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

January 29, 2010

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: **NORTH TEXAS DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD**
TCEQ DOCKET NO. 2010-0024-MWD

Dear Ms. Castañuela:

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

Sincerely,

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2010-0024-MWD

IN THE MATTER OF THE APPLICATION BY NORTH TEXAS DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD FOR TPDES PERMIT NO. WQ0013847001	§ § § § § §	**BEFORE THE** **TEXAS COMMISSION ON** **ENVIRONMENTAL QUALITY**

THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO REQUEST FOR RECONSIDERATION AND 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 Hearing Request in the above-referenced matter.

I. INTRODUCTION

North Texas District Council of the Assemblies of God (Applicant) has applied to the TCEQ for a major permit amendment that would authorize the Applicant to increase its discharge of treated domestic wastewater from a daily average flow not to exceed 21,000 gallons per day to a daily average flow not to exceed 80,000 gallons per day. The Applicant's facility, known as the Lakeview Camp Wastewater Treatment Facility, consists of activated sludge process plants operated in the extended aeration mode. The facility currently has two 15,000-gallon package plants. Treatment units include bar screens, equalization basins, final clarifiers, sludge digesters, aeration basins, settling chambers, and chlorine contact chambers. Under the draft permit, the Applicant would construct an additional 50,000-gallon package plant, bringing its total treatment capacity to 80,000 gallons. Treatment units would include bar screens,

aeration basins, final clarifiers, sludge digesters, settling chambers, and chlorine contact chambers. The facility is currently operating in the interim phase of the draft permit.

The facility is located approximately 400 feet southeast of the east end of Soil Conservation Service Dam No. 56 and approximately 2.5 miles east-northeast of the City of Maypearl in Ellis County, Texas. The treated effluent is discharged to an unnamed tributary; then to Oak Branch; then to North Fork Chambers Creek; and then to Chambers Creek Above Richland-Chambers Reservoir in Segment No. 0814 of the Trinity River Basin. The unclassified receiving water uses are no significant aquatic life use for the unnamed tributary and limited aquatic life use for Oak Branch. The designated uses for Segment No. 0814 are high aquatic uses, public water supply, and contact recreation.

The application for a major permit amendment was received on May 13, 2009, and declared administratively complete on May 21, 2009. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on May 27, 2009 in the *Waxahachie Daily Light*. The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published on September 1, 2009 in the *Waxahachie Daily Light*. The public comment period ended on October 1, 2009. The Executive Director's decision and Response to Comments was mailed December 3, 2009, extending the deadline for requests for reconsideration or contested case hearing thirty calendar days to January 4, 2010.[1] Since this application was administratively complete after September 1, 1999, it is subject to the procedural requirements of House Bill 801 (76th Legislature, 1999).

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[1] 30 TAC §55.201(a)

II. REQUEST FOR RECONSIDERATION

A. Applicable Law

The application was declared administratively complete after September 1, 1999 and is subject to the requirements of Texas Water Code Chapter 5, Subchapter M, Environmental Permitting Procedures, §§5.551 to 5.556, added by Acts 1999, 76th Leg., ch 1350 (commonly known as "House Bill 801"). House Bill 801 created the request for reconsideration as a procedural mechanism which allows the Commission to review and reconsider the Executive Director's decision on an application without a contested case hearing. Following the Executive Director's technical review and issuance of the Executive Director's decision and response to comments, a person may file a request for reconsideration or a request for contested case hearing, or both. TEXAS WATER CODE §5.556; 30 TEXAS ADMINISTRATIVE CODE ("TAC") §55.201(e).

Any person may file a request for reconsideration of the executive director's decision. 30 TAC 55.201(e). The request for reconsideration must state the reasons why the Executive Director's decision should be reconsidered. 30 TAC 55.201(e). Responses to requests for reconsideration should address the issues raised in the request. 30 TAC §55.209(f).

B. Discussion

A timely request for reconsideration of the Executive Director's (ED) decision was filed by Patrick Larkin on behalf of Dr. Frederick H. Sklar. For the reasons discussed below, OPIC recommends that the Commission deny the pending request for reconsideration.

Dr. Sklar requests reconsideration of the ED's decision because the proposed changes to the applicant's permit pose the risk of potential contamination of local groundwater resources. Firstly, Dr. Sklar contends the ED has not properly characterized the influent which will be treated at the applicant's facility. Because the influent may contain medical wastes and other commercial or industrial wastes, the influent should not be considered ordinary domestic wastewater. Due to this error, the ED has required inadequate design criteria from the applicant to protect human health and the environment. Secondly, the system itself is a potential source of contamination because of the aged condition of the collection system and its connections. Thirdly, multiple historical water supply wells which have not been properly plugged and abandoned are additional potential conduits for surface pollution to reach local groundwater resources.

Dr. Sklar also requests reconsideration of the ED's decision because pollution of local groundwater resources will directly affect his property and health. Dr. Sklar states that the ED has not properly calculated the migration of subsurface water, consequently the effects of the increased volume and characteristics of the effluent will have on Dr. Sklar's property have been inherently erroneous. Finally, Dr. Sklar states that groundwater flows toward his residence rather than away from it, as maintained by the ED. Because Dr. Sklar consumes water from his wells, potential contamination of the local groundwater also presents personal health implications.

Although we are sympathetic to the issues raised by Dr. Sklar concerning the proposed application, without further development of the record demonstrating why the draft permit does not provide sufficient protections to address these issues, OPIC cannot recommend denial of the

permit at this time. We note, however, that OPIC does recommend that the issues of protection of local groundwater resources and human health raised in this request be referred to the State Office of Administrative Hearings (SOAH) for precisely this purpose.

III. REQUEST FOR HEARING

A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code § 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 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.

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).

The Commission has also set forth specific criteria for judging whether a group or organization should be considered an "affected person." 30 TAC § 55.205(a) states that a group or association may request a hearing if:

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.

Any group or association which meets all of these criteria shall be considered an "affected person."

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.

III. DISCUSSION

A. Determination of Affected Person Status

The Office of the Chief Clerk received timely filed requests for a contested case hearing by attorney Patrick Larkin on behalf of Dr. Frederick H. Sklar. Dr. Sklar's request included relevant contact information and raised disputed issues outlining why the requestor would be adversely affected by the proposed activity in a manner not common to members of the general public.

Dr. Sklar raises the concern that the proposed changes to the applicant's permit pose the risk of contamination of local water resources. Dr. Sklar is concerned that the influent that will be treated at the plant not be ordinary domestic wastewater and the facility is therefore inadequately designed to treat the influent authorized under the proposed amendment. Releases of contaminants may also result from leaks in the aged system components. Further, multiple historical water supply wells which have not been properly plugged and abandoned have not been properly identified in the application, which could result in transmission of contaminants from the surface to groundwater. Because Dr. Sklar consumes water from wells located on his property, contamination of local groundwater may negatively affect his health. Contamination of surface water may harm exposed eco-receptors on or near his property. OPIC finds that Dr.

Sklar has raised concerns that are protected by the law under which the application will be considered, and has therefore complied with the requirements of 30 TAC §55.203(c)(1).

The applicant submitted a map with their application that identifies Dr. Sklar as an adjacent landowner residing within one mile of the discharge point. Dr. Sklar has also represented in his hearing request that his property adjoins the applicant's, and that a surface water body is located adjacent to the Sklar residence that would be affected by the wastewater transport and collection systems. Furthermore, although the proposed discharge route flows away from the direction of Dr. Sklar's property and residence, Dr. Sklar states in his hearing request that middle and deeper zone subsurface groundwater flows towards his residence and water wells rather than away from it. If connectivity exists between the surface and subsurface, pollutants could possibly make their way toward Dr. Sklar's property and water wells. OPIC finds a reasonable relationship exists between the interests stated and the activity regulated.[2]

B. Issues Raised in the Hearing Request

Pollution of Water Sources

Dr. Sklar raises the concern that local water resources may be contaminated by the Applicant's activities.

Dissemination of Pollutants Harmful to Life

Dr. Sklar raises the concern that Applicant's discharge will pose a health risk to human, animal, and vegetative life in the region.

[2] 30 TAC § 55.203(c)(3).

System Infrastructure

Dr. Sklar raises the concern that the plant cannot safely treat and transport permitted influent due to technologically inadequate or otherwise aging infrastructure.

C. Issues raised in 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) & (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

There is no agreement between the Applicant, the Executive Director, and the Requestors on the issues presented above.

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. *See* 30 TAC §55.211(b)(3)(A) and (B). The issues concerning flooding, dissemination of pollutants harmful to life, pollution of water sources, use and enjoyment of property, interference with economic interests, odor nuisance, increased traffic danger, and plant accessibility in case of emergency are all issues of fact. However, OPIC is of the opinion that the issues regarding inefficiency or waste in trucking waste to a distant plant rather than treating it in on-site, operator inexperience, and potential handling of wastes not authorized by permit are all issues of policy or conjecture, and inappropriate for referral.

F. Relevant and Material Issues

The hearing request raises 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). Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.[3] In order to refer an issue to the State Office of Administrative Hearings (SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.[4]

The issues of water quality and human, animal, and vegetative life are addressed at 30 TAC §307.4(d), which states, "Surface waters will not be toxic to man from ingestion of water, consumption of aquatic organism, or contact with skin, or to terrestrial or aquatic life." Pursuant to Texas Water Code sections 26.027(a) and 26.003, the Commission may issue permits for wastewater discharges based upon the draft permit's effectiveness in maintaining the water quality of the state. Potential contamination of groundwater may adversely affect the use of impacted natural resources and this danger is addressed by the Code.[5] For the above reasons, it is therefore the opinion of OPIC that the foregoing questions are appropriate for referral to State Office of Administrative Hearings.

G. 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:

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[3] See 30 TAC §55.209(e)(6)

[4] *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.")

[5] 30 TAC § 55.203(c)(5).

1) Does the permit maintain surface and groundwater quality on the requestor's property?
2) Does the permit protect against the spread of pollutants that would pose a health risk to human, animal, and vegetative life in the region?
3) Does the permit require sufficient infrastructure to adequately treat permitted influent?

H. 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.

IV. 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

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2010 the original and seven true and correct copies of the Office of the Public Counsel's Response to Request for Reconsideration and 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.

Eli Martinez

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