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July 16, 2012

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

RE: TCEQ Docket No. 2009-0206-DIS; Rockwall County Water Control and Improvement District No. 2; Requests Filed Regarding Internal Control No. 06182008-D05

Dear Ms. Bohac:

Please accept this letter as the formal reply of Texas Media Enterprises, LLC, publisher of *Rockwall County News* ("RCN") to the responses filed regarding the requests for hearing.

RCN requested a hearing as to its issue involving the lack of notice by the petitioner. Lack of notice is a jurisdictional issue, and thus may jeopardize the entire proceeding if not cured. RCN does not request a hearing on the substantive issues involved in the permit process. RCN does request a resolution to its question of law so that proper notice is given not only in this proceeding, but all proceedings before the TCEQ.

In its response the Public Interest Counsel agreed with RCN that proper notice is a fundamental issue to public participation before the TCEQ. RCN respectfully requests the Commission examine and correct this fundamental flaw in the TCEQ notice process in order to avoid jeopardizing this and future dockets on this very basic due process issue.

Background Law:

Texas law is specific regarding the newspaper publication of notice required by Texas governmental bodies. Such notice must be in a "newspaper" as defined by Texas Government Code Sec. 2051.044. As such, in order to be a "newspaper" the publication must possess a periodical (i.e., "second-class") permit issued by the U.S. Postal Service and be mailed at a post office in the county where published. See 2051.044(a)(3).

TCEQ Requirements:

The Texas Water Code Section 49.011 (b) requires publication in a "newspaper" as does Tex. Admin. Code Section 293.12(b)(1) (TCEQ Rule). However, apparently, the Petitioner, as well as

Public Interest Counsel, feel they are free to define “newspaper” as any publication, and not a newspaper as required by Texas law. In taking this position, they rely on Govt. Code Section 2051.042(a) which notes that the section applies only to the extent that the general or special law requiring such notice does not specify the “manner” of the published notice.

This “carved out” exception by the Petitioner and Public Counsel is off base, both legally and factually. The “manner” of publication goes to exactly what it says: the “manner.” Manner goes to whether it is newspaper notice, or some other “manner” of notice, such as in the Texas Register, direct individual notice, bill stuffer, etc. For example, utility cooperatives are allowed under the Utility Code to publish notice by “bill insert.” See Texas Utilities Code Section 53.356. When the “manner” of notice is by bill stuffer, then newspaper notice is not required.

Newspaper Means Newspaper:

State law and TCEQ regulations require published notice in a “newspaper.” Newspaper notice **IS** the “manner” of notice in this proceeding. Therefore, notice must be published in a “newspaper,” not a newsletter, as is expressly specified by statute. Under the Petitioner’s and Public Counsel’s definition, a church newsletter would suffice so long as the publication calls itself a newspaper and claims it is distributed in the affected area.

That is why the Legislature specifically provided an express definition of a “newspaper.” It **MUST** possess a second class postal permit. It **MUST** be mailed at the post office in the city/county wherein it is published. The city/county of publication **MUST** be identified in the ID Statement which **MUST** be printed on one of the first four pages of the newspaper. Postal regulations require that a newspaper **MUST** have “paid” subscribers (not free), and the post office conducts periodic audits to insure its requirements are met and that the publication is indeed a legitimate, legal “newspaper,” meeting all of these requirements.

TCEQ’s current application of a “newspaper” definition offers no such indicia of reliability. However, for a postal-permitted and audited “newspaper,” TCEQ can take judicial notice of reliability pursuant to the reliability requirements specified by an independent federal agency.

By postal fiat, a second-class permitted newspaper is “published” in the city/county where it is delivered to the post office for mailing. The location of publication must be published in the newspaper’s ID statement located on one of its first four pages.

“Circulated” is not the same as “published.” The *New York Times* may be “circulated” to readers in Austin, Texas, (through news stands or the mail) but it is “published” in only one locale – New York City, pursuant to “second-class” postal regulations. Similarly, there are numerous newsletters and other publications (perhaps even other legitimate “newspapers”), which may be “circulated” in Rockwall County. However, there is only one legal newspaper which is both published AND circulated in Rockwall County – the RCN.

Conclusion:

In this proceeding the “manner” of notice required by statute is by publication in a “newspaper” published and circulated in Rockwall County. No such notice was made. As such, proper notice to provide for due process rights has not been met. Publication in RCN was the only available eligible newspaper in which such notice could be given.

Respectfully,

Richards, Elder & Green, L.L.P.

By 

Don R. Richards, SBN 16836400

*Attorneys for Texas Media LLC, publishers of
Rockwall County News*

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2012, a true and correct copy of the foregoing document was sent by either first class mail, electronic mail and/or facsimile to the persons on the attached Mailing List.



Don R. Richards

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