parties.**

No agreement exists between the parties on the issues stated above. In the Response to Comments, the Executive Director contends that the draft permit adequately considers each of the Requestors' concerns. These issues disputed.

### **2. The hearing requestors raise issues of fact and one issue of law or policy.**

The Requestors raise specific factual issues in its hearing request about water quality, odors, and the need for the proposed facility. As these are issues of fact, rather than issues of law or policy, these issues are appropriate for referral to hearing.<sup>1</sup>

### **3. The hearing requests raise an issue similarly raised in comments on the application.**

The issues that were raised during the comment period have not been withdrawn.<sup>2</sup>

### **4. The hearings requests raise issues that are relevant and material to the Commission's decision on this application.**

Issues 1 through 4 listed above are relevant and material to the Commission's decision on this application under the requirements of 30 TAC sections 55.201(d)(4) and 55.211(c)(2)(A).

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<sup>1</sup> 30 TAC § 55.211(b)(3)(A), (B).

<sup>2</sup> 30 TAC §§ 55.201(c), (d)(4); 55.211(c)(2)(A).

The issues raised by the District and the City of Anna relate directly to whether the Applicant will meet the requirements of applicable substantive law.<sup>3</sup>

Both requestors raise concerns that permitting this facility would be inconsistent with the Commission's policy of regionalization. They contend that there is no need for the proposed facility given proposed areawide or regional waste collection, treatment, and disposal systems. The issue of regionalization is addressed by statutes applicable this application. Texas Water Code Section 26.003 directs the Commission "to encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state." Furthermore, Texas Water Code Section 26.0282 provides that, in considering the issuance, amendment, or renewal of a permit to discharge waste, the commission may deny or alter the terms and conditions of the proposed permit, amendment, or renewal based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order. For these reasons, the issue of whether the proposed facility is consistent with the Commission's regionalization policy is relevant and material to the commission's decision on this application.

Both requestors express concern about the proposed discharge's effect on water quality in the basin where both entities operate or propose to operate other wastewater treatment plants. The provisions of 30 TAC Section 307.1 state that the purpose of the Commission's Chapter 307 rules is to maintain water quality in the State of Texas. Furthermore, 30 TAC Section 309.10

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<sup>3</sup> 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.")

states that the purpose of the Commission's Chapter 309 rules is to minimize possible contamination of surface water and groundwater in the State of Texas. 30 TAC section 309.12 does not allow the Commission to issue a permit for a new facility "unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface water and groundwater." For these reasons, the requestors' concern about the proposed facility's impact on water quality is relevant and material to the Commission's decision on this application.

The City's July 3, 2008 hearing request expresses concerns about potential nuisance odors resulting from the Applicant's operations. In accordance with 30 TAC section 309.13(e) and (g), the Applicant must abate and control nuisance odor in one of three alternative methods, and 'must carry out the nuisance odor prevention plan at all times.' Therefore, the issues regarding whether the facility will cause nuisance conditions is relevant and material to the Commission's decision on the application.

The City's October 24, 2008 hearing request further states an interest in protecting the life, safety and welfare of its residents. The purpose of Chapter 26 of the Texas Water Code is to maintain water quality in the State of Texas consistent with public health. Therefore, the proposed facility's potential impact on human health is relevant and material to the Commission's decision on this application.

The City asserts that the application incorrectly states that the City will operate the facility. The City further alleges the application misrepresents that the Applicant is a public entity, while the Secretary of State's office's records show the Applicant is a private entity. Clearly, the Commission must know who will be responsible for operations of the proposed facility in order to ensure compliance with all operation requirements. 30 TAC §305.48(a)(3).

The issue of who will be owning and operating the facility is relevant and material to the Commission's decision on the application.

OPIC further notes that the District's July 3, 2008 hearing request also expressed concern about the potential for increased traffic. OPIC cannot find that this issue is addressed by the laws governing this proceeding. Therefore, this issue is not relevant and material to the commission's decision and OPIOC has not recommended referral of this issue to SOAH.

### **5. Issues Recommended for Referral to SOAH**

In light of the requirements of 30 TAC Sections 50.115(b) and 55.211(b)(3)(A)(i), OPIC recommends that any referral to the State Office of Administrative Hearings ("SOAH") include the issues enumerated below:

- 1) Is there a need for the proposed facility and will operation of the proposed plant be consistent with the Commission's regionalization policy?
- 2) Will the facility's operations have an adverse impact on water quality?
- 3) Will the facility's operations under the permit cause offensive odors?
- 4) Will the facility's operations under the permit have an adverse impact on human health?
- 5) Who will own and operate the proposed facility?

### **C. OPIC Estimates that the Maximum Expected Duration of Hearing will be Nine Months.**

Commission rule 30 TAC section 50.115(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 proceed longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. In assisting the Commission to state a date by which the

judge is expected to issue a proposal for decision, and as required by 30 TAC section 55.209(e)(7), OPIC estimates that the maximum expected duration of 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

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission grant the contested case hearing requests of the North Texas Municipal Water District and the City of Anna and refer this matter to the State Office of Administrative Hearings for a hearing on the issues described above.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

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#### CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2008, the original and seven true and correct copies of the Office of 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.

*Vic McWherter*  
Vic McWherter

CHIEF CLERKS OFFICE

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