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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 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

RE: **AQUA WATER SUPPLY CORPORATION**
TCEQ DOCKET NO. 2009-0896-MWD

Dear Ms. Castañuela:

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

Sincerely,

Scott A. Humphrey by

Scott A. Humphrey, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2009-0896-MWD

IN THE MATTER OF THE APPLICATION OF AQUA WATER SUPPLY CORPORATION FOR PERMIT NO. WQ0014833001	§ § § §	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO REQUESTS FOR HEARING

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Response to Hearing Requests in the above-referenced matter.

I. INTRODUCTION

On July 9, 2007, the TCEQ received an application from South Central Water Company for proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014833301 to authorize the discharge of treated domestic wastewater at a daily average flow rate not to exceed 750,000 gallons per day (gpd). On November 19, 2008, the TCEQ received an amended application from Aqua Water Supply Corporation (Aqua or Applicant) listing Aqua as the sole Applicant. The Applicant also amended the application by reducing the daily average flow from the three phases (50,000, 150,000 and 750,000 gpd) to two phases (50,000 gpd in the interim phase and 250,000 gpd in the final phase). The proposed wastewater treatment facility would serve the Double Eagle Ranch Service Area and would be located approximately 1.25 miles north of the intersection of Old 71 and Highway 71 in Bastrop County, Texas.

The Double Eagle Ranch Wastewater Treatment Facility would be an activated sludge process plant operated in the complete mix single state nitrification mode. Treatment units would include bar screens, aeration basins, final clarifiers, sludge digesters and a chlorine contact

chamber. The Applicant has not constructed the facility. The draft permit would authorize the disposal of sludge at a TCEQ authorized land application site or co-disposal landfill.

The effluent limitations in both phases of the draft permit, based on a 30-day average, are 5 mg/l Carbonaceous Biochemical Oxygen Demand ($CBOD_5$), 5 mg/l Total Suspended Solids (TSS), 2 mg/l Ammonia-Nitrogen (NH_3-N), 1 mg/l Total Phosphorus, 126 colonies *E. coli* per 100ml and 4.0 mg/l minimum dissolved oxygen (DO). The effluent would contain a chlorine residual of at least 1.0 mg/l and would not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow. The effluent limitations in the draft permit would be designed to maintain and protect the existing instream uses.

The treated effluent would be discharged to Moss Branch; then to Dry Creek; then to the Colorado River Below Town Lake in Segment No. 1428 of the Colorado River Basin. The unclassified receiving water uses are high aquatic life uses for Moss Branch and Dry Creek. The designated uses for Segment No. 1428 are exceptional aquatic life uses, public water supply and contact recreation. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses would not be impaired by this permit action. A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in Segment No. 1428, which has been identified as having exceptional aquatic life use. Existing uses would be maintained and protected.

The TCEQ received the original permit application on July 9, 2007, and the Executive Director (ED) declared it administratively complete on July 20, 2007. The Notice of Application and Intent to Obtain Water Quality Permit (NORI) was published on August 25, 2007 in *The Bastrop Advertiser*. The Notice of Application and Preliminary Decision (NAPD) was published on October 11, 2007 in *The Bastrop Advertiser*. The TCEQ held a public meeting on July 15,

2008, and the public comment period ended at the close of the meeting. Due to significant public interest, Aqua filed an amended application on November 19, 2008 listing itself as the sole applicant. On February 5, 2009, the Applicant published a combined NORI and NAPD in Spanish in *Ahora si!* and in English in *The Bastrop Advertiser*. The Applicant also published the combined notice on February 6, 2009 in the *Austin American-Statesman*. The extended public comment period ended on March 9, 2009.

In response to the various notices, the TCEQ received timely hearing requests from the following: River Crossing Improvement Association; Darren S. Carroll; Rick Clemens; William & Darlene Pendell; Bennie & Elizabeth Wallace; and Lori Zimmerman. OPIC recommends granting all of the requests for a contested case hearing and referring the matter to the State Office of Administrative Hearings (SOAH).

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 § 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).

II. DISCUSSION

A. Affected Person Analysis

1. River Crossing Improvement Association (RCIA)

RCIA's hearing request was submitted by the following board members: President Catherine E. Roberts; Vice President Bryce A. Johnson; Secretary Marcy Bernasconi; Treasurer Bill Pendell; and Director Dinah Van Peski. They live in the River Crossing subdivision located next to the Double Eagle Ranch on which the proposed sewage treatment plant would be located, and they are all members of the association. They claim that a number of properties in River Crossing will be adversely affected by the proposed facility as they would be subject to noise, vibrations and other air pollution that would impact their ability to enjoy the amenities provided within the community such as outside activities in the natural habitat that River Crossing provides. They are concerned about how increased noise from the proposed facility would impact their quality of life. They express concern about how the facility will impact the roadrunners, armadillos, deer and other wildlife that move along their farm homes and freely walk the trails near the Lower Colorado River banks. They also are concerned about the adverse environmental impact that the proposed facility would have on the well-being of the many species of marine life that have been discovered in Moss Branch Creek, the primary stream into which the proposed facility would discharge, as well as the Lower Colorado River itself. RCIA would prefer the facility to be located farther away from River Crossing with noise barriers, vibration limitations and visibility screening requirements.

According to 30 Texas Admin. Code (TAC) § 55.205, 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. RCIA states in its letter that it speaks for its entire membership and for the residents of River Crossing. The request also states that the signatories to the letter are members of the organization. Although the letter states that they live in the River Crossing Subdivision located next to the Double Eagle Ranch on which the proposed sewage treatment plant would be located, RCIA does not identify any one specific resident's relative distance from the facility. However, William Pendell, who filed a separate hearing request, provided adequate information for the ED to map his residence and determine his distance from the proposed facility. Based on the map provided by the ED, it appears that Mr. Pendell lives less than one-half mile from the location for the proposed facility.

OPIC concludes that RCIA is an affected person entitled to a contested case hearing. As evidenced by the map prepared by the ED, RCIA member Pendell is located within one-half mile from the proposed facility. The association's timely filed hearing requests express concern about the discharge's potential impact on area wildlife as well as recreational uses.

RCIA has a personal justiciable interest that is not common the public. 55 TAC § 55.203(a). Based on the proximity of at least one of its members' residences and the proposed discharge's impact on area wildlife and recreational use, the regulated activities are likely to have an impact on RCIA's interests. 30 TAC §55.203(c)(9-11). These interests are protected under the law governing this application. Furthermore, the relief the association seeks would not require the individual participation of any specific member in the case. Therefore, OPIC recommends finding that RCIA is an affected person entitled to a contested case hearing.

2. Darren A. Carroll

Mr. Carroll provides his address on his hearing request and states he lives less than one-half mile from the site of the proposed facility. Beyond that, his hearing request is substantially similar to that provided by RCIA.

OPIC concludes that Mr. Carroll is an affected person entitled to a contested case hearing. Based on the map provided by the ED, it appears that he resides approximately one-half mile from the location of the proposed facility. He has a personal justiciable interest that is not common the public. 55 TAC § 55.203(a). Based on the proximity of his residence and the proposed discharge's impact on area wildlife and recreational use, the regulated activities are likely to have an impact on Mr. Carroll's interests. 30 TAC §55.203(c)(9-11). Therefore, OPIC recommends finding that Mr. Carroll is an affected person entitled to a contested case hearing.

3. Rick Clemens

Mr. Clemens provides his address on his hearing request and states he lives less than one mile from the site of the proposed facility. Other than that, his hearing request is substantially similar to that provided by RCIA and Mr. Carroll.

OPIC concludes that Mr. Clemens is an affected person entitled to a contested case hearing. Based on the map provided by the ED, it appears that he resides less than one-half mile from the location of the proposed facility. He has a personal justiciable interest that is not common the public. 55 TAC § 55.203(a). Based on the proximity of his residence and the proposed discharge's impact on area wildlife and recreational use, the regulated activities are likely to have an impact on Mr. Clemens' interests. 30 TAC §55.203(c)(9-11). Therefore, OPIC recommends finding that Mr. Clemens is an affected person entitled to a contested case hearing.

4. William and Darlene Pendell

The Pendells indicate they live in the River Crossing subdivision located next to the Double Eagle Ranch on which the proposed sewage treatment plant would be located. They provide an address on their hearing request. Their subdivision is bordered by the Colorado River. The Moss Branch Creek is at least twenty feet wide and significantly deep. They state the creek runs through the subdivision, and a creek bed is at the back of their property. They are concerned about the environmental impact on water quality and potential flooding issues.

As discussed in the analysis of the RCIA, OPIC concludes that the Pendells are affected persons entitled to a contested case hearing. Based on the map provided by the ED, it appears they live less than one-half mile from the proposed site. Their concern regarding the environmental impact of the discharge on the creek is an interest protected by the law under which this application will be considered. The discharge is likely to have an impact on the creek. Therefore, OPIC recommends finding that the Pendells are affected persons entitled to a contested case hearing.

5. Bennie and Elizabeth Wallace

The Wallaces provide their address on their hearing request. They express concerns about impacts from accidental discharges on Moss Creek as well as potential odors emanating from the plant.

The map provided by the ED shows that the Wallaces live between one-half and one mile from the location of the proposed facility. They have a personal justiciable interest that is not common to members of the general public. Impacts from accidental discharges as well as potential nuisance odors from the facility are interests that are protected by the law under which this application will be considered. There is a likely impact from the proposed discharge on

Moss Creek, and nuisance odors could impact the use of their property. OPIC recommends finding that the Wallaces are affected persons entitled to a contested case hearing.

6. Lori Zimmerman

Ms. Zimmerman provides an address on her hearing request and states she lives less than one-quarter of a mile from the location of the proposed facility. Other than that, her hearing request is substantially similar to the one submitted by RCIA, Mr. Carroll and Mr. Clemens.

OPIC concludes that Ms. Zimmerman is an affected person entitled to a contested case hearing. Based on the map provided by the ED, it appears that she resides approximately one-quarter of a mile from the location of the proposed facility. She has a personal justiciable interest that is not common the public. 55 TAC § 55.203(a). Based on the proximity of her residence and the proposed discharge's impact on area wildlife and recreational use, the regulated activities are likely to have an impact on Ms. Zimmerman's interests. 30 TAC §55.203(c)(9-11). Therefore, OPIC recommends finding that Ms. Zimmerman is an affected person entitled to a contested case hearing.

B. Issue Analysis

The hearing requests raise the following issues:

1) Will the proposed discharge adversely impact Moss Branch Creek?
2) Will the proposed discharge adversely impact area wildlife?
3) Will the proposed discharge cause nuisance odors?
4) Is the permit adequately protective in the event of an accidental discharge?
5) Will the proposed permit adversely affect use and enjoyment of property?

1. The hearing requestors raise issues disputed by the parties.

No agreement exists between the parties on the issues set forth above. In his Response to Comments, the ED states that the draft permit sets effluent limits that are protective of water

quality and will not damage the ecosystem, impair recreational uses or cause health problems.[1] Regarding nuisance odors, the ED does not anticipate such problems because Aqua is in compliance with the buffer zone requirements.[2]. Regarding accidental discharges, the ED states the Applicant is required to take steps to minimize that possibility, such as maintaining adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failures.[3]

2. The hearing requesters raise issues of fact.

Issues 1-5 above involve issues of fact appropriate for referral to the State Office of Administrative Hearings.

3. The hearing requests raise issues raised in comments on the application.

All of the issues set forth above were raised in timely filed comments.

4. The hearing requests raise issues which are relevant and material.

The hearing requests raise issues which are relevant and material to the Commission's decision on this application under the requirements of 30 TAC sections 55.201(d)(4) and 55.211(c)(2)(A). Interests related to the protection of wildlife and use and enjoyment of property are addressed by Texas Water Code Chapter 26 of the Texas Water Code, the law governing this application. Therefore, these issues are relevant and material to the Commission's decision on the application. The application must comply with Texas Surface Water Quality Standards, which are designed to protect surface water, groundwater, aquatic and terrestrial life as well as human health. The buffer zone requirements set out in 30 TAC § 309.13 are designed to prevent

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[1] ED's Response to Comment No. 1, p. 4
[2] ED's Response to Comment No. 4, p. 7
[3] ED's Response to Comment No. 7, pgs. 9-10

nuisance odors. Finally, regarding accidents, the Applicant is required to take certain steps to minimize the possibility of an accidental discharge of untreated wastewater.

OPIC notes that the hearing requests also raised several issues that are not relevant to the disposition of this permit application. They include: noise, vibrations and visual aesthetics as they relate to this permit application; the desire of the protesters to relocate the plant and/or the outfall; and issues related to flooding. OPIC does not recommend that any of these issues be referred to SOAH.

5. Issues recommended for referral to SOAH

In light of the requirements of 30 TAC sections 50.115(b) and 55.211(b) (3) (A)(i), OPIC recommends that any referral to the State Office of Administrative Hearings ("SOAH") include the issues enumerated below:

1) Will the proposed discharge adversely impact Moss Branch Creek?
2) Will the proposed discharge adversely impact area wildlife?
3) Will the proposed discharge cause nuisance odors
4) Is the permit adequately protective in the event of an accidental discharge?
5) Will the proposed permit adversely affect use and enjoyment of property?

C. OPIC Estimates that the Maximum Expected Duration of Hearing will be Nine Months.

Commission rule 30 TAC section 50.115(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 proceed longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. In assisting the Commission to state a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC Section 55.209(e) (7), OPIC estimates that the maximum expected duration of hearing on this application would be

nine months from the first date of the preliminary hearing until the proposal for decision is issued.

III. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel recommends granting all of the requests for contested case hearing with the above-reference issues. OPIC recommends a maximum expected hearing duration of nine months.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2009, the original and seven true and correct copies of the foregoing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

_____
Scott A. Humphrey

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TCEQ DOCKET NO. 2009-0896-MWD

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