

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 15, 2010

Ms. LaDonna Castañuela, Chief Clerk
Office of the Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC-105
Austin, Texas 78711-3087

Re: Petition of Polk County Fresh Water Supply District No. 2 (FWSD) for Approval to Levy Operation and Maintenance Standby Fees in Polk County, Texas; Internal Control No. 05142009-D01

Dear Ms. Castañuela:

Enclosed please find the Executive Director's Response to Hearing Requests.

Please do not hesitate to contact me at (512) 239-4309 if you have any questions regarding this material. Thank you for your attention to this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jose Caso".

Jose Caso, Staff Attorney
Environmental Law Division

Enclosures

cc: mailing list

TCEQ DOCKET NO. 2009-1866-DIS

PETITION OF POLK COUNTY FRESH
WATER SUPPLY DISTRICT NO.2
(FWSD) FOR APPROVAL TO LEVY
OPERATION AND MAINTENANCE
STANDBY FEES IN POLK COUNTY,
TEXAS, INTERNAL CONTROL NO.
05142009-D01

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BEFORE THE

TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

NOW COMES the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) and files this response to two protest letters filed in response to Polk County FWSD No. 2's (District's) petition to levy an operation and maintenance standby fee. The Petition was filed pursuant to section 49.231 of the Texas Water Code and title 30, section 293.141 of the Texas Administrative Code, seeking to levy an annual operation and maintenance standby fee of \$24. In response to the letters, the ED shows the following:

I. BACKGROUND

On May 14, 2009, the District filed its petition to levy an operation and maintenance standby fee in the amount of \$24 per year. The District previously received approval to charge this amount for 2001 through 2003, 2004 through 2006, 2007 through 2009, and is seeking to continue charging this amount for 2010 through 2012. The application was declared administratively complete on May 19, 2009. After program review, notice of the application was mailed by the applicant via certified mail on September 25, 2009, and published in the Polk County Enterprise on September 27, 2009, and October 4, 2009.

In response to the notice, the TCEQ received five letters. The first letter, received on October 22, 2009, from Steve Zhanel, stated that he was requesting a contested case hearing.

The second letter, received on October 6, 2009, from Malcolm David Wyatt, stated that he was requesting a contested case hearing. The third letter, received on October 8, 2009, from Carl Henry, stated that he was requesting a contested case hearing. However, Mr. Henry formally withdrew his hearing request through a letter received on December 23, 2009. The fourth letter, received on October 26, 2009, from Loanne Bourdreaux, president of the Idlewilde Property Owners Association (IPOA), did not request a contested case hearing. Ms. Bourdreaux stated that the IPOA would oppose a \$24 monthly standby fee. Ms. Bourdreaux withdrew her protest through a letter received on December 28, 2009. The fifth letter, received on October 19, 2009, from Loraine Provan, stated that she does not believe that the standby fee should apply to her. Ms. Provan did not request a contested case hearing, and thus, the ED has treated her letter as a public comment on the application instead of a hearing request.

II. LEGAL AUTHORITIES

The District's petition is subject to the TCEQ rules governing requests for contested case hearings found in title 30, chapter 55, subchapter G of the Texas Administrative Code.¹ Under section 55.251(a), an affected person may request a contested case hearing. The request must be in writing and filed with the chief clerk within the time period specified in the notice.² The request must also substantially comply with the requirements found in section 55.251(c). A document that comments on an application but does not request a hearing is treated as a public comment.³

To be an affected person, a person must have a personal justiciable interest related to a

¹ 30 TEX. ADMIN. CODE § 55.250.

² *Id.* § 55.251(b), (d).

³ *Id.* § 55.251(e).

legal right, duty, privilege, power, or economic interest affected by the petition.⁴ An interest common to members of the general public is not a personal justiciable interest.⁵ Section 55.256(c) lists other factors that shall be considered when determining if someone is an affected party. If someone is an affected person, then their hearing request shall be granted if it complies with the section 55.251 requirements, is timely filed, and is pursuant to a right to hearing authorized by law.⁶

III. ANALYSIS

A. Mr. Zhanel's Letter

1. Summary of the letter

In his letter, Mr. Zhanel stated that most of the area where his property is located is undeveloped land, that he purchased the land over thirty years ago as an investment, and that he has been unable to sell the property. Mr. Zhanel claims that he cannot afford to pay a standby fee in addition to what he has already paid. He provided his name, address, phone number, the District's name, and the TCEQ internal control number, and stated, "I, Steve Zhanel, request a contested case hearing."

2. The requirements in section 55.255(b) have more than likely been met

Under section 55.251(a), Mr. Zhanel may request a contested case hearing if he is an affected person. Mr. Zhanel's letter implies that the proposed standby fee will be imposed on his property, but he did not specifically state the location of the property he owns inside of the District. Mr. Zhanel only stated that he owns property in Idlewilde Estates. However, the fact that he owns property in the District can be inferred from what he stated in his letter, and it is

⁴ *Id.* § 55.256(a).

⁵ *Id.*

⁶ *Id.* § 55.255(b).

unlikely that the District would have mailed Mr. Zhanel the proposed standby fee rates notice if he did not own property in the District. Assuming that Mr. Zhanel owns unimproved property in the District, he has a personal justiciable interest related to an economic interest affected by the application that is not common to members of the general public. As the owner of unimproved property in the District, he will have to pay the standby fee. Therefore, if one assumes that Mr. Zhanel owns unimproved property in the District, then Mr. Zhanel is an affected person.

Mr. Zhanel's request for a hearing is also pursuant to a right to hearing authorized by law. Under title 30, section 293.145(d) of the Texas Administrative Code, an affected person can request a public hearing during the thirty days following the final publication of notice of application. Therefore, Mr. Zhanel's letter seems to fulfill this requirement. Looking at all the hearing request requirements, his letter complies with most aspects of section 55.251. It was timely filed, and it is pursuant to a right to hearing authorized by law. However, pursuant to 55.251(c)(2), Mr. Zhanel did not provide the location of his unimproved property within Polk County FSWD. However, for the reasons stated earlier, it can be inferred that Mr. Zhanel owns unimproved property located within the District. Therefore, the section 55.255(b) requirements have been met, and his hearing request should be granted.

B. Mr. Wyatt's Letter

1. Summary of the letter

Mr. Wyatt stated that he would be affected by the current petition if he had to pay the new standby fee in addition to the standby fee he already pays. In addition, Mr. Wyatt claims that he has been paying standby fees for thirty years, and that he believes that because of this he has already paid for the cost of running water lines in the subdivision where he owns property. Mr. Wyatt provided his name, address, phone number, the District's name, and the TCEQ

internal control number, and stated, "I Malcolm David Wyatt hearby request a contested case hearing."

2. The requirements in section 55.255(b) have more than likely been met

Under section 55.251(a), Mr. Wyatt may request a contested case hearing if he is an affected person. Mr. Wyatt's letter implies that the proposed standby fee will be imposed on two lots that he owns, but he did not specifically state the location of the property he owns inside of the District. Mr. Wyatt only stated that he owns Lots 114 and 512, Block 1, Section 2 in Twins Harbors. However, the fact that he owns property in the District can be inferred from what he stated in his letter, and it is unlikely that the District would have mailed Mr. Wyatt the proposed standby fee rates notice if he did not own property in the District. Assuming that Mr. Wyatt owns unimproved property in the District, he has a personal justiciable interest related to an economic interest affected by the application that is not common to members of the general public. As the owner of unimproved property in the District, he will have to pay the standby fee. Therefore, if one assumes that Mr. Wyatt owns unimproved property in the District, then Mr. Wyatt is an affected person.

Mr. Wyatt's letter indicates that he believes he will have to pay the new standby fee in addition to the standby fee he already pays. Mr. Wyatt would not pay an additional standby fee in addition to the standby fee he currently pays. The new standby fee would replace the existing standby fee, as the existing standby fee obligations would terminate before the new standby fee is allowed.

Mr. Wyatt's request for a hearing is also pursuant to a right to hearing authorized by law. Under title 30, section 293.145(d) of the Texas Administrative Code, an affected person can request a public hearing during the thirty days following the final publication of notice of

application. Therefore, Mr. Wyatt's letter seems to fulfill this requirement. Looking at all the hearing request requirements, his letter complies with most aspects of section 55.251. It was timely filed, and it is pursuant to a right to hearing authorized by law. However, pursuant to 55.251(c)(2), Mr. Wyatt did not provide the location of his unimproved property within Polk County FSWD. However, for the reasons stated earlier, it can be inferred that Mr. Wyatt owns unimproved property located within the District. Furthermore, the fact that he was mistaken about paying the new standby fee in addition to the existing standby fee does not preclude him from becoming an interested party, as he presents other valid arguments, and because he owns unimproved property in the District, so he has a personal economic interest that is not common to members of the general public. Therefore, the section 55.255(b) requirements have been met, and his hearing request should be granted.

IV. CONCLUSION

The ED recommends the Commission grant both Mr. Zhanel's and Mr. Wyatt's requests for a contested case hearing. In addition, pursuant to title 30, section 40.3 of the Texas Administrative Code, the ED recommends the Commission initiate alternative dispute resolution procedures on this application, prior to referral to SOAH.

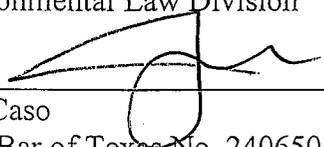
Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Mark Vickery, Executive Director

Robert Martinez, Director

Environmental Law Division

By 

Jose Caso

State Bar of Texas No. 24065018

P.O. Box 13087, MC-173

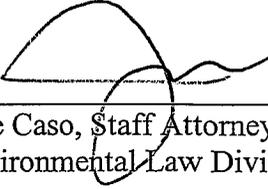
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CERTIFICATE OF SERVICE

I certify that on January 15, 2010, a copy of the foregoing documents was sent by first class, agency mail, electronic mail, and/or facsimile to the persons on the attached Mailing List.



Jose Caso, Staff Attorney
Environmental Law Division

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