

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: **CARTER-CC, LTD.**
TCEQ DOCKET NO. 2009-1187-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 black ink, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

DOCKET NO. 2009-1187-MWD

APPLICATION BY	§	BEFORE THE
CARTER-CC, LTD.	§	TEXAS COMMISSION ON
PROPOSED PERMIT NO. WQ0014928001	§	ENVIRONMENTAL QUALITY

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

To the Members of the Texas Commission on Environmental Quality:

The Office of the Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to the hearing requests in the above-referenced matter.

I. Introduction

On September 24, 2008, Carter-CC, Ltd. ("Carter-CC" or the "Applicant") applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) permit. The permit would authorize the construction and operation of a new municipal wastewater treatment plant. The proposed plant would be located 550 feet south of FM 563, approximately 1.8 miles southeast from the intersection of FM 563 and I-10 in Chambers County.

Under the proposed permit, the facility would be allowed to discharge treated domestic wastewater at a daily average flow not to exceed 250,000 gallons per day. The treated effluent would be discharged to Turtle Bayou; then to Anahuac Lake; then to the Trinity River Tidal in Segment No. 0801 of the Trinity River Basin. The unclassified receiving water uses are high aquatic life use for Turtle Bayou and for Lake Anahuac. The designated uses for Segment No. 0801 are high aquatic life use and contact recreation.

Carter-CC's application was declared administratively complete December 16, 2008.

The first notice was published January 14, 2009 in *The Progress*. On April 1, 2009, the second notice was published using the same newspaper. The Executive Director's (ED) Response to Comments (RTC) was mailed June 26, 2009, and the deadline for hearing requests was July 27, 2009.

The TCEQ received timely hearing requests from the Trinity Bay Conservation District (TBCD) and the Chambers-Liberty Counties Navigation District (CLCND). For the reasons stated herein, OPIC recommends the Commission grant both hearing requests.

II. Applicable Law

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;

- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

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. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to 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.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;
- (B) is timely filed with the chief clerk;

- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

III. Analysis of Hearing Requests

A. Whether the requestor is an affected person

Trinity Bay Conservation District

According to TBCD's hearing request, the District is a water conservation and reclamation district organized and existing under Article XVI, Section 59 of the Texas Constitution and Chapter 49 of the Texas Water Code (TWC). TBCD states that it provides water and wastewater services within the boundaries of the District pursuant to Certificate of Convenience and Necessity (CCN) No. 10997. TBCD is concerned about the proposed plant's discharge into Turtle Bayou upstream of Lake Anahuac because Lake Anahuac is the raw water supply for both TBCD's public water system and the City of Anahuac. Based on water quality issues, TBCD concludes that the proximity of the proposed discharge to TBCD's water supply is not acceptable.

As the holder of a CCN and the operator of a public water system, TBCD has an interest in the quality of its water supply, Lake Anahuac.¹ The proposed discharge route includes Lake Anahuac, and as a result, the water quality of Lake Anahuac is an issue relevant to this application. Given TBCD's use of Lake Anahuac for public water supply purposes, TBCD's water quality interest qualifies as a personal justiciable interest which is not common to the general public. Therefore, OPIC finds that TBCD should be considered an affected person in this matter.

¹ See 30 TAC § 55.203(c).

Chambers-Liberty Counties Navigation District

According to CLCND's hearing request, CLCND is a navigation district created under Article XVI, Section 59 of the Texas Constitution and TWC Chapters 62 and 63. CLCND states that it owns, operates, and maintains Lake Anahuac as a freshwater supply and provides raw water to the City of Anahuac and TBCD for municipal purposes. CLCND is concerned that the proposed plant location would place the discharge into Turtle Bayou just upstream of Lake Anahuac, and CLCND asserts that the proximity of the proposed discharge to Lake Anahuac is not acceptable. CLCND is additionally concerned with wastewater effluent overflows into Lake Anahuac during storm or hurricane events. CLCND describes its concerns as critical issues to water quality.

As the owner and operator of Lake Anahuac, CLCND has an interest in the water quality of Lake Anahuac.² The proposed discharge route includes Lake Anahuac, and as a result, the water quality of Lake Anahuac is an issue relevant to this application. Given that CLCND maintains Lake Anahuac as a public water supply and provides raw water for municipal purposes, CLCND's water quality interest qualifies as a personal justiciable interest which is not common to the general public. Therefore, OPIC finds that CLCND should be considered an affected person in this matter.

B. Which issues raised in the hearing request are disputed

All of the issues raised in the hearing requests are disputed.

C. Whether the dispute involves questions of fact or of law

All of the disputed issues involve questions of fact.

D. Whether the issues were raised during the public comment period

All of the issues were raised during the public comment period.

² *Id.*

E. Whether the hearing request is based on issues raised solely in a public comment which has been withdrawn

The hearing requests are not based on issues raised solely in a public comment which has been withdrawn.

F. Whether the issues are relevant and material to the decision on the application

Both hearing requestors have raised the issue of water quality along the proposed discharge route. Water quality is an issue addressed by the Chapter 307 Texas Surface Water Quality Standards, and the issue is therefore relevant and material to the Commission's decision on this application.³

CLCND has also raised the issue of wastewater effluent overflows into Lake Anahuac during storm and hurricane events. TCEQ may not issue a permit for a new facility unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface water.⁴ In making this determination, the agency may consider climatological conditions.⁵ Therefore, the proposed plant's ability to minimize surface water contamination given the applicable climatological conditions is an issue which is relevant and material to the Commission's decision on this application.

G. Maximum expected duration for the contested case hearing

For the contested case hearing, OPIC estimates a maximum duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

³ See 30 TAC Chapter 307.

⁴ See 30 TAC § 309.12.

⁵ *Id.*

IV. Conclusion

Having found that the Trinity Bay Conservation District and the Chambers-Liberty Counties Navigation District qualify as affected persons and have raised disputed issues of fact that are relevant and material to the Commission's decision on this application, OPIC recommends the Commission grant both hearing requests.

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

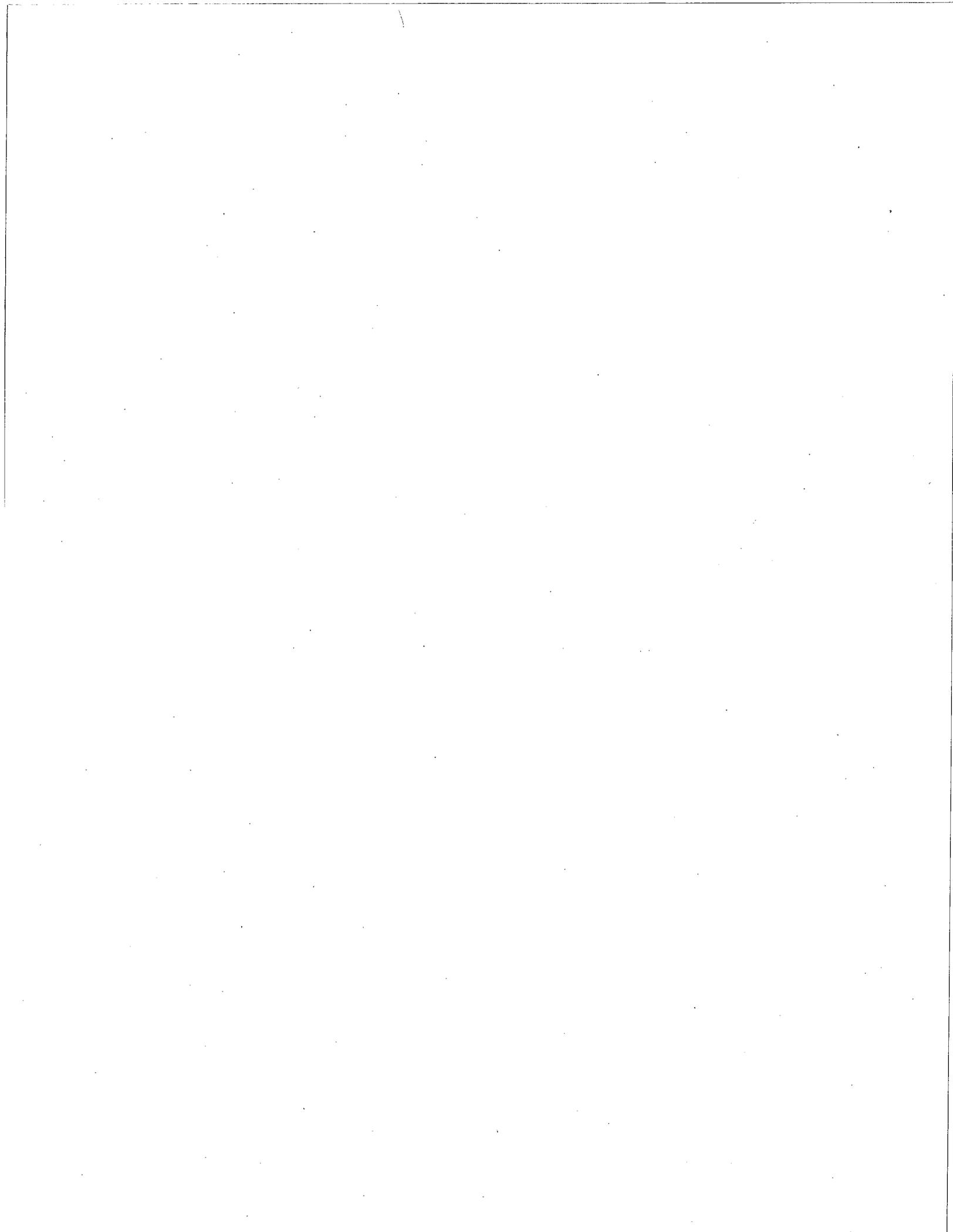
1. **Whether the proposed plant and draft permit will adversely impact the water quality of any water body, including Lake Anahuac, along the proposed discharge route**
2. **Whether the proposed plant and draft permit will prevent wastewater effluent overflows during storm or hurricane events**

For the contested case hearing, OPIC recommends a duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

Respectfully submitted,

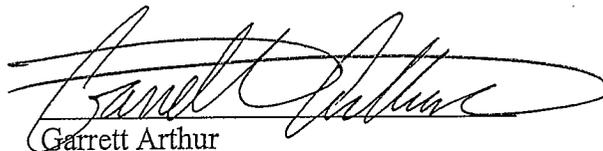
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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2009, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.

A handwritten signature in cursive script, appearing to read "Garrett Arthur", is written over a horizontal line. The signature is fluid and somewhat stylized, with a large loop at the end.

Garrett Arthur

**MAILING LIST
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TCEQ DOCKET NO. 2009-1187-MWD**

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