

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

May 24, 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: **KATY 884 PARTNERS, LTD**
TCEQ DOCKET NO. 2010-0500-MWD

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanholm".

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 P.O. Box 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

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TCEQ DOCKET NO. 2010-0500-MWD

**IN THE MATTER OF
THE APPLICATION OF
KATY 884 PARTNERS
LTD. FOR PERMIT NO.
WQ0014943001**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

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

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) with a Response to Hearing Requests in the above-referenced matter.

I. INTRODUCTION

A. Background of Facility

Katy 884 Partners, Ltd. has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014943001. This permit would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 750,000 gallons per day. The proposed facility would serve Waller County Mud No. 9. It would be located 1,400 ft northwest of the intersection of Stockdick Rd. and Schlipf Rd. in Waller County TX, 77493.

The treated effluent would be discharged to a drainage ditch, then to Cane Island Branch, then to Buffalo Bayou Above Tidal in Segment No. 1014 of the San Jacinto River Basin. The unclassified receiving water uses are no significant aquatic life uses for the drainage ditch and Cone Island Branch. The designated uses for Segment No. 1014 are limited aquatic life and contact recreation.

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 is not required since no exceptional, high, or intermediate aquatic life use water bodies have been identified in the discharge route. Existing uses will be maintained and protected. The preliminary determination can be reexamined and may be modified if new information is received.

Buffalo Bayou Tidal is currently listed on Texas' inventory of impaired and threatened waters, the 2008 303(d) list. The listing is specifically for elevated levels of bacteria and is impaired throughout the entire segment. The ED has determined that the facility should not add to the bacterial impairment in Buffalo Bayou Tidal, if operated properly, because it is designed to create adequate disinfection. The draft permit also contains an effluent limit for *E. coli* of 65 colonies per 100 ml.

B. Procedural Background

TCEQ received this application on June 10, 2009. On August 14, 2009, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain Water Quality Permit (NORI) was published in the *Waller County News Citizen* on September 3, 2009. The Notice of Application and Preliminary Decision (NAPD) was published in the *Waller County News Citizen* on December 3, 2009. The public comment period ended on January 4, 2010, and the period to request a contested case hearing ended on March 29, 2010.

TCEQ received one comment and request for a public meeting from J.R. Dollins III on October 5, 2009. TCEQ also received a letter requesting a public meeting and a contested case hearing on this matter from Nona Fain, on behalf of the Robert H. Fain Family Partnership, submitted October 21, 2009.

II. ANALYSIS OF REQUESTS FOR CONTESTED CASE HEARINGS

A. Applicable Law

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

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, 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.

B. Determination of Affected Person Status

TCEQ received a letter requesting a contested case hearing on this matter from Nona Fain, on behalf of the Robert H. Fain Family Partnership (Fain Partnership). In the letter she states that the Fain Partnership is a downstream property owner and is interested in discussing the ramifications of approving the application. The ED has identified the Fain Partnership's property as located directly adjacent to the discharge point. However, the hearing request does not list specific concerns regarding human health, water quality, or other interests protected by the law under which the application will be considered. 30 TAC § 55.203(c).

Therefore, OPIC cannot recommend the Commission find that the Fain Partnership is an affected person. OPIC will reevaluate this position based on any timely filed reply.

C. Issues Analysis

OPIC cannot recommend the Commission refer any disputed issues of fact to the State Office of Administrative Hearings for a contested case hearing, because the Fain Partnership raises no specific issues in its hearing request. The request merely expresses an interest in discussing "the ramifications of approving the application."

I. Maximum Expected Duration of Hearing

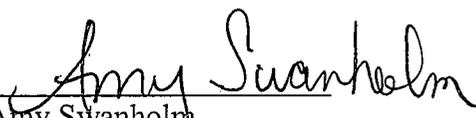
Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. As discussed, OPIC cannot recommend that this hearing request be granted. However, if the Commission disagrees, 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 would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

III. CONCLUSION

Because the requester has not demonstrated that it is an affected person, nor raised disputed issues of fact that may be referred to a hearing under applicable law, OPIC recommends the Commission deny the Fain Partnership's request for a contested case hearing. Based on any timely-filed reply addressing these deficiencies, OPIC may reconsider its recommendation.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2010 the original and seven true and correct copies of the *Office of the Public Interest Counsel's Response to Hearing Request* 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.


Amy Swanholm

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TCEQ DOCKET NO. 2010-0500-MWD

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