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

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

July 2, 2012

Bridget Bohac, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

**RE: ROCKWALL COUNTY WCID NO. 2  
TCEQ DOCKET NO. 2009-0206-DIS**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Requests 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



**DOCKET NO. 2009-0206-DIS**

**ROCKWALL COUNTY WATER § BEFORE THE  
CONTROL AND IMPROVEMENT §  
DISTRICT NO. 2 § TEXAS COMMISSION ON  
INTERNAL CONTROL §  
NO. 06182008-D05 § ENVIRONMENTAL QUALITY**

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

**To the Members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to the hearing requests in the above-referenced matter.

**I. Background**

In June 2008, TCEQ received a petition for creation of Rockwall County Water Control and Improvement District (WCID) No. 2. The petition was declared administratively complete on June 25, 2008. Notice of the petition was published December 19 and 26, 2008 in the *Rockwall County Herald-Banner*. The public comment period closed January 26, 2009.

TCEQ timely received two hearing requests. The first is from the Rockwall County Commissioners Court and is signed by Rockwall County Judge Chris Florance and Commissioners Jerry Wimpee, Lorie Grinnan, Bruce Beaty, and J. David Magness. The second hearing request is from Texas Media Enterprises, LLC, publisher of the *Rockwall County News*, and Wesley Burnett. For the reasons stated herein, OPIC recommends both hearing requests be denied.

## **II. Applicable Law**

Under Title 30 of the Texas Administrative Code (TAC) § 55.251(a)(4), “affected persons” may request a contested case hearing. Section 55.256(a) defines an affected person as “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” Section 55.256(a) further states, “An interest common to members of the general public does not qualify as a personal justiciable interest.”

Regarding a governmental hearing requestor, § 55.256(b) states, “[G]overnmental entities, including local governments and public agencies, with authority under state law over issues contemplated by the application may be considered affected persons.” To determine whether a requestor is an affected person, section 55.256(c) states that all relevant factors should be considered, including, for governmental entities, their statutory authority over or interest in the issues relevant to the application.

Texas Water Code (TWC) Chapter 51 applies to the creation of a WCID. Rockwall County WCID No. 2 wants to provide sewer service, and that is allowed under TWC §51.331. However, under TWC § 51.333, a petition which includes sewer service must be approved by the TCEQ instead of the county commissioners court. The land proposed to be included in WCID No. 2 is entirely within Rockwall County. As such, TWC §51.021(a) applies and states that the TCEQ shall grant a petition requesting creation of a WCID if it appears that:

- (1) organization of the district as requested is feasible and practicable;
- (2) the land to be included and the residents of the proposed district will be benefited by the creation of the district;
- (3) there is a public necessity or need for the district; and
- (4) the creation of the district would further the public welfare.

Finally, 30 TAC § 55.255(b) states that a hearing request shall be granted if the request is made by an affected person and complies with the form requirements for a hearing request, is timely filed, and is pursuant to a right to hearing authorized by law.

### **III. Analysis of Hearing Requests**

#### *Rockwall County*

As stated in the hearing request, the Commissioners Court of Rockwall County is opposed to the creation of Rockwall County WCID No. 2. The Commissioners Court requests to review all information related to the proposed district and asks that the petitioners for creation of the district submit all relevant information requested by the Court. The Commissioners Court also requests that its opinion be considered by TCEQ.

However, the hearing request provides no reasons for the County's opposition and contains no discussion of the County's statutory authority over or interest in issues relevant to this petition. Under Texas Water Code § 51.021(a), the issues relevant to the creation of a WCID include: (1) whether organization of the district as requested is feasible and practicable; (2) whether the land to be included and the residents of the proposed district will be benefited by the creation of the district; (3) whether a public necessity or need for the district exists; and (4) whether the creation of the district would further the public welfare. Rockwall County's hearing request addresses none of those issues.

Though Rockwall County does not cite TWC § 54.0161, the hearing request appears to rely on this statute. Section 54.0161 concerns county review of the creation of a municipal utility district (MUD) and is found in Chapter 54 of the Texas Water Code. Section 54.0161(a) states that the commissioners court of the county in which the district is to be located may review the petition for creation and other evidence and information relating to the proposed district that the commissioners consider necessary. Subsection (a) also states that petitioners for the creation of a district shall submit to the county commissioners court any relevant information requested by the commissioners court in the event a review is done. Subsection (b) states that in the event of a review, the commissioners court shall submit to the Commission, at least 10 days before Agenda, a written opinion stating whether or not the county would recommend the creation of the proposed district and stating any findings, conclusions, and other information that the commissioners think would assist the Commission in making a final determination on the petition. Finally, subsection (c) states that when deciding on a petition for creation of a MUD, the Commission shall consider the written opinion submitted by the county commissioners. However, the petition at issue is for the creation of a WCID under Chapter 51, not a MUD under Chapter 54. Therefore, §54.0161 does not apply in this matter.

Rockwall County could qualify as an affected person in this matter if the County addressed the issues which are relevant to creation of a WCID, but the County has failed to address those issues. Without further information, OPIC must find that Rockwall County does not qualify as an affected person under TCEQ rules.

Texas Media Enterprises, LLC and Wesley Burnett

Texas Media Enterprises, LLC (TME) and Wesley Burnett are requesting a hearing based on improper publication of notice. According to the hearing request, TME is the publisher of the *Rockwall County News*, and Mr. Burnett is a resident of Rockwall County. Though not stated in the hearing request, TCEQ records indicate that as of December 20, 2008, Mr. Burnett was the publisher of the *Rockwall County News*.

Mr. Burnett is protesting “as an individual Rockwall County resident to whom the requirement of published notice is directed.” TME states, “The *Rockwall County News* is the only newspaper in Rockwall County which meets the Texas statutory legal definition of a ‘newspaper’ by virtue of the fact that it holds the requisite ‘second-class’ or ‘periodical’ permit with the United States Post Office as required by Texas Gov’t Code § 2051.044.”

Mr. Burnett and TME rely entirely on the issue of notice and apparently disagree with the Petitioner’s choice of newspaper. As a result, their hearing request fails to address any of the TWC § 51.021(a) issues relevant to creation of a WCID. Though proper notice is fundamentally important to the public participation process, an interest in proper notice is an interest common to all members of the general public. Therefore, an interest in proper newspaper notice does not qualify as a personal justiciable interest and cannot serve as the basis for affected person status. OPIC finds that Mr. Burnett and TME do not qualify as affected persons under the definition provided in 30 TAC §55.256(a). Further, notice is a jurisdictional issue, and the remedy for improper notice is republication, not the grant of a hearing request.

Although OPIC finds that Mr. Burnett and TME are not affected persons, we will nevertheless consider whether notice in this matter was properly published. The publisher's affidavit indicates notice was published in the *Rockwall County Herald-Banner* on December 19 and 26, 2008. The affidavit also states that the *Rockwall County Herald-Banner* is regularly published or circulated in Rockwall County.

Mr. Burnett and TME have cited Texas Gov't Code § 2051.044, which, in relevant part, reads, "The newspaper in which a notice is published must ... be entered as second-class postal matter in the county where published ...." However, § 2051.044 must be harmonized with § 2051.042. Both sections are found in Subchapter C of Chapter 2051. Section 2051.042 concerns the applicability of Subchapter C and states, "This subchapter applies only to the extent that the general or special law requiring or authorizing the publication of a notice in a newspaper by a governmental entity ... does not specify the manner of the publication ...." For TCEQ notice of a petition to create a WCID, the manner of publication is specified by TWC § 49.011 and the implementing regulation, 30 TAC § 293.12. Section 293.12(b) provides that notice must be published once a week for two consecutive weeks in a newspaper regularly published or circulated in the county where the district is proposed to be located. Therefore, Texas Gov't Code §2051.044 does not apply to TCEQ notice of a WCID petition.

OPIC finds that even if a notice issue could make TME and Mr. Burnett affected persons in this matter, newspaper notice was properly published according to applicable law.

#### **IV. Conclusion**

Having found that Rockwall County, TME, and Mr. Burnett do not qualify as affected persons, OPIC must respectfully recommend the Commission deny the hearing request submitted by the Rockwall County Commissioners Court and the hearing request submitted by TME and Wesley Burnett.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
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## CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2012, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.

  
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Garrett Arthur

**MAILING LIST  
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TCEQ DOCKET NO. 2009-0206-DIS**

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