

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

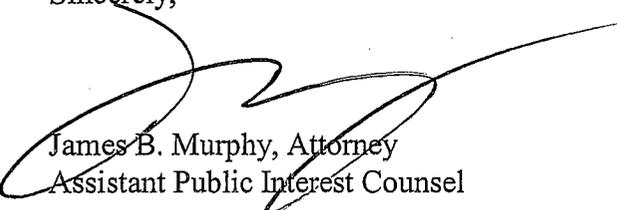
LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

**RE: 130 CACTUS INVESTMENTS, L.P.**  
**TCEQ DOCKET NO. 2010-0654-MWD**

Dear Ms. Castañuela:

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

Sincerely,



James B. Murphy, Attorney  
Assistant Public Interest Counsel

Enclosure

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

P.O. Box 13087

Austin, Texas 78711-3087

512-239-1000

Internet address: [www.tceq.state.tx.us](http://www.tceq.state.tx.us)



**TCEQ DOCKET NO. 2010-0654-MWD**

**IN THE MATTER  
OF THE APPLICATION OF  
130 CACTUS INVESTMENTS, LP  
FOR TPDES PERMIT  
NO. WQ0014548001**

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§

**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE  
TO REQUESTS 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 Requests for Hearing in  
the above-referenced matter and respectfully shows the following.

**I. INTRODUCTION**

**A. Background of Facility**

130 Cactus Investments, LP (Cactus or Applicant) applied for a renewal of Texas  
Pollution Discharge Elimination System (TPDES) Permit No. WQ0014548001, which authorizes  
the discharge of treated domestic wastewater at a daily average flow not to exceed 75,000  
gallons per day (gpd) in the interim I phase, 475,000 gpd in the interim II phase, and 950,000  
gpd in the final phase. The facility covered by the permit, the WildPflower Wastewater  
Treatment Plant (WildPflower WWTP), has not been constructed. It would be an activated  
sludge process plant operated in the complete mix mode. Treatment units would include aeration  
basins, a final clarifier, filters, a sludge digester, and a chlorination chamber. The permit also  
authorizes the disposal of sludge at a TCEQ authorized land application site or co-disposal  
landfill.

The WildPflower WWTP would be located on a 20-acre tract on the south side of Jesse Bohls Road, 7,000 feet east of the Weiss Lane intersection in Travis County. The treated effluent would be discharged to an unnamed tributary, thence to Wilbarger Creek, thence to Colorado River Above La Grange in Segment No. 1434 of the Colorado River Basin. The unclassified receiving water uses are high aquatic life use for the unnamed tributary and high aquatic life use for Wilbarger Creek. The designated uses for Segment No. 1434 are exceptional aquatic life use, public water supply, and contact recreation.

The effluent limitations in all phases of the permit, based on a 30-day average, are 5 milligrams per liter (mg/l) carbonaceous oxygen demand (CBOD<sub>5</sub>), 5 mg/l total suspended solids (TSS), 2 mg/l ammonia nitrogen (NH<sub>3</sub>-N), and 1.0 mg/l total phosphorus. In the interim I and II phases the dissolved oxygen (DO) limit is 4.0 mg/l, and in the final phase the DO limit is 5.0 mg/l. In all phases, the effluent shall contain a chlorine residual of at least 1.0 mg/l and shall not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow.

Tejas Viejo Land Company held the original permit for this proposed facility. On December 17, 2007, Cactus submitted an application to transfer the permit from Tejas Viejo to Cactus. The Executive Director (ED) approved the transfer on January 21, 2008.

## **B. Procedural Background**

TCEQ received this application on June 2, 2009. On June 11, 2009, the ED declared the application administratively complete. The Notice of Receipt of Application and Intent to Obtain Water Quality Permit Renewal (NORI) was published on June 25, 2009 in the *Austin American-Statesman* and on July 2, 2009 in *jahora sí!*. 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 TPDES Permit for Municipal Wastewater Renewal (NAPD) on September 10, 2009, and it was published on October 14, 2009 in the *Austin American-Statesman* and on October 15, 2009 in *jahora si!*. In response to a request for a public meeting from Representative Mark Strama, a Notice of Public Meeting was published on December 22, 2009 in the *Austin American-Statesman*. A public meeting was held in Pflugerville on January 25, 2010, and the public comment period ended at the conclusion of the meeting. On March 24, 2010, the ED filed its decision and Response to Comments, which the Chief Clerk's office mailed on March 26, 2010. The deadline to request a contested case hearing was April 26, 2010.

TCEQ received timely comments and requests for a contested case hearing from Vernagene Mott on August 6, 2009, Charles and Vernagene Mott on August 17, 2009 and April 16, 2010, Hal Kuempel on August 19, 2009, Fancy Fairchild on August 20, 2009, Marilyn Samuelson on August 25, 2009, and Kathleen Wolfer on August 25, 2009. Because there is no right to a contested case hearing on this renewal application, OPIC recommends denying the hearing requests.

## II. APPLICABLE LAW

This application was declared administratively complete on June 11, 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).

A group or association may request a contested case 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.

30 TAC § 55.205(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements. 30 TAC § 55.205(b).

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).

There is no right to a contested case hearing on an application to renew or amend a permit under Chapter 26 of the TWC if:

- (A) the applicant is not applying to:
  - (i) increase significantly the quantity of waste authorized to be discharged;
  - or
  - (ii) change materially the pattern or place of discharge;
- (B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;
- (C) any required opportunity for public meeting has been given;
- (D) consultation and response to all timely received and significant public comment has been given; and

(E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit[.]

30 TAC § 55.201(i)(5).

### III. DISCUSSION

#### A. No Right to a Contested Case Hearing

Pursuant to 30 TAC § 55.201(i)(5), there is no right to a contested case hearing on this renewal application. Applicant is not applying to increase the quantity of waste or change the discharge location. 30 TAC § 55.201(i)(5)(A). The renewal application maintains the discharge limits in the original permit. *Id.* § 55.201(i)(5)(B). A public meeting was held on January 25, 2010. *Id.* § 55.201(i)(5)(C). The ED's Response to Comments was mailed to interested persons on March 26, 2010. *Id.* § 55.201(i)(5)(D). TCEQ rates Applicant's compliance history as average, and the hearing requests do not disclose violations since TCEQ rated Applicant in September 2009. *Id.* § 55.201(i)(5)(E). Accordingly, the hearing requests should be denied under 30 TAC § 55.201(i)(5).

#### B. Regionalization

Despite OPIC's conclusion that there is no right to a hearing on this renewal application, OPIC takes this opportunity to address the hearing requesters' concerns related to regionalization. TCEQ issued the original permit for this proposed facility in September 2006, yet neither Applicant nor its predecessor, Tejas Viejo, commenced construction of the facility, apparently due to economic conditions. The City of Pflugerville has proposed a regional WWTP in the same area as Applicant's proposed facility. The City applied to TCEQ on July 28, 2009 for a permit for this facility, TPDES Permit No. WQ0011845005, and the ED has prepared a

draft permit. A public meeting on the City's draft wastewater permit currently is scheduled for June 3, 2010.

It is the policy of the State "to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state." TWC § 26.081(a). To facilitate this policy, the Commission may hold a hearing to define an area of regional wastewater collection, treatment, and disposal under TWC § 26.082 and designate a facility as the system to serve the area under TWC § 26.083.

The Commission may designate an "existing or proposed system or systems then capable or which in the reasonably foreseeable future will be capable of serving" the area. *Id.* § 26.083(c). Designation as a system to serve the area requires the consent of the designated system owner or operator. *Id.* If after notice and hearing the Commission enters an order defining the area and designating the system to serve, the Commission may cancel or suspend any permit that authorizes the discharge of waste in a defined regional service area if certain conditions are met. *Id.* § 26.084(a)(3) and (b); 30 TAC § 305.66(b).

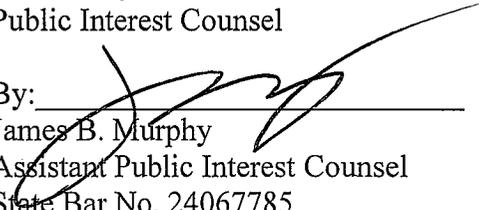
It is unclear from the hearing requests whether the City's proposed system is capable of serving the development served by the WilfPflower WWTP and whether the City wishes to be designated the service provider for the area. If the City desires such a designation, it may request that the Commission hold a hearing to define a regional area and designate its proposed WWTP as the facility to serve the area pursuant to the requirements of TWC §§ 26.081–26.087.

#### IV. CONCLUSION

OPIC recommends denying the hearing requests.

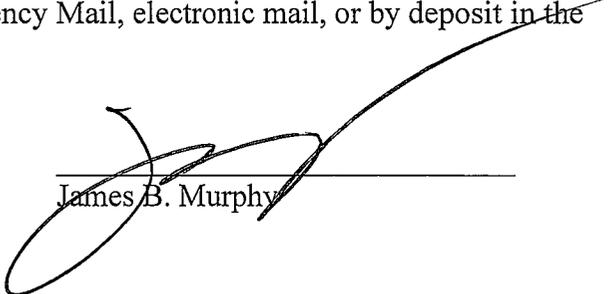
Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By:   
James B. Murphy  
Assistant Public Interest Counsel  
State Bar No. 24067785  
P.O. Box 13087, MC 103  
Austin, Texas 78711-3087  
(512) 239-4014 Phone  
(512) 239-6377 Fax

#### CERTIFICATE OF SERVICE

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

**MAILING LIST**  
**130 CACTUS INVESTMENTS, L.P.**  
**TCEQ DOCKET NO. 2010-0654-MWD**

FOR THE APPLICANT:

Irma Speers  
130 Cactus Investments, L.P.  
2207 Lake Austin Boulevard  
Austin, Texas 78703-4547  
Tel: (512) 481-8899  
Fax: (512) 481-9922

James A. Huffcut  
Pape-Dawson Engineers  
7800 Shoal Creek Boulevard  
Austin, Texas 78757-1098  
Tel: (512) 454-8711  
Fax: (512) 459-8867

FOR THE EXECUTIVE DIRECTOR

via electronic mail:

Kathy J. Humphreys, Staff Attorney  
Texas Commission on Environmental Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-0600  
Fax: (512) 239-0606

Larry Diamond, Technical Staff  
Texas Commission on Environmental Quality  
Water Quality Division, MC-148  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-0037  
Fax: (512) 239-4430

FOR OFFICE OF PUBLIC ASSISTANCE

via electronic mail:

Bridget Bohac, Director  
Texas Commission on Environmental Quality  
Office of Public Assistance, MC-108  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4000  
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE  
RESOLUTION

via electronic mail:

Kyle Lucas  
Texas Commission on Environmental Quality  
Alternative Dispute Resolution, MC-222  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4010  
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela  
Texas Commission on Environmental Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-3300  
Fax: (512) 239-3311

REQUESTERS:

Fancy Fairchild  
8802 Unice Dr.  
Elgin, Texas 78621-9222

Hal Kuempel  
PO Box 266  
Pflugerville, Texas 78691-0266

Charles & Vernagene Mott  
PO Box 951  
Pflugerville, Texas 78691-0951

Marilyn Samuelson  
14914 Svenska  
Coupland, Texas 78615-4874

Kathleen Wolfer  
8502 Jesse Bohls Dr.  
Pflugerville, Texas 78660-8918

