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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 13, 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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 APR 13 PM 3:06
CHIEF CLERKS OFFICE

Re: **FORESTAR USA REAL ESTATE GROUP, INC.**
TCEQ DOCKET NO. 2008-1936-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, appearing to read "Garrett Arthur".

Garrett Arthur, 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. 2008-1936-MWD

2009 APR 13 PM 3:06

**APPLICATION BY
FORESTAR USA REAL
ESTATE GROUP, INC.
PROPOSED PERMIT
NO. WQ0014824001**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

CHIEF CLERKS OFFICE

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

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 hearing request in the above-referenced matter.

I. Introduction

On June 25, 2007, Forestar USA Real Estate Group, Inc. ("Forestar" or the "Applicant") applied to the TCEQ for a new water quality permit. The permit would authorize a new wastewater treatment facility and associated disposal site. Treated effluent would be disposed via a public access subsurface drip irrigation system with a minimum area of 29 acres. The wastewater treatment facility and disposal site would be located at 2303 West Highway 290 in Dripping Springs, Hays County. The facility would serve the Arrowhead Ranch development. The facility and disposal site would be located in the drainage basin of Onion Creek, in Segment No. 1427 of the Colorado River Basin.

Forestar's application was declared administratively complete August 22, 2007. The first notice was published September 9, 2007 in the *Austin American-Statesman*, and the second notice was published July 23, 2008 in the same newspaper. The Executive Director's (ED)

Response to Comments (RTC) was mailed November 18, 2008, and the deadline for hearing requests was December 18, 2008. Save Our Springs Alliance (“SOS”) submitted a timely hearing request.

For the reasons stated herein, OPIC recommends that the Commission deny SOS’ 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.

As provided by 30 TAC § 55.205(a), a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (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.

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.

III. Analysis of Hearing Request

A. Whether the requestor is an affected person

To gain standing as a group, SOS must present at least one member who would individually qualify as an affected person. 30 TAC § 55.205(a)(1). SOS has named member Colin Clark. According to SOS, Mr. Clark regularly swims in Barton Springs Pool and enjoys observing the endangered Barton Springs salamander and other aquatic life in Barton Springs Pool. SOS also states that Mr. Clark enjoys swimming in Barton Creek at the many publicly accessible swimming holes along the creek. Finally, SOS asserts that Mr. Clark's interests are harmed by wastewater effluent polluting Onion Creek and Barton Springs.

While OPIC understands and appreciates Mr. Clark's use and enjoyment of Barton Creek and Barton Springs Pool, OPIC cannot determine whether Mr. Clark is an affected person without further information regarding his location. To judge Mr. Clark's standing, and thereby SOS' standing, OPIC needs to know Mr. Clark's location and distance relative to the proposed treatment plant and disposal site. The facility and

disposal site would be located in the drainage basin of Onion Creek, and SOS asserts that Mr. Clark's interests would be harmed by wastewater effluent polluting Onion Creek. However, SOS has not provided any specific information regarding Mr. Clark's use of Onion Creek or his location relative to Onion Creek. SOS states that many of its members regularly swim and recreate in Onion Creek, but SOS does not state whether Mr. Clark is one of those members. For these reasons, OPIC cannot, at this time, find that Colin Clark would individually qualify as an affected person.

The second requirement for group standing is the interests the group seeks to protect must be germane to the organization's purpose. 30 TAC § 55.205(a)(2). SOS states that the organization is a non-profit public interest corporation committed to protecting the Edwards Aquifer, its springs and contributing streams, and the natural and cultural heritage of its Hill Country watersheds, with special emphasis on the Barton Springs Edwards Aquifer. OPIC finds that the interests raised by SOS are germane to the group's purpose, and SOS has satisfied the second requirement for group standing.

Finally, as required by 30 TAC § 55.205(a)(3), neither the claim asserted by SOS nor the relief requested by SOS requires the participation of individual SOS members.

Because Colin Clark does not currently qualify as an affected person, SOS has not satisfied all three of the § 55.205 requirements for group standing, and therefore, OPIC cannot find that SOS is an affected person in this matter.

B. Which issues raised in the hearing request are disputed

All of the issues raised by SOS are disputed.

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

All of the disputed issues raised by SOS involve questions of fact.

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

All issues raised by SOS 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

SOS' 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

SOS has raised the following issues, all of which are relevant and material to the Commission's decision on this application. Specifically, these issues are relevant and material under the Chapter 222 rules concerning subsurface area drip dispersal systems.

- *Inadequate space with soil, vegetation, and other natural features exists between the proposed drip fields and Onion Creek to allow for proper attenuation of effluent to protect the Edwards Aquifer from pollution.*

This issue concerns buffer zone requirements and is therefore relevant and material under 30 TAC § 222.81.

- *The Applicant has not demonstrated ownership of the effluent disposal site, a long-term lease agreement, or sufficient control of the site that would ensure the system is operated responsibly and without interference.*

This issue concerns application requirements which apply if the owner of the land is not the same as the applicant. The application instructions state that a long-term lease agreement must be provided, and the lease agreement must give the facility owner use of the land for effluent disposal. The issue is therefore relevant and material to the Commission's decision.

- *Rainfall could super-saturate the drip fields and cause runoff of effluent into Onion Creek.*

This issue concerns design criteria and is therefore relevant and material under 30

TAC Chapter 222, Subchapter D.

- *The calculations of wastewater nutrient loading appear to assume uniform application when, in reality, distribution is uneven, as is uptake of water and nutrients.*

This issue concerns hydraulic application rate calculations and is therefore relevant and material under 30 TAC § 222.83.

- *Nitrogen and phosphorous entering the Edward Aquifer and Barton Springs through Onion Creek will cause further degradation of the Barton Springs aquatic habitat.*

This issue concerns effluent quality and is therefore relevant and material under 30 TAC § 222.85.

- *The application attachments do not adequately explain the routing of the effluent to the disposal site.*

This issue concerns administrative procedures and is therefore relevant and material under 30 TAC Chapter 222, Subchapter B.

- *The Applicant's proposed storage capacity is inadequate to ensure irrigation will not occur during saturated conditions and prolonged rain events.*

This issue concerns design criteria and storage and is therefore relevant and material under 30 TAC § 222.127.

- *The application is unclear regarding whether a procedure will be in place to prohibit use of the irrigation fields during irrigation with effluent.*

Because this application is for subsurface drip fields and not surface irrigation fields, public access to the dispersal area during irrigation periods is not limited by

chapter 222. This issue is therefore not relevant and material to the Commission's decision on the application.

- *Homeowners and their families will be exposed to nuisance odors from the facilities.*

Under 30 TAC § 222.151(c), creating a condition at the treatment facility or the drip dispersal zones that contributes to odor is prohibited. Therefore, this issue is relevant and material to the Commission's decision on the application.

- *Groundwater seepage on the property could lead to contamination of wells or springs, and preventative measures will be difficult to achieve with infrequent monitoring of groundwater and the unpredictability of flow paths.*

Under 30 TAC § 222.151(a), seepage out of the root zone is prohibited, and this issue also concerns protection of groundwater under 30 TAC § 222.77. The issue is therefore relevant and material to the Commission's decision.

- *The draft permit does not adequately ensure there will be no discharge of effluent into Onion Creek.*

This issue raises the adequacy of the draft permit to implement the Chapter 222 rules. According to 30 TAC § 222.1, the purpose of Chapter 222 is to maintain the quality of fresh water in the state to the extent consistent with public health, welfare, and the operation of existing industries. The issue is therefore relevant and material to the Commission's decision.

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

OPIC finds that the SOS hearing request does not satisfy all three of the § 55.205(a) criteria for group standing, and OPIC cannot, at this time, recommend granting the request. However, under § 55.205(b), we are requesting that SOS provide an explanation of how the group meets the § 55.205(a) requirements for group standing. If SOS files a timely reply to this response and demonstrates that SOS qualifies as an affected person, OPIC may change its recommendation.

Should the Commission grant a hearing in this matter, OPIC finds that the following issues would be appropriate for referral to the State Office of Administrative Hearings (SOAH):

1. Do the irrigation areas provide adequate space with soil, vegetation, and other natural features to properly attenuate effluent?
2. Has the Applicant demonstrated ownership of the effluent disposal site, a long-term lease agreement, or sufficient control of the site that would ensure the system is operated responsibly and without interference?
3. Does the proposed permit incorporate measures designed to prevent super-saturation of the irrigation fields and migration of wastewater?
4. Has the Applicant correctly performed the calculations of wastewater nutrient loading?
5. Will the proposed activities cause degradation of the Barton Springs aquatic habitat?
6. Do the application attachments adequately explain the routing of the effluent to the disposal site?
7. Is the Applicant's proposed storage capacity adequate to ensure irrigation will not occur during saturated conditions and prolonged rain events?
8. Will homeowners and their families be exposed to nuisance odors from the facilities?
9. Will groundwater seepage on the property lead to contamination of wells or springs?

10. Does the proposed permit adequately ensure there will be no discharge of effluent into Onion Creek?

If the Commission grants a hearing, OPIC recommends a duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
Garrett Arthur
Assistant Public Interest Counsel
State Bar No. 24006771
P.O. Box 13087, MC 103
Austin, Texas 78711
phone: (512) 239-5757
fax: (512) 239-6377

CHIEF CLERKS OFFICE

2009 APR 13 PM 3:06

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2009, 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, electronic mail, or by deposit in the U.S. Mail.


Garrett Arthur

MAILING LIST
FORESTAR USA REAL ESTATE GROUP, INC.
TCEQ DOCKET NO. 2008-1936-MWD

FOR THE APPLICANT:

Barrett Allison, PE
Environmental & Planning Assoc.
7200 Twilight Mesa Dr.
Austin, Texas 78737-3525
Tel: (512) 394-9710
Fax: (512) 394-1537

Gilbert P. Gregory
Bury & Partners-Public Works Inc.
3000 S. 31st St. Ste. 308
Temple, Texas 76502-1852
Tel: (254) 742-2110
Fax: (254) 742-2120

Wayne E. McDonald
Forestar Real Estate Group Inc
1300 S. Mopac Expy
Austin, Texas 78746
Tel: (713) 267-2731
Fax: (713) 267-2794

FOR THE EXECUTIVE DIRECTOR:

Christiaan Siano, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE

RESOLUTION:

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

REQUESTER:

Andrew Hawkins
Save Our Springs Alliance
P.O. Box 684881
Austin, Texas 78768-4881
andrew@sosalliance.org