

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 25, 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: SOUTHERN HORIZONS, L.P.
TCEQ DOCKET NO. 2009-1027-MWD

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Vic McWherter".

Vic McWherter, Senior Attorney
Public Interest Counsel

cc: Mailing List

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. 2009-1027-MWD

**IN THE MATTER OF
THE APPLICATION OF
SOUTHERN HORIZONS,
L.P.
FOR WATER QUALITY
PERMIT NO.
WQ0014922001**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

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

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Response to Request for Hearing in the above-referenced matter.

I. INTRODUCTION

Southern Horizons, L.P. (Applicant), 12793 Highway 59, Splendora, Texas 77372, has applied to the TCEQ for proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014922001 to authorize operation of a new wastewater treatment plant which would discharge treated domestic wastewater at a volume not to exceed a daily average flow of 120,000 gallons per day. The facility would be an activated sludge process plant operated in the complete mix mode with single stage nitrification. Treatment units would include a lift station, bar screen, aeration basin, final clarifiers, two aerobic sludge digesters and a chlorine contact chamber. According to information available in the Chief Clerk's Office and published notices, the facility will

be located 3,300 feet southeast of the intersection of Highway 59 and King Port Drive in Montgomery County.

Treated effluent would be discharged to Cow Branch and then flow to East Fork San Jacinto River in Segment No. 1003 of the San Jacinto River Basin. The unclassified receiving water use is no significant aquatic life use for Cow Branch. The designated uses for segment No. 1003 are high aquatic life uses, public water supply and contact recreation. The Executive Director (ED) conducted an antidegradation review which concluded that existing water quality uses will not be impaired.

The application was received on August 15, 2008 and was declared administratively complete on October 17, 2008. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published in the *Conroe Courier* on November 14, 2008. The Executive Director (ED) completed the technical review of the application and prepared a draft permit and the Notice of Application and Preliminary Decision (NAPD) was published in the *Conroe Courier* on March 6, 2009. The Chief Clerk of the TCEQ mailed the Decision of the Executive Director and the Executive Director's Response to Comments (RTC) on June 9, 2009. The TCEQ has received one timely hearing request from Lewis A. Haraway. For the reasons stated below, OPIC recommends that the Commission grant Mr. Haraway's request and refer to the State Office of Administrative Hearings the issues listed in Section II H.

II. ANALYSIS OF REQUEST FOR CONTESTED CASE HEARING

A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 5.556 added by Acts

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 application. 30 TEXAS ADMINISTRATIVE 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. 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.

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, 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.

B. Determination of Affected Person Status

Lewis A. Haraway owns property located approximately one mile downstream along the proposed discharge route. Maps provided by both the ED and the Applicant confirm the location of Mr. Haraway's property. In his letter dated November 17, 2008, Mr. Haraway raises the issue of whether the proposed discharge route is adequate to hold the effluent proposed for discharge by the Applicant. He expresses concern about whether the area of the proposed discharge has adequate drainage and whether his property may be harmed by being inundated with contaminated untreated waste and wastewater during accidental releases from the proposed plant.

Mr. Haraway has met the requirements for affected person status. He owns property approximately one mile downstream along the discharge point. His concerns about the adequacy of the discharge route and potential harm to his property from

exposure to wastewater are within the Commission's jurisdiction to address. 30 TAC §55.203(c)(1). A reasonable relationship exists between the interests claimed and the activity regulated. 30 TAC §55.203(c)(3) Because of his close proximity to the proposed discharge route, the regulated activity is likely to have an impact on Mr. Haraway's property. 30 TAC §55.203(c)(4). For these reasons, OPIC recommends that the Commission find Mr. Haraway to be an affected person.

C. Issues Raised in the Hearing Requests

Mr. Haraway raises concerns about the adequacy of the discharge route and its suitability for channeling Applicant's 120,000 gallons per day of treated wastewater. He states that Cow Branch is a dry creek bed that only contains water during rainfall events. Cow Branch flows across Mr. Haraway's property intermittently with indeterminate and changing depths and widths. He asserts that in some places the alleged "stream" actually flows over worn areas of his property, as opposed to being contained within a confined channel. Because of the inadequacy of the discharge route and lack of proper drainage, Mr. Haraway is concerned that his property may become inundated with standing water discharged from the plant. Mr. Haraway also raises concern about the contamination of his property during accidental releases of untreated waste and wastewater. The requester further expresses concern about the potential negative impact to his property value resulting from plant operations.

D. Issues raised in Comment Period

Mr. Haraway filed his hearing request during the comment period. Therefore, 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).

E. Disputed Issues

There is no agreement between the requester and the Applicant or Executive Director on the issues raised in the hearing requests.

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. All of the issues raised are issues of fact.

G. Relevant and Material Issues

Only issues deemed relevant and material to the Commission's decision may be referred to hearing 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. Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.¹

1. Issues not Relevant and Material

The issue of the impact to property values is not relevant and material because the Commission has no authority to regulate property values, zoning, or land use in any proceedings on this application. Such proceedings would be limited to issues regarding the suitability of the plant site, adequacy of the discharge route, and impacts on water quality. These are the issues framed by Chapter 26 of the Texas water Code which would govern these proceedings.

¹ 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.")

2. Issues Relevant and Material

The requester has alleged that, in fact, there is no proper “route” here for the discharged effluent to follow. He states that Cow Branch is an intermittent stream which only contains any water during rainfall events. He further alleges that even when it does contain water, it only flows into the county drainage ditch by cutting across two separate small, worn areas of his property. One of these drainage areas measures approximately 24 inches deep and tapers from 24 to 4 inches in width. The second drainage area measures approximately 40 inches deep and tapers from a width of 5 feet to a width of 1 foot.

The issue of whether the proposed discharge route is adequate to hold the proposed discharge is relevant and material to the Commission proceedings in this matter. The proper functioning of the discharge route as modeled by the ED is relevant to assessing the potential water quality and environmental impacts of the proposed activities. OPIC acknowledges that the agency’s permitting process, governed by Chapter 26 of the Texas Water Code (TWC), does not give the TCEQ jurisdiction to regulate wastewater discharge based on general flooding concerns; however, the requester here has raised site specific problems that call into question whether the “route” can function to carry Applicant’s effluent. In determining whether the proposed site minimizes surface water and groundwater contamination, the Commission may consider active geologic processes and climatological conditions. 30 TAC § 309.12(1) and (4). Active geologic processes include “[a]ny natural process which alters the surface and/or subsurface of the earth, including, but not limited to, erosion (including shoreline erosion

along the coast), submergence, subsidence, faulting, karst formation, flooding in alluvial flood wash zones, meandering river bank cutting, and earthquakes.” 30 TAC § 309.11(1)

Unsuitable conditions and site specific characteristics may prevent proper drainage and discharge route functioning. The lack of a defined or adequate “route” to carry the effluent would be problematic in creating standing water. Such a condition would render the site unsuitable because the discharged water would not flow as modeled, thereby threatening human health and the environment. The TCEQ prohibits the “issuance of a permit for a facility to be located in an area determined to be unsuitable or inappropriate, unless the design, construction, and operational features of the facility will mitigate the unsuitable site characteristics.” 30 TAC § 309.10.

OPIC further notes that the Commission previously has recognized such an issue as relevant and material in its Interim Order issued February 2, 2009 concerning the application of RMD construction, Inc, and the City of Pflugerville; TCEQ Docket No. 2008-1082-MWD, wherein the Commission referred to SOAH the issue of “[w]hether the requested discharge volume is appropriate for the carrying capacity of the specific receiving stream to hold the proposed discharge.”

Finally, the issue of whether the permit contains adequate safeguards to protect Mr. Haraway’s property from the negative impacts of accidental releases of untreated waste and wastewater is a relevant and material issue. One of the charges of 30 TAC § 307.1 is to “maintain the quality of water in the state consistent with public health and enjoyment.” Furthermore, 30 TAC §305.535 addresses issues related to bypasses from TPDES permitted facilities. Therefore, this issue is appropriate for referral to the State office of Administrative Hearings.

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. whether the proposed permit identifies an adequate discharge route with sufficient carrying capacity to hold the proposed volume of Applicant's discharged effluent; and
2. whether the proposed permit contains adequate safeguards to protect Mr. Haraway's property from potential negative impacts of accidental releases of untreated waste and wastewater.

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.

III. CONCLUSION

OPIC recommends referring the matter to SOAH for an evidentiary hearing on the issues recommended above. OPIC further recommends a hearing duration of nine months.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2009 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Requests for Hearing 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.

Vic McWherter
Vic McWherter

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TCEQ DOCKET NO. 2009-1027-MWD

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