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

February 12, 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: **WYLIE NORTHEAST SPECIAL UTILITY DISTRICT**
TCEQ DOCKET NO. 2010-0107-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,

James B. Murphy bgjh

James B. Murphy, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2010-0107-MWD

IN THE MATTER OF THE APPLICATION OF WYLIE NORTHEAST SPECIAL UTILITY DISTRICT FOR TPDES PERMIT NO. WQ0014935001	§ § § § §	**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:

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

I. INTRODUCTION

A. Background of Facility

Wylie Northeast Special Utility District (Applicant) has applied to the TCEQ for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014935001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 225,000 gallons per day (gpd) in the interim I phase, 450,000 gpd in the interim II phase, and 900,000 gpd in the final phase. The proposed facility will be located at 745 Parker Road, approximately 3,680 feet northeast of the intersection of Parker Road and Aztec Lane in Wylie, Collin County, and will serve a development called Lavon 600.

If the draft permit is issued, the facility will be an activated sludge process plant operated in the conventional aeration mode with single stage nitrification. Treatment units include bar screens, aeration basins, final clarifiers, sludge digesters and a chlorine contact chamber. Sludge

generated from the facility would be hauled by a registered transporter and disposed of at a TCEQ permitted landfill, 121 Regional Disposal Facility, Permit No. 2294, in Collin County. The draft permit would also authorize the disposal of sludge at a TCEQ authorized land application site or co-disposal landfill.

The treated effluent will be discharged to an unnamed ditch, thence to a wetland, thence to an unnamed tributary, thence to Lavon Lake in Segment No. 0821 of the Trinity River Basin. The unclassified receiving water uses are no significant aquatic life use for the unnamed ditch and unnamed tributary and limited aquatic life use for the wetland. The designated uses for Segment No. 0821 are high aquatic life uses, public water supply, and contact recreation. In accordance with § 307.5 and the TCEQ implementation procedures (January 2003) for the Texas Surface Water Quality Standards, an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action. A Tier 2 antidegradation review has preliminarily determined that by adding 0.5 mg/L Total Phosphorus limits to the permit, no significant degradation of waters with exceptional, high, or intermediate aquatic life use is expected.

The effluent limitation in the interim phase I of the draft permit, based on a 30-day average, are 10 mg/l Carbonaceous Biochemical Oxygen Demand ($CBOD_5$), 15 mg/l Total Suspended Solids (TSS), 3 mg/l Ammonia Nitrogen (NH_3-N), 0.5 mg/l Total Phosphorus, and 4.0 mg/l minimum Dissolved Oxygen (DO). The effluent limitations in the interim II phase of the draft permit, based on a 30-day average, are 10 mg/l $CBOD_5$, 15 mg/l TSS, 2 mg/l NH_3-N, 0.5 mg/l Total Phosphorus, and 4.0 mg/l minimum DO. The effluent limitations in the final

phase of the draft permit, based on a 30-day average, are 7 mg/l $CBOD_5$, 15 mg/l TSS, 2 mg/l NH_3-N, 0.5 mg/l Total Phosphorus, and 5.0 mg/l minimum DO.

B. Procedural Background

TCEQ received this application on January 12, 2009. On April 3, 2009, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on April 16, 2009 in *The Dallas Morning News*. 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 23, 2009, and it was published on October 1, 2009 in *The Dallas Morning News*. The public comment period ended on November 2, 2009. On December 18, 2009, the ED filed its decision and Response to Comments, which the Chief Clerk's office mailed on December 22, 2009. The deadline to request a contested case hearing was January 21, 2010.

TCEQ received timely comments and a request for a contested case hearing from the North Texas Municipal Water District (NTMWD) on October 27, 2009 and on January 19, 2010 by the same letter. OPIC recommends granting the hearing request submitted by NTMWD.

II. APPLICABLE LAW

This application was declared administratively complete on April 3, 2009. 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.* Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.203(b). 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

According to the hearing request, NTMWD is a regional agency that provides sewer service from NTMWD-owned or operated wastewater treatment plants located north and east of Dallas. NTMWD is also a major water supplier in the area and holds significant water rights from Lake Lavon, a primary source of drinking water for NTMWD's customers, who are located downstream from the proposed discharge.

NTMWD is concerned about adverse effects on water quality in Lake Lavon, in particular the cumulative impact of the proposed discharge and other developments planned for the area. Because of the importance of Lake Lavon as a source of drinking water, NTMWD

argues the effluent limitations in the draft permit should be as stringent as those limitations included in NTMWD's Wilson Creek Wastewater Treatment Plant TPDES Permit No. WQ0012446001 (5 mg/l $CBOD_5$, 5 mg/l TSS, 2 mg/l NH_3-N, 0.5 mg/l Total Phosphorus, and 5 mg/l minimum DO), which is a major regional wastewater treatment facility that discharges into Lake Lavon.

In addition, NTMWD owns and operates the Wylie Water Treatment Facility for the purpose of supplying its customers with drinking water from Lake Lavon. According to the hearing request, the proposed discharge point is located approximately 18,400 feet from Wylie Water Treatment Facility intake #3 and approximately 20,800 feet from intake #2.

Finally, NTMWD is concerned the proposed facility may violate the regionalization policy because NTMWD's Wilson Creek Wastewater Treatment Plant or another third-party wastewater treatment facility has the capacity to serve Lavon 600. NTMWD expresses concern about nuisance odors, water quality impacts, and other environmental impacts because the effluent limitations in the draft permit are less stringent than other available facilities in the region such as the Wilson Creek Wastewater Treatment Plant.

NTMWD is an affected person based on the factors in 30 TAC § 55.203(c). Governmental entities such as NTMWD may be considered affected if they have authority under state law over issues contemplated by the application. 30 TAC § 55.203(b). In this case, NTMWD has statutory authority to provide drinking water, and its ability to provide this water may be affected by the proposed facility. *Id.* § 55.203(c)(6). Additionally, as owner and operator of the Wilson Creek Wastewater Treatment Plant, NTMWD has an in interest in providing water services for the region. A reasonable relationship exists between NTMWD's interest in regionalization and the proposed facility. *Id.* § 55.203(c)(3). Additionally, there is a

likely impact on the natural resource used by NTMWD to provide drinking water—Lake Lavon. *Id.* § 55.203(c)(5). Although the intake structures of NTMWD's Wylie Water Treatment Facility are approximately 3.5 miles away from the proposed facility, the remaining factors weigh in favor of concluding NTMWD is affected.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing request:

1. Whether the draft permit's requirements for Carbonaceous Biochemical Oxygen Demand, Total Suspended Solids, Ammonia Nitrogen, and minimum Dissolved Oxygen should be more stringent.

2. Whether the proposed facility will adversely affect water quality.

3. Whether the proposed facility will create nuisance odors.

4. Whether the proposed facility will violate TCEQ's regionalization policy.

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 NTMWD and the ED on the issues raised in the hearing request.

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.

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 are relevant and material to the Commission's decision on this application.

TCEQ also adheres to a regionalization policy, as expressed in TWC §§ 26.003, 26.0282, and 26.081. Therefore, Issue No. 4 related to regionalization is relevant and material.

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 draft permit's requirements for Carbonaceous Biochemical Oxygen Demand, Total Suspended Solids, Ammonia Nitrogen, and minimum Dissolved Oxygen should be more stringent.

2. Whether the proposed facility will adversely affect water quality.

3. Whether the proposed facility will create nuisance odors.

4. Whether the proposed facility will violate TCEQ's regionalization policy.

H. Maximum Expected Duration of Hearing

Commission Rule 30 TAC § 50.115(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 six months from the first date of the preliminary hearing until the proposal for decision is issued.

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IV. CONCLUSION

OPIC recommends granting the hearing requests from NTMWD on the issues referenced in Section III.G above. OPIC further recommends a hearing duration of six months.

Respectfully submitted,

Blas J. Coy, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2010 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request 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

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TCEQ DOCKET NO. 2010-0107-MWD

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