

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*



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

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**  
*Protecting Texas by Reducing and Preventing Pollution*

March 16, 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 MAR 16 PM 2:15  
CHIEF CLERKS OFFICE  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Re: **CITY OF DRIPPING SPRINGS**  
**TCEQ DOCKET NO. 2009-0012-MWD**

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2009-0012-MWD**

**APPLICATION BY**  
**CITY OF DRIPPING SPRINGS**  
**PERMIT NO. WQ0014488002**

§  
§  
§

**BEFORE THE**  
**TEXAS COMMISSION ON**  
**ENVIRONMENTAL QUALITY**

2009 MAR 16 PM 2:15  
CLERK'S OFFICE

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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

**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 the hearing request and request for reconsideration in the above-referenced matter.

**I. Introduction**

On August 16, 2007, the City of Dripping Springs ("City" 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. The wastewater treatment facility and disposal site would serve and be located within the Scenic Greens subdivision approximately 4.4 miles west of Dripping Springs along U.S. Highway 290 in Hays County. The facility and disposal site would be located in the drainage basin of Onion Creek, in Segment No. 1427 of the Colorado River Basin.

The City's application was declared administratively complete September 26, 2007. The first notice was published October 9, 2007 in the *Austin American-Statesman*, and the second notice was published June 23, 2008 in the same newspaper. The Executive Director's (ED) Response to Comments (RTC) was mailed December 5, 2008, and the deadline for hearing

requests and requests for reconsideration was January 5, 2009. Save Our Springs Alliance (“SOS”) timely requested a hearing and reconsideration of the ED’s decision. The TCEQ also received hearing requests from Jene and Karen Glass and Kevin Glass, which were subsequently withdrawn.

For the reasons stated herein, OPIC recommends that the Commission grant SOS’ hearing request and deny SOS’ request for reconsideration.

## **II. Applicable Law**

### **A. Request for Reconsideration**

Section 55.201(e) of the TCEQ procedural rules states that any person may file a request for reconsideration of the ED's decision. The request must expressly state that the person is requesting reconsideration of the ED's decision and give reasons why the decision should be reconsidered. 30 TAC § 55.201(e).

### **B. Hearing Request**

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 two members, Colin Clark and Doug Wierman, but to establish standing, SOS appears to be relying solely on Doug Wierman. According to SOS, Mr. Wierman's property is approximately 1,800 feet from the proposed irrigation field sites, and Blue Creek runs directly through his property. SOS states that nuisance odors, runoff pollution, and water quality degradation would threaten Mr. Wierman's use and enjoyment of his home, property, and Blue Creek. Further, SOS states that Mr. Wierman's scientific, recreational, environmental, and aesthetic interests would be harmed by the increased discharge of nutrients, pesticides, fertilizers, and sediment into Blue Creek, Onion Creek,

Barton Creek, the Edwards and Trinity Aquifers, and Barton Springs. Finally, SOS writes that degradation in the quality of these waters will injure Mr. Wierman's use and enjoyment of these resources.

As indicated by the map prepared by the ED, Mr. Wierman's property is within one mile of the proposed wastewater treatment plant, and it appears that his property is also within one mile of some of the subsurface drip irrigation areas. Mr. Wierman's interest is water quality, and water quality is protected by the Texas Water Code. When combined with his proximity to the proposed plant and disposal areas, Mr. Wierman's water quality interest becomes an interest which is not common to members of the general public. The TCEQ regulates subsurface drip irrigation under 30 TAC, Chapter 222. One of the purposes of Chapter 222 is to prevent underground injection that may pollute fresh water. 30 TAC § 222.1. Therefore, a reasonable relationship exists between Mr. Wierman's water quality interest and the TCEQ's regulation of subsurface drip irrigation. OPIC finds that Doug Wierman 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.

SOS has satisfied the § 55.205 requirements for group standing, and therefore, SOS should be considered 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.

- *The proposed permit will pollute and degrade creeks, aquifers, and associated seeps and springs, and the permit does not adequately ensure that there will be no discharge of effluent to these waters.*

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

- *The irrigation areas are too close to Blue Creek and other sensitive surface waters and groundwater and do not provide adequate space with soil, vegetation, and other natural features to properly attenuate effluent.*

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

- *The soils are too shallow, rocky, uneven, and lacking in storage capacity to provide adequate filtration and attenuation for irrigation of wastewater.*

This issue concerns soil evaluation and is therefore relevant and material under 30 TAC § 222.73.

- *The irrigation areas and facilities are too close to homes and wells in the area, will cause nuisance odors, and harm drinking water supplies.*

This issue concerns site selection and is therefore relevant and material under 30 TAC § 222.71.

- *Loadings of nitrogen, phosphorus, sediment, and toxic chemicals will cause too great a risk of contamination of creeks and aquifers, to the detriment of human health and the vitality of the aquatic organisms living in the creeks, aquifers, and nearby critical environmental features.*

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

- *There is no plan for maintaining the artificial soil depth and thus preventing the erosion of imported soil, sediment flow into creeks and aquifers, and leaching of unabsorbed effluent into creeks and groundwater.*

This issue concerns the site preparation plan and soil evaluation and is therefore relevant and material under 30 TAC §§ 222.73 and 222.75.

- *The proposed permit does not prevent irrigation during rainfall or otherwise incorporate measures designed to prevent supersaturation of the irrigation fields and migration of wastewater.*

This issue concerns design criteria and is therefore relevant and material under 30 TAC Chapter 222, Subchapter D.

- *The proposed permit does not provide adequate soil moisture monitoring and effluent storage capacity.*

This issue concerns design criteria and is therefore relevant and material under 30 TAC Chapter 222, Subchapter D.

**G. Maximum expected duration for the contested case hearing**

For the contested case hearing, OPIC estimates a maximum duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

**IV. Conclusion**

Having found that SOS qualifies as an affected person and has raised disputed issues of fact that are relevant and material to the Commission's decision on this application, OPIC recommends the Commission grant SOS' hearing request.

While SOS states that it is requesting reconsideration of the ED's decision, SOS has provided no bases for its request for reconsideration which are distinct from the bases for its hearing request. An evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the application should be denied based on the issues raised by SOS. OPIC is recommending a hearing on this matter, and the hearing process will create an evidentiary record. However, such record currently does not exist, and OPIC cannot recommend that SOS' request for reconsideration be granted.

OPIC further recommends that the following issues be referred to the State Office of Administrative Hearings for a contested case hearing:

1. Does the proposed permit adequately ensure that there will be no discharge of effluent to creeks, aquifers, and associated seeps and springs?

2. Do the irrigation areas provide adequate space with soil, vegetation, and other natural features to properly attenuate effluent?
3. Do the soils in the disposal areas provide adequate filtration and attenuation for irrigation of wastewater?
4. Will the irrigation areas and facilities cause nuisance odors?
5. Will the irrigation areas and facilities harm drinking water supplies?
6. Will the proposed permit be protective of human health?
7. Will the proposed permit be protective of aquatic organisms living in the creeks, aquifers, and nearby critical environmental features?
8. Will the proposed permit maintain the soil depth?
9. Will the proposed permit prevent the erosion of imported soil?
10. Will the proposed permit prevent sediment from flowing into creeks and aquifers?
11. Will the proposed permit prevent the leaching of unabsorbed effluent into creeks and groundwater?
12. Does the proposed permit prevent irrigation during rainfall or otherwise incorporate measures designed to prevent supersaturation of the irrigation fields and migration of wastewater?
13. Does the proposed permit provide adequate soil moisture monitoring and effluent storage capacity?

For the contested case 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

**CERTIFICATE OF SERVICE**

I hereby certify that on March 16, 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.

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2009 MAR 16 PM 3:15  
CHIEF CLERK'S OFFICE

  
Garrett Arthur

**MAILING LIST**  
**CITY OF DRIPPING SPRINGS**  
**TCEQ DOCKET NO. 2009-0012-MWD**

**FOR THE APPLICANT:**

Susan G. Zachos  
901 S. Mopac Expressway  
Barton Oaks Plaza One, Suite 300  
Austin, Texas 78746  
zachos@zachoslaw.com

**FOR THE EXECUTIVE DIRECTOR:**

John Williams, 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  
johwilli@tceq.state.tx.us

**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  
bbohac@tceq.state.tx.us

**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  
klucas@tceq.state.tx.us

**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