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

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

July 14, 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

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2009 JUL 14 AM 9:34  
CHIEF CLERKS OFFICE

**RE: CITY OF GATESVILLE  
TCEQ DOCKET NO. 2009-0545-SLG**

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request for a Contested Case Hearing and Reconsideration of Executive Director's Decision in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Scott A. Humphrey".

Scott A. Humphrey, Attorney  
Assistant Public Interest Counsel

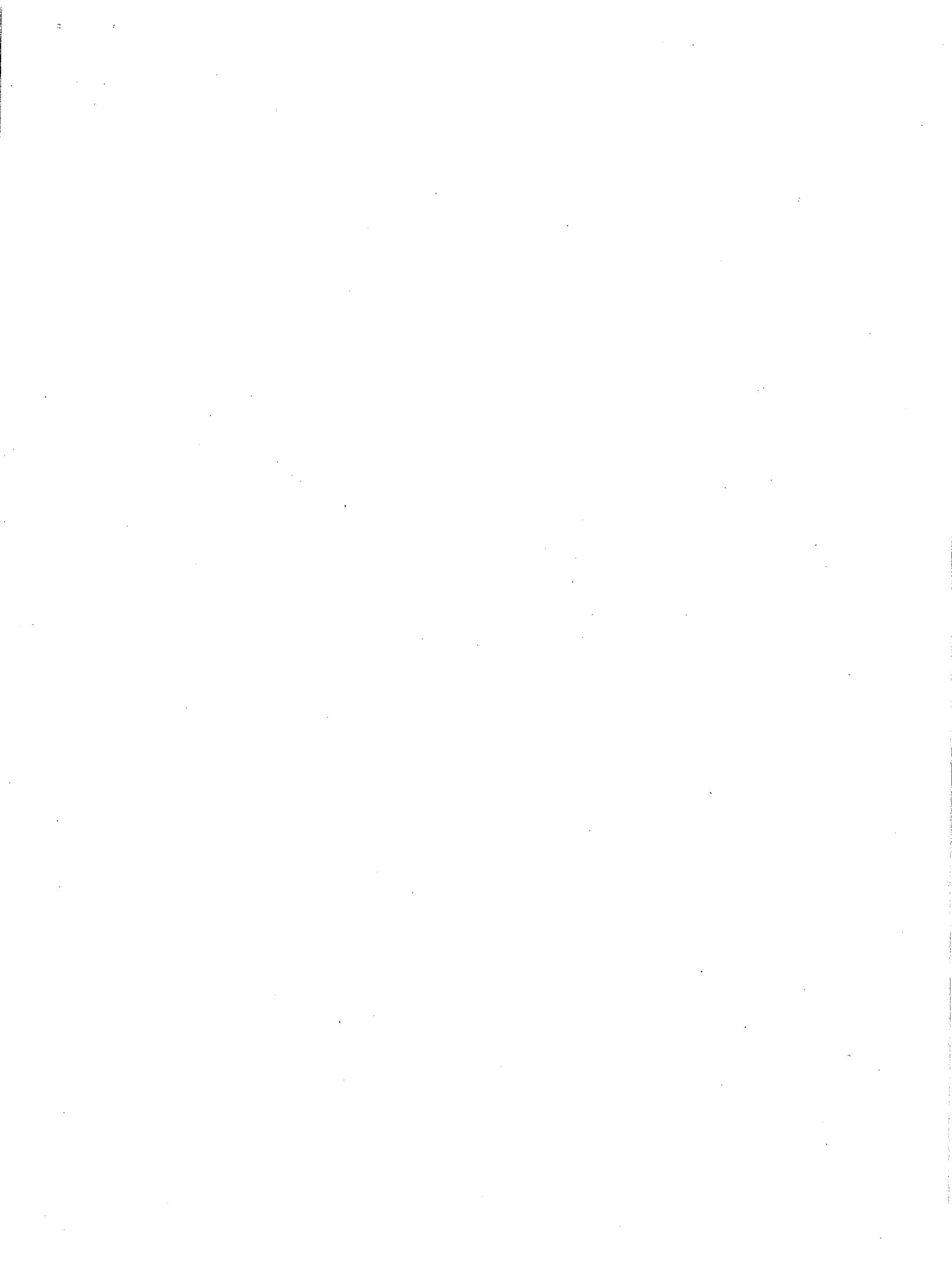
cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2009-0545-SLG

2009 JUL 14 AM 9:34

IN THE MATTER OF THE  
APPLICATION OF THE CITY OF  
GATESVILLE FOR RENEWAL OF  
PERMIT NO. WQ0004464000

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BEFORE THE TEXAS  
COMMISSION ON CHIEF CLERKS OFFICE  
ENVIRONMENTAL QUALITY

**OPIC'S RESPONSE TO REQUEST FOR A CONTESTED CASE HEARING AND  
RECONSIDERATION OF THE EXECUTIVE DIRECTOR'S DECISION**

TO THE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to the Request For Hearing and Reconsideration of the Executive Director's (ED's) Decision in the above-referenced matter.

**I. INTRODUCTION**

The City of Gatesville (Gatesville or Applicant) has applied to the TCEQ for the renewal of an existing permit that authorizes the beneficial land application of wastewater treatment plant sewage sludge at a rate not to exceed 8.5 dry tons per acre per year. The proposed land application site is approximately 25 acres within an approximately 51.5 acre tract located on the Gatesville Airport property, approximately one mile southwest of the intersection of State Highway 116 and U.S. Highway 84 in Coryell County, Texas. The permit does not authorize any discharge of pollutants into or adjacent to waters in the State. The proposed land application site is located in the drainage area of the Leon River Below Proctor Lake in Segment No. 1221 of the Brazos River Basin.

The TCEQ received the permit application on November 26, 2007 and the Executive Director declared the application administratively complete on February 11, 2008. The Notice of Receipt and Intent to Obtain a Beneficial Land Use Permit was published on April 12, 2008 in

the *Gatesville Messenger*. The ED completed the technical review of the application and prepared a preliminary decision and draft permit on November 17, 2008. The Applicant published the Notice of Application and Preliminary Decision in the *Gatesville Messenger* on December 20, 2008. The public comment period closed on January 20, 2009.

In response to the notices, the TCEQ received one<sup>1</sup> request for a contested case hearing and request for reconsideration of the ED's decision<sup>2</sup> from Don Strieber. OPIC recommends granting Mr. Strieber's request for a contested case hearing and referring this matter to the State Office of Administrative Hearings (SOAH). OPIC recommends denial of the request for reconsideration.

## II. REQUIREMENTS OF APPLICABLE LAW

Because Gatesville's application was declared administratively complete after September 1, 1999, it is subject to the requirements of Tex. Water Code Chapter 5, Subchapter M, Environmental Permitting Procedures, §§ 5.551 to 5.556, added by Acts 1999, 76<sup>th</sup> Leg., Ch. 1350 (commonly known as House Bill 801) as well as the TCEQ procedural rules that implement House Bill 801. The public participation procedures available under House Bill 801 include opportunities for filing requests for reconsideration of the executive director's decision and requests for contested case hearing.

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<sup>1</sup> On July 8, 2009, OPIC received an undated letter from Debra Sloane requesting reconsideration of the ED's decision. OPIC confirmed that the Office of the Chief Clerk received the same letter the same day. This request is untimely and will not be considered in OPIC's response.

<sup>2</sup> Within his hearing request, Mr. Strieber states, "These issues cited below constitute reasons why the Executive Director (ED) should reconsider issuing the permit." OPIC interprets this statement as a request for reconsideration of the Executive Director's decision.

Under the applicable statutory and regulatory requirements, a person requesting a hearing must file the request in writing with the Chief Clerk no later than 30 days after the Chief Clerk's transmittal of the ED's response to comments. 30 TAC § 55.201(c). The request must also 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 application. 30 TAC § 55.201(d).

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." This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will 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 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.

In addition, Texas Health & Safety Code § 361.121(c) specifies that in the case of a Class B Sludge application permit, an owner of land located within one-quarter mile of the proposed land application unit who lives on that land is an affected person. 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).<sup>3</sup>

Accordingly, pursuant to 30 TAC § 55.209(e), 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.

A request for reconsideration is a procedural mechanism that allows for the Commission's review of the Executive Director's decision on an application. A person may file a request for reconsideration or a request for contested case hearing or both no later than 30 days

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<sup>3</sup> A hearing request cannot be based on an issue raised solely in comments that have been withdrawn by written letter filed with the Chief Clerk prior to the filing of the executive director's response to comments. 30 TAC § 55.211(c)(2)(A).

after the Chief Clerk's transmittal of the Executive Director's decision and response to comments. Tex. Health & Safety Code § 382.056(m)-(n); Tex. Water Code § 5.556; 30 TAC § 55.201(e). Responses to requests for reconsideration should address the issues raised in the request. 30 TAC § 55.209(f).

### III. DISCUSSION

This application is for a permit renewal. There are several types of applications, including renewals, for which there is no right to a contested case hearing.<sup>4</sup> However, a renewal of a beneficial land use permit is not included among the enumerated renewals for which there is no right to a hearing. Furthermore, Tex. Health & Safety Code § 361.121 contains no limitations on the right to a contested case hearing for the renewal of this type of permit. Therefore, OPIC concludes that there is a right to a contested case hearing regarding this renewal.

#### A. Determination of Affected Person Status

As previously stated, Tex. Health & Safety Code § 361.121(c) provides that in the case of a Class B Sludge application permit, an owner of land located within one-quarter mile of the proposed land application unit who lives on that land is an affected person. This provision applies to Gatesville's draft permit, which includes an authorization for the application of Class B sludge.

Don Strieber, the sole hearing requestor, indicates that his air, land and water have all been adversely impacted by the existing permit, and these concerns have been documented by the TCEQ Waco Regional Office. He states that this is an airport sludge disposal site, and offensive

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<sup>4</sup> See 30 TAC § 55.201(i)

sludge odors emanate from the site. He also claims that there is not enough information to determine the long term public health effects from the sludge site. In addition, he is concerned about pollutants migrating into the public waterways from the application site and that there are currently no preventive measures taken by Gatesville to prevent sludge contaminated rainwater runoff from the airport site. He also says that the land application sludge disposal is not consistent with current land use, both residential and business, in close proximity to the airport site.

Mr. Strieber does not indicate how close he lives to the land application site. Based on maps provided by the ED, it is difficult to determine with certainty that Mr. Strieber falls within the quarter-mile distance. Even if Mr. Strieber is just outside the one-quarter mile distance, OPIC notes that the statute does not preclude any hearing requester residing more than one-quarter of a mile away from demonstrating they have a personal justiciable interest.<sup>5</sup> Mr. Strieber raises concerns regarding odors, health effects and potential water contamination, interests that are protected by the law under which this application will be considered. Because of his close proximity, a reasonable relationship exists between the interest claimed and the activity regulated. The regulated activity is likely to impact his health and his use of natural resources. Therefore, OPIC recommends a finding that Mr. Strieber is an affected person entitled to a contested case hearing.

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<sup>5</sup> In cases where the legislature has created an *exclusive* class of affected persons, the legislature has explicitly expressed this intent. See, *i.e.*, Texas Health & Safety Code § 382.058(c), setting forth that “only” those persons residing within 440 yards of a proposed concrete batch plant may request a hearing on such an application as an affected person. Health & Safety Code § 361.121(c) does not contain such exclusive and limiting language.

## **B. Issues Raised in the Hearing Requests**

The hearing requests filed by the Don Strieber raise the following issues:

- (1) Will the proposed permit create a nuisance condition?;
- (2) Will operation of the facility adversely affect human health?; and
- (3) Will the proposed permit adversely impact water quality?

### **1. Relevant and Material Issues**

The issues raised are relevant and material to the Commission's decision under the requirements of 30 TAC §§55.201(d)(4) and 55.211(c)(2)(A). Concerns regarding potential nuisance conditions, health impacts of the permitted facility and potential impacts to groundwater and surface water are all relevant and material to the Commission's decision on the application because they are addressed by the substantive law governing this application, are within the jurisdiction of the TCEQ and can be addressed in a hearing on the pending application. These issues raised by the requesters relate to whether the applicant will meet the requirements of applicable substantive law.<sup>6</sup>

### **2. Issues Of Fact**

The issues stated above involve questions of fact and, therefore, they are appropriate for referral to hearing.<sup>7</sup>

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<sup>6</sup> 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.").

<sup>7</sup> 30 TAC Section 55.211(b)(3)(A) and (B).

### 3. Issues Disputed

No agreement exists on the relevant and material issues of fact raised by the hearing requesters. In response to the concerns raised by the requesters, the ED has found that the permit will not create a nuisance condition<sup>8</sup>, will not adversely impact health<sup>9</sup> and will protect against groundwater contamination.<sup>10</sup> Mr. Strieber has not withdrawn his request and the issues set forth above remain disputed.

### 4. Issues Raised During the Comment Period

All of the above issues were raised in timely filed comments that have not been withdrawn.

### 5. Issues Recommended for Referral To Hearing:

OPIC recommends that the following issues be referred to SOAH for a contested case hearing:

- (1) Will the proposed permit create a nuisance condition?;
- (2) Will the proposed permit adversely impact health?; and
- (3) Will the proposed permit adversely impact water quality?

### C. Recommended Expected Duration of Hearing

Section 50.115(d) of the TCEQ's rules requires the Commission to specify the maximum

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<sup>8</sup> Executive Director's Response to Comments, Pgs. 4-5

<sup>9</sup> *Ibid.*, Pg. 7

<sup>10</sup> *Ibid.*, Pgs. 2-3

expected duration of the hearing in its order when referring a matter to the State Office of Administrative Hearings. The rules specify that the Commission must state the duration of the hearing from the preliminary hearing to the Administrative Law Judge's issuance of the Proposal for Decision (PFD). OPIC estimates that the maximum expected duration of a hearing on this matter would be nine (9) months from the date of the preliminary hearing until the issuance of the PFD.

#### **IV. REQUEST FOR RECONSIDERATION**

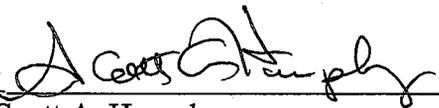
In his letter for a contested case hearing, Mr. Strieber also requested reconsideration of the ED's decision. The request for reconsideration, just like the hearing request, includes several issues over which the TCEQ has jurisdiction. However, an evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the permit should be denied or modified based on these concerns. While OPIC cannot recommend that the Commission grant the request for reconsideration, these issues will be further developed for the Commission's consideration during the hearing process.

#### **IV. CONCLUSION**

OPIC respectfully recommends that the Commission grant the hearing requests filed by Don Strieber and refer to SOAH the issues set forth above with a maximum hearing duration of nine (9) months. OPIC further recommends the Commission deny the request for reconsideration.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
Scott A. Humphrey  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of July, 2009, the original and seven true and correct copies of the foregoing was served upon the Chief Clerk of the TCEQ and a true and correct copy on all persons listed on the attached Mailing List via hand delivery, Intra-Agency Mail or by deposit in the U.S. Mail.

  
Scott A. Humphrey

2009 JUL 14 AM 9:34  
CHIEF CLERKS OFFICE  
TEXAS  
COMMISSION  
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QUALITY

**MAILING LIST  
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TCEQ DOCKET NO. 2009-0545-SLG**

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