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March 16, 2009

VIA HAND DELIVERY

Office of the Chief Clerk
ATTN: Agenda Docket Clerk
Mail Code 105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

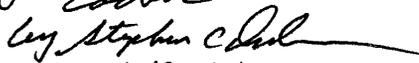
Re: Docket No. 2009-0012-MWD
City of Dripping Springs Permit No WQ0014488002;
Filing Letter

Dear Ms Castañuela

Attached, in accordance with your notice of March 4, 2009, is an original and 7 copies of the City of Dripping Springs' **Response to Hearing Request**. Please file this in the referenced matter, which is scheduled for the Commission's April 8, 2009 agenda.

Please file stamp one copy, and return it to our waiting messenger. Thank you very much.

Sincerely,



Susan G. Zachos *in permission*

CHIEF CLERKS OFFICE

2009 MAR 16 AM 10:23

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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Re: Docket No. 2009-0012-MWD
City of Dripping Springs Permit No WQ0014488002;
City of Dripping Spring's Response to Hearing Request

Dear Ms Castañuela

This firm represents the City of Dripping Springs, the applicant for a "no discharge" permit in the referenced permit application. The only pending hearing request in this matter is by Save Our Springs Alliance ("SOS"). We file this response to that hearing request.

Background and Permit Application. The City is seeking a permit for a wastewater treatment/drip irrigation system to serve a proposed new development approximately 4.4 miles west of the City along U.S. Highway 290. The City negotiated with the developer to construct the plant as a "no discharge" plant, and to allow the City to own and operate the plant. The plant will treat domestic wastewater within the development, and irrigate the treated wastewater on-site through a sub-surface drip irrigation system. It is proposed as a "no discharge" facility.

In addition, the City's utility contract with the developer requires the plant to be constructed to more stringent treatment standards than those required under TCEQ rules and permits for this type of facility. The City obtained the right to own and operate the plant, and took on the responsibility of becoming the permittee, so that the City could assure proper long-term operation of the plant. Finally, the developer agreed to construct the development, including the plant, under the City's conservation development ordinance.

As a policy matter, we would expect SOS to support these actions by the City to protect water quality during development, rather than protest it.

1. No Hearing unless SOS is an “Affected Person”

The Commission’s authority to grant the SOS hearing request is subject to a determination that SOS is an “affected person.” That finding must be based on specific legal requirements for finding that an association or group – like SOS – has associational standing. SOS’s hearing request does not meet those requirements.

a. Texas Water Code Limitations.

Under the Texas Water Code, the TCEQ:

may not grant a request for a contested case hearing unless the commission determines that the request was filed by an affected person as defined by Section 5.115 [of the Texas Water Code].¹

Section 5.115(a) states that an affected person:

means a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. *An interest common to members of the general public does not qualify as a personal justiciable interest.*²

For an entity like SOS, which is an association rather than a person, the Texas Water Code required the Commission to adopt rules for associational standing:

The commission shall adopt rules specifying factors which must be considered in determining whether a person is an affected person in any contested case arising under the air, waste, or water programs within the commission's jurisdiction *and whether an affected association is entitled to standing in contested case hearings.*³

TCEQ adopted rules for “associational standing” under this authority.

b. No Hearing unless SOS meets the TCEQ Rule Requirements.

TCEQ Rules have mandatory conditions that SOS must meet in order to demonstrate that it is an “affected person” and to prevail in its request for a contested case hearing in this matter. SOS

¹ Texas Water Code § 5.556(c)

² Id. § 5.115(a) (emphasis added).

³ Id.

may request a hearing “*only if* the group or association meets all of the following requirements”⁴:

- (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.⁵

SOS is not an “affected person,” and therefore does not have standing to request a contested case hearing on the pending permit unless SOS demonstrates that it meets each of these three requirements for associational standing. As discussed below, SOS’s hearing request does not satisfy these requirements.

c. Request for an “Explanation”

When a group—like SOS – requests a hearing, both the TCEQ’s executive director and the applicant have the right to ask the requestor for “an explanation of how the group or association meets the requirements” of each of the elements of associational standing quoted above.⁶ **The Applicant hereby requests that SOS be required to explain which SOS member “would otherwise have standing to request a hearing in their own right.”** To meet this element of standing, the member identified must have a “personal justiciable interest” in the case, which rises to an interest beyond that of the general public,⁷ and only that person’s justiciable interest may be asserted by the association.

2. SOS is Not an Affected Person under the TCEQ Statutes and Rules.

SOS is required, among other things, to show that “one or more members of the group or association would otherwise have standing to request a hearing in their own right”⁸ In both its initial protest and in its request for rehearing, SOS identified only two individuals: Colin Clark and Doug Wierman. SOS has not made the required showings for either of them.

a. Cited Individuals Do Not Have Standing

Colin Clark. One of the individuals is Colin Clark, who swims in Barton Creek, which lies within Zilker Park, which is within the Austin City limits. But the fact that Mr. Clark enjoys

⁴ 30 Tex. Admin. Code § 55.23(a).

⁵ Id.

⁶ Id. § 55.23(b)

⁷ Tex. Water Code § 5.115(a)

⁸ 30 Tex. Admin. Code § 55.23(a)(1).

swimming in a public park goes no further than the interests of the general public. Be assured that the City of Dripping Springs values and protects Hill Country water resources. In fact, it has taken affirmative steps to do so by applying for this permit and imposing conservation requirements on the development. But, under the TCEQ statutes and rules, Mr. Clark's affiliation with SOS does not confer standing on that association to protest this permit.

Doug Wierman. The second person identified is a Mr. Doug Wierman. In support of its hearing request, SOS asserts (i) the location of Mr. Wierman's property, (i) its relationship to the hydrology in the area, and (iii) general statements that "the use and enjoyment of his home, property and Blue Creek is threatened by the proposed facilities" for various reasons. We respectfully request that SOS demonstrate, first, that Mr. Wierman is one of its members. Next, SOS needs to explain "how and why the requestor believes he or she will be adversely affected."⁹ There is no evidence of Mr. Wierman's position on this permit, including whether even he "believes that he will be affected." He did not protest the application or file objections to the permit. We would also like clarification whether Mr. Wierman lives on the property, or whether the assertions about his "home" involve property in a more distant location.

Irrelevant and Vague Interests. The request for hearing adds that "Mr. Wierman's and other members' scientific, recreational, environmental and aesthetic interests will be harmed by the increased discharge of nutrients."¹⁰ This statement does not confer standing on SOS for two reasons. First, the proposed permit is for a no-discharge, subsurface drip irrigation permit, not a discharge to surface waters. We are concerned that SOS does not even know what kind of permit we are seeking. Second, even if these concerns were valid, they are indistinguishable from those of the general public.

b. Some Interests Cited Are Not "Germane to the Organization's Purpose"

The SOS cannot be heard on an issue unless it can show that the interests it seeks to protect are "germane to the organization's purpose."¹¹ Several of the interests that SOS is seeking to protect are clearly NOT germane to the organization's purpose." Its protest alleges that, in its own words, SOS 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 County watersheds, with special emphasis on the Barton Springs Edwards Aquifer."

Yet, its hearing request states that "Mr. Wierman's use and enjoyment of his home [and] property is threatened by the proposed facilities from . . . devaluation of his property."¹² Its

⁹ Id. § 55.21(d).

¹⁰ SOS Request for Reconsideration at 2 (Jan. 3, 2009); SOS Comments and Request for Contested Case Hearing at 4 (July 22, 2007)

¹¹ 30 Tex. Admin. Code § 55.23(a)(2).

¹² SOS Request for Reconsideration at 2 (Jan. 3, 2009); SOS Comments and Request for Contested Case Hearing at 4 (July 22, 2007)

allegations about devaluation of the market value of private property is neither germane to the purpose of SOS, nor within the TCEQ's jurisdiction in conducting a contested case water quality permit hearing. Thus, SOS should be denied standing to request a contested case hearing to address any private property value issues raised in its hearing requests.

3. The Issues Are Limited

TCEQ should not grant the SOS hearing request. However, if it were to grant the request, the issues considered at a contested case hearing must be limited to those that are:

- (1) relevant and material to the commission's decision on the application; and
- (2) raised in SOS's own hearing requests, and for which SOS's standing has been demonstrated.

By law, if TCEQ grants a protestant's request for a contested case hearing, then TCEQ "*shall*: (1) *limit the number and scope of the issues* to be referred to the State Office of Administrative Hearings for a hearing."¹³ Among other things, the issues must be limited to those "raised during the public comment period"¹⁴

a. Issues Properly Raised in the SOS Requests are Limited to Water Quality.

The issues that are within the TCEQ's jurisdiction in a water quality permit hearing, and that were raised by SOS during the public comment period, all relate to the requirements of Section 309.12 of the TCEQ rules -- "Site Selection to Protect Groundwater or Surface Water." Nothing in the SOS hearing request goes beyond those issues, with a limited exception -- the allegations about private property rights, and about nuisance odors, noise and "visual pollution." However, those issues are either (i) issues outside TCEQ jurisdiction in a case deciding whether to issue a no discharge permit (for example, visual aesthetics and private property values), (ii) do not go beyond the concerns of the general public; or (iii) are not germane to SOS's purpose.

b. Issues Raised in the Withdrawn Hearing Request Cannot be Heard

The TCEQ's authority to refer a matter to SOAH for hearing is limited to issues:

that were not 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*, and that are relevant and material to the commission's decision on the application."¹⁵

¹³ Texas Water Code § 5.556(e).

¹⁴ Id. § 5.556(d)(2).

¹⁵ 30 Tex. Admin. Code § 55.211(b)(3)(A) and (g) (emphasis added).

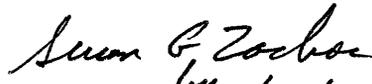
The only other persons who filed a request for hearing on the permit was a family of landowners who settled with the Applicant. Those protestants' requests for hearing were withdrawn on September 23, 2008, before the Executive Director's December 5, 2008 Response Comment. Accordingly, the TCEQ may not refer an issue to hearing unless it was raised in the SOS comments. Any issue raised solely by the withdrawn protest is not eligible for a hearing.

Thus, if the case is referred to hearing, TCEQ should expressly instruct SOAH that the issues are limited to those that were expressly identified in the SOS requests for hearing, but excluding issues raised that are not within TCEQ's jurisdiction in this matter, such as private property values, visual esthetics, and general nuisance odors.

Summary and Conclusion

Because SOS has not met each of the elements of associational standing, its hearing request should be denied. If TCEQ finds that each element of associational standing has been met, and grants the hearing request, then TCEQ must limit the issues to those that meet all of the following criteria: (i) they were expressly raised by SOS in its request for hearing; (ii) they could have been raised by members shown to have standing "to request a hearing in their own right," and (iii) they pertain to water quality issues over which TCEQ has jurisdiction in this matter.

Respectfully submitted,


by Stephen [unclear] w/ permission
Susan G. Zachos

cc: Attached TCEQ Mailing List (via fax)
Andrew Hawkins, Save Our Springs Alliance (via fax at 512-477-6410)

TEXAS
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CHIEF CLERK'S OFFICE

**MAILING LIST
CITY OF DRIPPING SPRINGS
DOCKET NO. 2009-0012-MWD; PERMIT NO. WQ0014488002**

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*Please see attached for complete list
of Requesters and Interested Persons.*

CHIEF CLERKS OFFICE

2009 MAR 16 AM 10:23

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COMMISSION
ON ENVIRONMENTAL
QUALITY

REQUESTER(S)

ANDREW HAWKINS
SAVE OUR SPRINGS ALLIANCE
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