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Blas J. Coy, Jr., *Public Interest Counsel*

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**  
*Protecting Texas by Reducing and Preventing Pollution*

April 5, 2010

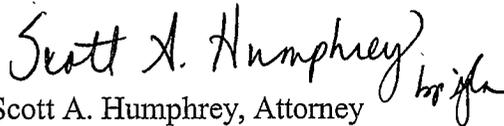
LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

**RE: XS RANCH FUND VI, L.P.**  
**TCEQ DOCKET NO. 2010-0422-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,

  
Scott A. Humphrey, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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**TCEQ DOCKET NO. 2010-0422-MWD**

**IN THE MATTER OF  
THE APPLICATION OF  
XS RANCH FUND VI, LP  
FOR TPDES PERMIT  
NO. WQ0014946001**

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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 MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

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

**I. INTRODUCTION AND PROCEDURAL HISTORY**

XS Ranch Fund VI, LP (XS Ranch or Applicant) has applied to TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014946001. The proposed permit would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day (gpd) in the interim phase, a daily average flow not to exceed 500,000 gpd in the interim II phase and a daily average flow not to exceed 990,000 gpd in the final phase. The proposed wastewater treatment facility would serve the proposed single family development XS Ranch.

The facility would be an activated sludge process plant operated in the extended aeration mode in the interim I phase. Treatment units include a lift station, bar screens, aeration basins, clarifier, aerobic sludge digester and chlorine contact chamber. The interim II and final phases will be an activated sludge process plant operated in the

complete mix mode with nitrification. Treatment units will include a lift station, a bar screen, two clarifiers, two aerobic sludge digesters, two aeration basins and two chlorine contact chambers in the interim II phase. Treatment units will include a lift station, a bar screen, three clarifiers, three aerobic sludge digesters, three aeration basins and three chlorine contact chambers in the final phase.

Sludge generated from the treatment facility will be hauled by a registered transporter to the City of Austin Walnut Creek Wastewater Treatment Facility, Permit No. WQ0010543011, to be digested, dewatered and then disposed of with the bulk of the sludge from the plant accepting the sludge. The draft permit would also authorize the disposal of sludge at a TCEQ authorized land application site or co-disposal landfill. The plant site would be located at 802 Sayers Road, approximately 2.3 miles northwest of the intersection of Phelan Road and Sayers Road in Bastrop County, Texas 78706.

The effluent limitations in all phases the draft permit, based on a 30-day average, are 10mg/l 5-day carbonaceous biochemical oxygen demand (CBOD<sub>5</sub>), 15 mg/l total suspended solids (TSS), 2 mg/l ammonia nitrogen (NH<sub>3</sub>-N) and 5.0 mg/l minimum dissolved oxygen. The effluent must contain a chlorine residual of at least 1.0 mg/l after a detention time of at least 20 minutes based on peak flow.

The treated effluent will be discharged directly to the Colorado River Above La Grange in Segment No. 1434 of the Colorado River Basin. The designated uses for Segment No. 1434 are exceptional aquatic life uses, public water supply and contact recreation.

In accordance with 30 Texas Administrative Code (TAC) § 307.5 of the Texas Surface Water Quality Standards (TSWQS) and the TCEQ's Procedures to

Implementation of the Texas Surface Water Quality Standards (IPs) (January 2003), 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. Numerical and narrative criteria to protect existing uses will be maintained. A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in the Colorado River Above La Grange, which has been identified as having exceptional aquatic life uses. According to the Executive Director (ED) of the TCEQ, existing uses will be maintained and protected. However, the preliminary determination can be re-examined and may be modified if new information is received.

The TCEQ received the permit application on June 11, 2009, and the Executive Director (ED) declared the application administratively complete on July 7, 2009. The Notice of Application and Intent to Obtain Water Quality Permit (NORI) was published on August 3, 2009 in the *Austin American Statesman*. The Notice of Application and Preliminary Decision (NAPD) was published on October 1, 2009 in the *Austin American Statesman*. The alternative language notice (Spanish) was published on October 1, 2009 in *El Mundo*.

In response to the various notices, the TCEQ received a request for a contested case hearing from attorney Skip Newsom, representing the McCall Ranch, L.P., the Flying Ranch, L.C., Jo Goertz and Michael Goertz (Protestants). OPIC recommends granting the request for a contested case hearing.

## II. APPLICABLE LAW

As 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 Texas Water Code Section 5.556, added by Act 1999, 76<sup>th</sup> 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 the application. 30 TEXAS ADMIN. CODE ("TAC") § 55.201(d).

Under 30 TAC Section 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. *Id.* Relevant factors that will be 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, 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.

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 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).

House Bill 801 also allows for another procedural mechanism, a request for reconsideration. Therefore, following the ED's technical review and consideration of comments, a person may file a request for reconsideration, a request for a contested case hearing, or both. TEX. WATER CODE § 5.556; 30 TEX. ADMIN. CODE ("TAC") § 55.201(e).

Any person may file a request for reconsideration of the ED's decision. 30 TAC § 55.201(e). A request for reconsideration must state the reasons why the decision should

be reconsidered. *Id.* Responses to requests for reconsideration should address the issues raised in the request. 30 TAC § 55.209(f).

### III. DISCUSSION

#### A. Determination of Affected Person Status

The McCall Ranch, L.P. is the owner of the property immediately adjacent to and downstream of the wastewater treatment facilities proposed by the application. The Flying M Ranch, L.C. is the general partner of the McCall Ranch. Jo Goertz is the sole manager of the ranch and maintains a residence on site at 701B Sayers Road in Bastrop, Texas 78602. Her son, Michael Goertz, is the ranch foreman and also maintains a separate residence on the property at 701A Sayers Road in Bastrop, Texas 78602. The Protestants indicate they maintain five drinking water wells and a variety of residential and utility structures on their property in close proximity to the proposed wastewater treatment plant site and proposed point of discharge and utilize the receiving waters for domestic, livestock and recreational use. Their livestock includes high value show horses. They have expressed concerns about groundwater contamination, the adequacy of the proposed effluent limitations, odor control, sludge handling and the proposed plant capacity.

The Protestants are identified on the Applicant's list of affected landowners contained in the application file. Furthermore, the maps provided with the application are consistent with the Protestants' representation that their property is immediately adjacent to and downstream of the wastewater treatment facilities proposed by the application. Therefore, OPIC concludes that the Protestants are affected persons who may be affected

by the proposed facility in a manner not common to the general public. Their concerns (groundwater contamination, effluent limitations, odor control, sludge handling and plant capacity) are protected by the law under which this application will be considered. A reasonable relationship exists between the interests they are claiming and the activity that is being regulated. It is likely that the activity from the proposed facility will impact the health, safety and use of the Protestants' property. It is likely that the activity from the proposed facility will impact the use of natural resources (groundwater, high quality waters from Segment No. 1434, air) by the Protestants. Therefore, OPIC recommends the Commission find that the Protestants are affected persons entitled to a contested case hearing.

**B. Issues Raised in the Hearing Requests**

The following issues have been raised in the hearing requests: (1) Will proposed discharge permit cause groundwater contamination?; (2) Will the proposed effluent limitations cause significant degradation of the high quality waters within Segment No. 1434?; (3) Will the proposed permit cause nuisance odors; and (4) Is the proposed plant capacity adequate and appropriate?

**C. Issues raised in Comment Period**

All of the issues raised in the hearing requests 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 the requesters and the Applicant or Executive Director on the issues raised in the hearing requests. Regarding impacts on health, the ED states that the Applicant will comply with buffer zone requirements by ownership,

ensuring that no wastewater treatment unit will be closer than 250 feet from a private well or 500 feet from a public well. The Protestants reply that minimum buffer zone requirements do not preclude the imposition of greater spatial distances such as in this case in which the wells are as shallow as 200 feet deep. Concerning potential degradation, the ED asserts that the draft permit was developed to protect aquatic life and human health in accordance with TSWQS and was established to be protective of human health and the environment provided the Applicant operates and maintains the facility according to TCEQ rules and the requirements in the draft permit. The Protestants counter that the TCEQ has not performed a Waste Load Evaluation Study for Segment No. 1434 since the 1970s, whereas drought conditions sufficient to alter the hydraulic modeling employed and additional wastewater discharge permits issued below Longhorn Dam call into question the stream constituent, flow, topographical characteristics and assimilative capacity assumed in the TCEQ model. With respect to odor control, the ED claims that the buffer zone requirements are implemented to control nuisance odor. Furthermore, the ED does not anticipate odor problems pertaining to sludge because it will be hauled to the City of Austin's Walnut Creek Wastewater Treatment Facility to be digested, dewatered and disposed of with the bulk of the sludge from the plant that accepts the sludge. The Protestants counter that the buffer zone requirements have not been sufficient to control odors at other facilities. As for the sludge transportation, the Protestants point out that there are no provisions for on-site sludge that is partially digested, stored and made ready for transit. Concerning capacity, the ED says that the permitted volume will be implemented in three phases, and the incremental increase in discharge would occur over a long period of time and be based on projected population.

estimates within the service area. The Protestants reply that the Commission has historically rejected unrealistic growth projections beyond the term of the initial permit and capacity requirements should be conservative, not speculative.

**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.<sup>1</sup> Whether the proposed discharge will cause groundwater contamination is an appropriate question of fact for referral to the State Office of Administrative Hearings (SOAH). Whether the proposed discharge may adversely impact water quality is an appropriate question of fact for referral to SOAH. Whether the proposed facility may cause potential odor problems is an appropriate question of fact for referral to SOAH. And whether the capacity limits are adequate or appropriate for the proposed permit is an appropriate question of fact 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.<sup>2</sup> Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.<sup>3</sup>

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<sup>1</sup> 30 TAC 55.211(c)(2)(A)

<sup>2</sup> 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.")

<sup>3</sup> *Id.*

The proposed permit must comply with Chapter 307 Texas Surface Water Quality Standards, which require that the proposed permit is adequately protective of human health and water quality.<sup>4</sup> Therefore, issues relating to health impacts and water quality are relevant and material issues to the Commission's decision regarding the issuance of this permit. In addition, the Applicant is required to control and abate nuisance odor under 30 TAC § 309.13(e). Additionally, according to 30 TAC § 309.13(c), a wastewater treatment plant unit may not be closer than 500 feet from a public water well or 250 feet from a private water well. Therefore, potential nuisance odor is a relevant and material issue to the Commission's decision regarding the issuance of this permit. Finally, the proposed permit will contain capacity limitations, which is an issue the Commission must decide regarding this permit.

**G. Issues Recommended for Referral**

OPIIC recommends that the following disputed issues of fact be referred to the State Office of Administrative Hearings for a contested case hearing:

1. Will the proposed discharge cause groundwater contamination?
2. Will the proposed discharge adversely impact water quality?
3. Will the proposed facility cause potential odor problems?
4. Are the capacity limitations for the proposed permit adequate or appropriate?

**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

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<sup>4</sup> See 30 TAC § 307.1

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 that the hearing requests filed on behalf of the McCall Ranch, L.P., the Flying Ranch, L.C., Jo Goertz and Michael Goertz with the above referenced issues be granted. OPIC recommends a hearing duration of nine months.

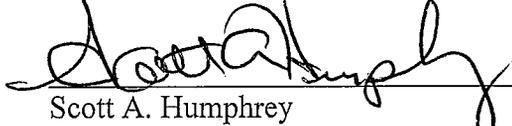
Respectfully submitted,

Blas J. Coy, Jr.  
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By   
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#### CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2010 the original and seven true and correct copies of the Office of the foregoing 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.

  
Scott A. Humphrey

**MAILING LIST**  
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**TCEQ DOCKET NO. 2010-0422-MWD**

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