

Bryan W. Shaw, Ph.D., *Chairman*
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

November 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

RE: FANNETT SEWER SERVICE & WATER SUPPLY CORPORATION
TCEQ DOCKET NO. 2009-0363-MWD

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Scott A. Humphrey".

for Scott A. Humphrey, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2009-0363-MWD

IN THE MATTER OF
THE APPLICATION OF
FANNETT SEWER
SERVICE & WATER
SUPPLY
CORPORATION FOR
TPDES PERMIT NO.
WQ0014867001

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
HEARING REQUESTS AND REQUESTS FOR 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 (the Commission or TCEQ) files this Response to Hearing Requests and Requests for Reconsideration in the above-referenced matter. Permit No. WQ0014867001. The proposed permit would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 120,000 gallons per day. The facility would be an activated sludge process plant operated in the extended aeration mode. Treatment units include a lift station, bar screens, aeration basins, final clarifiers, a roll-off sludge dewatering box and a chlorine contact chamber. The draft permit would authorize the disposal of sludge at a TCEQ authorized land application site or co-disposal landfill. The facility has not been constructed.

The effluent limitations in the draft permit, based on a 30-day average, are 10mg/l 5-day carbonaceous biochemical oxygen demand (CBOD₅), 15 mg/l total suspended solids (TSS), 3 mg/l ammonia nitrogen (NH₃-N) and 4.0 mg/l minimum dissolved

oxygen. The effluent must contain a chlorine residual of at least 1.0 mg/l after a detention time of at least 20 minutes based on peak flow.

The treated effluent will be discharged via pipe to Burrell Gully, then to North Fork of Taylor Bayou, then to Taylor Bayou above tidal in Segment No. 0701 of the Neches-Trinity Coastal Basin. The unclassified receiving water uses are limited aquatic life use for Burrell Gully. The designated uses for Segment No. 0701 are intermediate aquatic life uses and contact recreation. The proposed facility will be located 5,890 feet south of the intersection of Highway 365 and Gualding Road in Jefferson County, Texas.

The TCEQ received the permit application on December 11, 2007, and declared it administratively complete on January 7, 2008. The Notice of Application and Intent to Obtain Water Quality Permit (NORI) was published on January 13, 2008 in the *Beaumont Enterprise*. Due to significant public interest, TCEQ originally scheduled a public meeting for September 30, 2008, but re-scheduled the meeting in the aftermath of Hurricane Ike. A combined Notice of Application and Preliminary Decision (NAPD) and Notice of Public Meeting were published on October 20, 2008 in the *Beaumont Enterprise*. The rescheduled public meeting was held on December 11, 2008 and the original public comment period ended at the close of the meeting. The original Response to Comment (RTC) was filed on February 5, 2009.

In response to the various notices, the TCEQ received numerous requests for a contested case hearing and requests for reconsideration of the ED's decision. These requests were set for consideration on the Commission's May 20, 2009 agenda. Prior to the agenda date, it was determined that the permit file in the Office of the Chief Clerk did not contain accurate maps showing the proposed location of the facility. Therefore, the

ED filed a Motion to Remand on May 15, 2009. The permit file was appropriately updated and the Applicant published a combined NORI and NAPD on July 24, 2009 in the *Beaumont Enterprise*. The new comment period ended on August 24, 2009. The Chief Clerk mailed the ED's Revised Response to Comments on September 16, 2009. Dorothy Kubicek filed an additional request for reconsideration on September 30, 2009.

As discussed below, OPIC recommends that the Commission deny the requests for reconsideration and grant the hearing requests of Lloyd & Chris Betar; Barbara & Roland Blanchard; Janette & Earl Callahan; Hope Colston; Ronnie & Debbie Colston; Joyce Hankamer; Sharon Harvey; Jackie & Jerry Jordan; G.C. Kessler; Lindsay & Glen Kiker; Dorothy & Joe Kubicek; Chris Matak; Mr. & Mrs. Bobby Thornton; Candy Melancon; Charlotte Rainey; James Walsh; Beth & James McGown; and Missy & Eric Viator.

II. APPLICABLE LAW

As the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of Texas Water Code Section 5.556, added by Act 1999, 76th Leg., ch. 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed

issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of the application. 30 TEXAS ADMIN. CODE ("TAC") § 55.201(d).

Under 30 TAC Section 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." This justiciable interest does not include an interest common to the general public. *Id.* Relevant factors that will be considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions 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.

30 TAC § 55.203(c).

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application. 30 TAC § 55.211(c).

Accordingly, responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;

- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment 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;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

House Bill 801 also allows for another procedural mechanism, a request for reconsideration. Therefore, following the ED's technical review and consideration of comments, a person may file a request for reconsideration, a request for a contested case hearing, or both. TEX. WATER CODE § 5.556; 30 TEX. ADMIN. CODE ("TAC") § 55.201(e). Any person may file a request for reconsideration of the ED's decision. 30 TAC § 55.201(e). A request for reconsideration must state the reasons why the decision should be reconsidered. *Id.* Responses to requests for reconsideration should address the issues raised in the request. 30 TAC § 55.209(f).

III. DISCUSSION

A. Analysis of Requests for Reconsideration

Timely requests for reconsideration have been filed by Dorothy Kubicek and by Chris Betar. Ms. Kubick raises concerns about whether affected property owners were properly notified about the applicant's plans for accessing the facility and how such access might affect the property interests of neighboring landowners. She raises further concerns about the impact of discharges of contaminated wastewater to the Kubicek property which abuts the facility. Chris Betar also expresses concern about the impact of the facility on nearby property. While OPIC is sympathetic to the concerns raised by these requestors, the assertions in these requests regarding the impact on water quality

and neighboring properties require further development and evidentiary support before OPIC could conclude that the application should be denied on these grounds. In light on the valid hearing requests which have been filed and which are discussed more fully below, OPIC is recommending that the Commission grant a contested case hearing to develop these issues. Furthermore, as noted in the ED's Revised Response to Comments, the permit would not authorize any invasion of private property rights. For these reasons, OPIC recommends that the Commission deny the requests for reconsideration.

B. Determination of Hearing Requesters' Affected Person Status

The TCEQ received identical timely hearing requests (form letters) from the following: L.J. Bergeron; Barbara & Roland Blanchard; Chad Blanchard; Earl & Janette Callahan; John Callahan; Ronnie & Debbie Colston; Hope Colston; James Derouen; Christine Edmonds; John Floyd; Joyce Hanhamer; Sharon Harley; Jackie & Jerry Jordon; G.C. Kessler; Anita & Homer Kiker; Glenn & Lindsey Kiker; Leonard King; Dorothy & Joe Kubicek; Susan LeBlanc; Roy Leger; Bert Manning; Chris Matak; Beth & James McGown; Candy Melancon; Cathy Pennell; Charlotte Rainey; Mr. & Mrs. Bobby Thornton; Ann Tully; Eric & Missy Viator; Joey Villemez; James Walsh; Jim Wingate; Darwin Wood; and Wayne Wright. In addition, Lloyd & Chris Betar requested a contested case hearing and a request for reconsideration of the ED's decision. As discussed above, Dorothy Kubicek also filed separate letters requesting reconsideration of the ED's decision.

1. The Form Letter

The hearing requesters using the form letter state that the proposed construction site for this facility is adjacent to Burrell Gully and will discharge treated sewage and

toxic waste. The area is prone to flooding and is not feasible for the plant. The letter further states that the foul odor emitted from the plant and quantity of water released could adversely affect the health and quality of life among the citizens living on Burrell Wingate Road and a nearby subdivision. Furthermore, according to the letter, the parties involved in the construction of this plant would benefit by developing the Green Acres Subdivision; therefore, the plant should be built nearer to the property intended to be served, not Burrell Gully.

Each letter was signed by the hearing requester, who also provided an address and a telephone number. Since the requesters themselves do not describe the location of their property with respect to the location of the facility or the route of the discharge, OPIC must rely on information provided by the Executive Director and the Applicant. OPIC first notes that the Kubiceks and the Colstons (Ronnie & Debbie) are specifically identified by the Applicant as landowners in very close proximity to the facility and the discharge route.

The form letter expresses concerns regarding potential odors and adverse health effects, both of which are justiciable issues in this application. Based on the ED's map,¹ OPIC concludes that in addition to the Kubiceks and the Colstons, there are several hearing requesters that could be adversely impacted by nuisance odors resulting from the operation of the facility and the discharge: Barbara & Roland Blanchard; Janette & Earl

¹ Fannett Sewer and Water Supply Company (Permit No. WQ0014867001), "Map Requested by TCEQ Office of Legal Services for Commission Agenda," (Oct. 29, 2009). OPIC's analysis is based on the proximity of the Kubicek property drawn on the map and shown as being adjacent to the facility, rather than the narrative description of the Kubiceks as being located 14.5 miles from the facility when identified as requestor no. 17. OPIC assumes that the Beaumont residential address stated on the Kubicek hearing request is a location separate from the Kubick property drawn on the map and shown as being adjacent to the facility. OPIC is recommending that the Commission find that the hearing requesters who are affected persons are those who live within one mile of the proposed facility and either live adjacent to the facility or sufficiently close to the facility or to the discharge route that they may potentially be affected by nuisance odors.

Callahan; Hope Colston; Joyce Hankamer; Sharon Harvey; Jackie & Jerry Jordan; G.C. Kessler; Lindsay & Glen Kiker; Chris Matak; Mr. & Mrs. Bobby Thornton; Candy Melancon; Charlotte Rainey; James Walsh; Beth & James McGown; and Missy & Eric Viator. Without any additional information, OPIC cannot conclude that the remaining hearing requesters who submitted a form letter are affected persons entitled to a contested case hearing. If the other requesters provide further information regarding where they reside in relationship to the facility or the discharge, OPIC will reconsider its recommendation.

2. Lloyd & Chris Betar

Lloyd and Chris Betar own property right beside the proposed location for the facility. They are concerned that after excess amounts of rain, the Burrell Gully backs up onto their property. If there is a constant outflow of wastewater from the sewage plant, they are concerned it will back up onto their property. They are also concerned about odor emanating from the property and believe a more suitable location for the plant will be other than their area (Burrell Wingate Road) because they will not use it.

The Betars' property abuts the proposed facility. They have expressed concerns regarding odor and potential water quality on their property. A reasonable relationship exists between the interests they are claiming and the activity that is the subject of this application. The application could have an impact on their property and on a natural resource. OPIC concludes that the Betars are affected persons entitled to a contested case hearing.

C. Issues Raised in the Hearing Requests

The following issues have been raised in the hearing requests:

- (1) Will proposed discharge permit cause adverse health impacts?;
- (2) Will the proposed facility cause potential odor problems?; and
- (3) Will the proposed discharge adversely impact water quality?

D. Issues raised in Comment Period

All of the issues raised in the hearing requests were raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c) and (d)(4), 55.211(c)(2)(A).

E. Disputed Issues

There is no agreement between the requesters and the Applicant or Executive Director on the issues raised in the hearing requests. Regarding impacts on health, the ED states that the draft permit includes effluent limitations that do not violate the Texas Surface Water Quality Standards for the protection of surface water, groundwater, aquatic and terrestrial life, and human health. Concerning water quality, the ED states that no significant degradation of water quality is expected in water bodies with exceptional, high, or intermediate aquatic life uses downstream, and existing uses should be maintained and protected as long as the Applicant operates and maintains the facility according to TCEQ rules and the requirements of the draft permit. With respect to odors, the ED states the Applicant has complied with buffer zone requirements that should control nuisance odors.

F. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable

requirements.² Whether the proposed discharge may cause adverse health impacts is an appropriate question of fact for referral to the State Office of Administrative Hearings (SOAH). Whether the proposed discharge may adversely impact water quality is an appropriate question of fact for referral to SOAH. Whether the proposed facility may cause potential odor problems is an appropriate question of fact for referral to SOAH.

G. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.³ Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.⁴

The proposed permit must comply with Chapter 307 Texas Surface Water Quality Standards, which require that the proposed permit is adequately protective of human health and water quality.⁵ Therefore, issues relating to health impacts and water quality are relevant and material issues to the Commission's decision regarding the issuance of this permit. In addition, the Applicant is required to control and abate nuisance odor under 30 TAC § 309.13(e). Therefore, potential nuisance odor is a relevant and material issue to the Commission's decision regarding the issuance of this permit.

² 30 TAC 55.211(c)(2)(A)

³ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

⁴ *Id.*

⁵ See 30 TAC § 307.1

H. Issues Recommended for Referral

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

1. Will the proposed discharge cause adverse health impacts?
2. Will the proposed discharge adversely impact water quality?
3. Will the proposed facility cause potential odor problems?

I. Maximum Expected Duration of Hearing

Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC recommends that the hearing requests filed by the following persons with the above referenced issues be granted: Lloyd & Chris Betar; Barbara & Roland Blanchard; Janette & Earl Callahan; Hope Colston; Ronnie & Debbie Colston; Joyce Hankamer; Sharon Harvey; Jackie & Jerry Jordan; G.C. Kessler; Lindsay & Glen Kiker; Dorothy & Joe Kubicek; Chris Matak; Mr. & Mrs. Bobby Thornton; Candy Melancon;

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TCEQ DOCKET NO. 2009-0363-MWD

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