

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 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: LAS LOMAS MUNICIPAL UTILITY DISTRICT NO. 4
TCEQ DOCKET NO. 2009-1026-MWD**

Dear Ms. Castañuela:

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 that reads "James B. Murphy" followed by a small flourish.

James B. Murphy, Attorney
Assistant Public Interest Counsel

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 P.O. BOX 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

P.O. Box 13087 Austin, Texas 78711-3087 512-239-1000 Internet address: www.tceq.state.tx.us

TCEQ DOCKET NO. 2009-1026-MWD

**IN THE MATTER OF THE
APPLICATION OF LAS LOMAS
MUNICIPAL UTILITY DISTRICT
NO. 4 FOR TPDES PERMIT
NO. WQ0014803001**

§
§
§
§
§

**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

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

TO THE HONORABLE 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 Requests for Hearing in
the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

A. Background of Facility

Las Lomas Municipal Utility District No. 4 of Kaufman County (Applicant) has applied
for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit
No. WQ0014803001, to authorize the discharge of treated domestic wastewater at a final annual
average flow not to exceed 1,500,000 gallons per day (gpd), with an interim I volume not to
exceed a daily average flow of 250,000 gpd and an interim II volume not to exceed a daily
average flow of 875,000 gpd. Subsequently, Executive Director (ED) staff received additional
information regarding the receiving stream, and reduced the maximum permitted flow to
500,000 gpd in order to protect instream uses and maintain minimum dissolved oxygen in the
stream.

The proposed wastewater treatment facility will serve the Las Lomas development. It will be located approximately 2.5 miles southwest of the intersection of State Highway 20 and Farm-to-Market Road (FM) 148 at the confluence of Big Brushy Creek and Terry Creek in Kaufman County, Texas. The treated effluent will be discharged to Terry Creek, thence to Big Brushy Creek, thence to King's Creek, thence to Cedar Creek Reservoir in Segment No. 0818 of the Trinity River Basin. The unclassified receiving water uses are limited aquatic life use for Terry Creek and high aquatic life use for Big Brushy Creek. The designated uses for Segment No. 0818 are contact recreation, public water supply, and high aquatic life use.

The facility will be an activated sludge process plant operated in the conventional aeration mode. Treatment units in all phases include bar screens, aeration basins, final clarifiers, aerobic sludge digesters, chlorine contact chambers, and in the final phase dechlorination facilities. The facility has not been constructed.

B. Procedural Background

TCEQ received this application on May 4, 2007. On May 30, 2007, the ED declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on June 14, 2007 in the *Terrell Tribune*. The ED completed the technical review of the application, and prepared a draft permit. The ED issued the Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) on September 20, 2007, and it was published on October 4, 2007 in the *Terrell Tribune* and on October 23, 2007 in Spanish language in *La Prensa Comunidad*. On November 6, 2007, the TCEQ received a letter from Applicant's engineer explaining that he was unable to find a Spanish language publication for the NORI at the time of its issuance and that *La Prensa Comunidad* was relatively new to the area.

The TCEQ received a public meeting request from District 4 State Representative Betty Brown, and a Notice of Public Meeting was published on January 9, 2008 in the *Terrell Tribune*. The public meeting was held on February 21, 2008.

Subsequent to the public meeting, Applicant discovered it had not properly mailed notice to the required landowners. The ED re-issued a combined NORI and NAPD and sent it to those persons on the corrected mailing list on June 25, 2008. The public comment period ended on July 25, 2008. Representative Brown requested a second public meeting on July 31, 2008, which she withdrew on January 23, 2009. On May 29, 2009, the ED filed its decision and Response to Comments, which the Office of Chief Clerk mailed on June 2, 2009. The deadline to request a contested case hearing was July 2, 2009.

The TCEQ received timely comments and requests for a contested case hearing from: (1) Andres and Agripina Benavidez on January 18, 2008 and July 30, 2007, (2) Andres and Rhonda Benavidez on January 18, 2008 and July 30, 2007 in nearly identical letters to those submitted by Andres and Agripina Benavidez on the same dates, (3) Milowe and Janice Jungjohann on June 28, 2007 and February 22, 2008, (4) James and Patricia Flewellen on July 13, 2007, (5) Jack Herring on July 2, 2007, (6) Zoe Howland on July 12, 2007, (7) Karen and Michael Johnson on July 19, 2007, (8) Jonathan and Julie McDougal on July 2, 2007, and (9) Steve and Nelda Timmons on January 18, 2008 and July 30, 2007. OPIC recommends granting the hearing requests of Andres and Agripina Benavidez, Andres and Rhonda Benavidez, and Milowe and Janice Jungjohann. OPIC recommends denying the hearings requests of James and Patricia Flewellen, Jack Herring, Zoe Howland, Karen and Michael Johnson, Jonathan and Julie McDougal, and Steve and Nelda Timmons.

II. APPLICABLE LAW

This application was declared administratively complete on May 30, 2007. Because 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 House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. WATER CODE (TWC) § 5.556).

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 TEX. ADMIN. CODE (TAC) § 55.201(d).

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." 30 TAC § 55.203(a). This justiciable interest does not include an interest common to the general public. *Id.* Relevant factors 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 and safety of the person, and on the 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 of 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).

III. DISCUSSION

A. Determination of Affected Person Status

1. Benavidez Family

Andres and Agripina Benavidez and Andres and Rhonda Benavidez timely filed requests for a contested case hearing. They list their address as 9024 F.M. 148, Terrell 75160, and state that the proposed facility is located in the middle of their neighborhood. Applicant lists Andres and Agripina Benavidez and this address as Tract 6 on the Adjacent Landowner List submitted

with the application. They express concern about nuisance odors and noise from the facility and adverse affects on views, property value, human health, livestock, pets, and the environment.

The Benavidez family's interests in water quality are protected by the law which governs this application. 30 TAC § 55.203(c)(1). Because of the location of their property relative to receiving waters and the facility, there is a reasonable relationship between their interest in protecting water quality and the wastewater activities to be regulated under the permit. 30 TAC § 55.203(c)(3). In addition, there is a likely impact on their health, safety, and use of their property and nearby natural resources due to the proximity of the proposed facility and discharge route. 30 TAC § 55.203(c)(4) and (5). For these reasons, OPIC concludes Andres and Agripina Benavidez and Andres and Rhonda Benavidez are affected persons entitled to a contested case hearing.

2. Milowe and Janice Jungjohann

Milowe and Janice Jungjohann timely filed requests for a contested case hearing. They list their address as 9601 N. FM 148, Terrell 75160, and state they live about 1000–1700 feet from the proposed facility. Applicant lists Mr. Jungjohann and this address as Tracts 15 and 16 on the Adjacent Landowner List submitted with the application.

They state that the permit proposal is disturbing and express concerns related to flooding problems, nuisance odors, visual impacts, and adverse effects on air quality. They ask whether their property will be built up with soil to prevent flooding if Applicant does so for the proposed facility and when the proposed facility will be constructed and begin operation. They suggest Applicant find an alternate site outside of the residential area. They are also concerned about accidental discharges due to line breaks.

The Jungjohanns' interests in water quality are protected by the law which governs this application. 30 TAC § 55.203(c)(1). Because of the location of their property relative to receiving waters and the facility, there is a reasonable relationship between their interest in protecting water quality and the wastewater activities to be regulated under the permit. 30 TAC § 55.203(c)(3). In addition, there is a likely impact on their health, safety, and use of their property and nearby natural resources due to the proximity of the proposed facility and discharge route. 30 TAC § 55.203(c)(4) and (5). For these reasons, OPIC concludes Milowe and Janice Jungjohann are affected persons entitled to a contested case hearing.

3. Jack Herring

Jack Herring timely filed a request for a contested case hearing. He lists his address as 8077 Willow Lane, Terrell 75160, and states that he lives in a neighborhood near Brushy Creek, presumably referring to Big Brushy Creek, a portion of the discharge route. He is concerned about flooding problems and adverse effects on human health, particularly the health of children playing in Big Brushy Creek.

In his hearing request, Mr. Herring does not state any concerns particular to his health or relevant to the Commission's consideration of effects on his property, and does not disclose the location of his property relative to the receiving waters other than that he lives in a nearby neighborhood. As a result, his interests appear to be "common to members of the general public," and do not qualify as personal justiciable interests. 30 TAC § 55.203(a). Accordingly, OPIC concludes Mr. Herring is not an affected person entitled to a contested case hearing.

4. Jonathan and Julie McDougal

Jonathan and Julie McDougal timely filed a request for a contested case hearing. They list their address as 8066 Willow Lane, Terrell 75160. They express concern about adverse

effects on the community and surrounding environment, and request an environmental impact study.

The McDougals do not state any concerns particular to their health or property in their hearing request, and do not disclose the location of their property relative to the receiving waters. As a result, their interests appear to be “common to members of the general public,” and do not qualify as personal justiciable interests. 30 TAC § 55.203(a). Accordingly, OPIC concludes Jonathan and Julie McDougal are not affected persons entitled to a contested case hearing.

5. James and Patricia Flewellen

James and Patricia Flewellen filed a timely request for a contested case hearing. They list their address as 8149 CR 272, Terrell 75160, and state that the permit proposal is disturbing. The Flewellens do not state any concerns particular to their health or property in their hearing request, and do not disclose the location of their property relative to the receiving waters. As a result, their interests appear to be “common to members of the general public,” and do not qualify as personal justiciable interests. 30 TAC § 55.203(a). Accordingly, OPIC concludes James and Patricia Flewellen are not affected persons entitled to a contested case hearing.

6. Zoe Howland

Zoe Howland filed a timely request for a contested case hearing. She lists her address as 2812 FM 987, Kaufman 75142, and states that the permit proposal is disturbing. Ms. Howland does not state any concerns particular to her health or property in her hearing request, and does not disclose the location of her property relative to the receiving waters. As a result, her interests appear to be “common to members of the general public,” and do not qualify as personal justiciable interests. 30 TAC § 55.203(a). Accordingly, OPIC concludes Zoe Howland is not an affected person entitled to a contested case hearing.

7. Karen and Michael Johnson

Karen and Michael Johnson filed a timely request for a contested case hearing. They list their address as 8141 CR 272, Terrell 75160, and state that the permit proposal is disturbing. The Johnsons do not state any concerns particular to their health or property in their hearing request, and do not disclose the location of their property relative to the receiving waters. As a result, their interests appear to be “common to members of the general public,” and do not qualify as personal justiciable interests. 30 TAC § 55.203(a). Accordingly, OPIC concludes Karen and Michael Johnson are not affected persons entitled to a contested case hearing.

8. Steve and Nelda Timmons

Steve and Nelda Timmons filed timely requests for a contested case hearing. They list their address as 4226 Bass Pro Dr. #402, Garland 75043, and state that the proposed facility is located in the middle of their neighborhood. They express concern about nuisance odors and noise from the facility and adverse affects on views, property value, human health, livestock, pets, and the environment.

Although they state valid concerns regarding the proposed facility, the address provided by the Timmons is located in Garland approximately 16 miles northwest of the facility site in Terrell. As a result, it is unclear how the proposed facility would have any likely impact on their health, safety, or property. 30 TAC § 55.203(c)(4). Furthermore, based on the location of their property, it does not appear a reasonable relationship exists between the interest claimed and the activity regulated. 30 TAC § 55.203(c)(3). Accordingly, OPIC concludes Steve and Nelda Timmons are not affected persons entitled to a contested case hearing.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing requests:

1. Whether the proposed facility will create nuisance odors. (Benavidez, Jungjohann, Timmons)
2. Whether the proposed facility will adversely affect human health and the environment. (Benavidez, Herring, McDougal, Timmons)
3. Whether the draft permit adequately protects against accidental discharge. (Jungjohann)
4. Whether the proposed facility will create noise adversely affecting nearby property owners. (Benavidez, Timmons)
5. Whether the proposed facility will adversely affect views. (Benavidez, Jungjohann, Timmons)
6. Whether the proposed facility will reduce property values. (Benavidez, Timmons)
7. Whether the proposed facility will contribute to flooding problems. (Herring, Jungjohann)
8. Whether the proposed facility will adversely affect air quality. (Jungjohann)
9. Whether the proposed facility is properly sited in a residential area. (Jungjohann)
10. Whether Applicant should prepare an environmental impact study. (McDougal)

C. Issues Raised in the Comment Period

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

D. Disputed Issues

There is no agreement between the hearing requestors and the ED on the issues raised in the hearing requests.

E. 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. 30 TAC § 55.211(c)(2)(A). All of the issues presented are issues of fact appropriate for referral to

SOAH, except for Issue No. 10 which is an issue of law. An environmental impact study is not required for a wastewater discharge permit under the TWC or Commission rules.

F. 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. *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”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307 and 309, as well as under specific rules related to wastewater systems found at 30 TAC Chapters 30 and 217. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. Furthermore, the proposed permit must comply with 30 TAC §§ 305.122(c), 307.1 and 309.10, which prohibit injury to private property and invasion of property rights and require minimization of exposure to nuisance conditions. In addition, Applicant is required to control and abate nuisance odor under 30 TAC §§ 307.4(b)(1) and 309.13(e). Therefore, Issue Nos. 1–3 relating to health and environmental impacts, accidental discharge risks, and potential nuisance odors are relevant and material issues to the Commission's decision regarding the issuance of this permit.

On the other hand, Issue No. 4 related to noise, Issue No. 5 related to views, Issue No. 6 related to property values, Issue No. 7 related to flooding, and Issue No. 8 related to air quality are not relevant and material because the TWC and Commission rules do not require consideration of these impacts when reviewing an application for a domestic wastewater treatment facility. Although 30 TAC §§ 309.10–309.14 set out siting requirements for domestic wastewater plants, they do not prohibit siting in a residential area, and there is no land use compatibility requirement for such a facility. Thus, Issue No. 9 related to siting in a residential area is not relevant and material. As discussed above in Section III.E., there is no requirement under state law to prepare an environmental impact study for a wastewater discharge permit, and thus Issue No. 10 is not relevant and material to the Commission’s decision on this permit.

G. Issues Recommended for Referral

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

1. Whether the proposed facility will create nuisance odors.
2. Whether the proposed facility will adversely affect human health and the environment.
3. Whether the draft permit adequately protects against accidental discharge.

H. Maximum Expected Duration of Hearing

Commission Rule 30 TAC § 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 TAC § 55.209(d)(7), OPIC

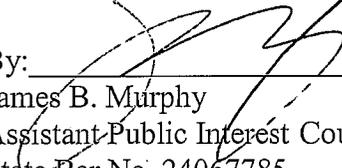
estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC recommends granting the hearing requests of Andres and Agripina Benavidez, Andres and Rhonda Benavidez, and Milowe and Janice Jungjohann on the issues referenced in Section III.G above. OPIC recommends denying the hearings requests of James and Patricia Flewellen, Jack Herring, Zoe Howland, Karen and Michael Johnson, Jonathan and Julie McDougal, and Steve and Nelda Timmons. OPIC further recommends a hearing duration of nine months.

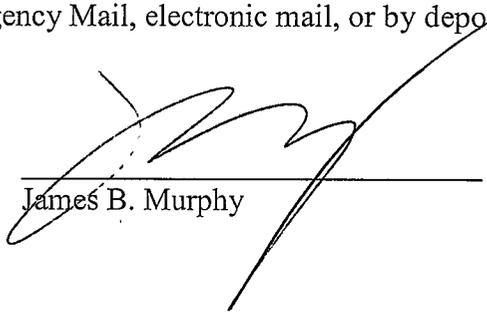
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: 
James B. Murphy
Assistant Public Interest Counsel
State Bar No. 24067785
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-4014 Phone
(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2009 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing was 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, electronic mail, or by deposit in the U.S. Mail.



James B. Murphy

MAILING LIST
LAS LOMAS MUNICIPAL UTILITY DISTRICT NO. 4
TCEQ DOCKET NO. 2009-1026-MWD.

FOR THE APPLICANT:

Angela Stepherson
Coats Rose Yale Ryman & Lee
5420 LBJ Freeway, Suite 1300
Dallas, Texas 75240-6299
Tel: (972) 982-8450
Fax: (972) 982-8451

Yanbo Li
Petitt and Associates, Inc.
300 Municipal Drive
Richardson, Texas 75080-3541

Adam Conway, P.E.
Petitt and Associates, Inc.
300 Municipal Drive
Richardson, Texas 75080-3541
Tel: (214) 221-9955
Fax: (214) 340-3550

FOR THE EXECUTIVE DIRECTOR:

Bob Brush, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

Kent Trede, Technical Staff
Texas Commission on Environmental Quality
Water Quality Division, MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-1747
Fax: (512) 239-4430

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE

RESOLUTION:

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

REQUESTERS:

See attached list.

AGRIPINA & ANDRES BENAVIDEZ
PO BOX 2245
TERRELL TX 75160-0042

AGRIPINA & ANDRES BENAVIDEZ
9024 N FM 148
TERRELL TX 75160

ANDRES & RHONDA BENAVIDEZ
9024 N FM 148
TERRELL TX 75160-7418

JAMES & PAT FLEWELLEN
8149 COUNTY ROAD 272
TERRELL TX 75160-7525

JACK HERRING
8077 WILLOW LN
TERRELL TX 75160-6803

ZOE HOWLAND
2812 FM 987
KAUFMAN TX 75142-5324

KAREN & MICHAEL JOHNSON
8141 COUNTY ROAD 272
TERRELL TX 75160-7525

JANICE & MILOWE JUNGJOHANN
9601 N FM 148
TERRELL TX 75160-6524

JONATHON & JULIE MCDOUGAL
8066 WILLOW LN
TERRELL TX 75160-6836

NELDA & STEVE TIMMONS
1800 EASTFORK LN
WYLIE TX 75098-7796