

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

August 2, 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: **CITY OF FAIR OAKS RANCH**
TCEQ DOCKET NO. 2010-0835-MWD

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Garrett Arthur".

Garrett Arthur, 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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DOCKET NO. 2010-0835-MWD

**APPLICATION BY
CITY OF FAIR OAKS RANCH
PERMIT NO. WQ0011867001**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUEST AND REQUEST FOR RECONSIDERATION**

To the Members of the Texas Commission on Environmental Quality:

The Office of the Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to a hearing request and a request for reconsideration in the above-referenced matter.

I. Introduction

On August 10, 2009, the City of Fair Oaks Ranch ("City" or "Applicant") applied to the TCEQ for renewal of a domestic wastewater permit. Renewal of the permit would authorize the continued operation of the Fair Oaks Plant. The plant is located in northern Bexar County, west of Ralph Fair Road, south of Cibolo Creek, and on the east side of Fair Oaks Ranch. The permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day via surface irrigation of 280 acres of Fair Oaks Ranch Golf and Country Club land. The plant and disposal site are located in the drainage basin of Upper Cibolo Creek, in Segment No. 1908 of the San Antonio River basin.

The Applicant is not seeking changes to the current authorization, and the renewed permit would not authorize a discharge of pollutants into waters in the State.

The application was declared administratively complete September 11, 2009. The first notice was published September 29, 2009 in *The Boerne Star* newspaper, and the second notice was published January 8, 2010 in the same newspaper. The final decision letter and the Executive Director's (ED) Response to Comments (RTC) were mailed April 20, 2010, and the deadline for hearing requests and requests for reconsideration was May 20, 2010.

The TCEQ timely received both a hearing request and a request for reconsideration from Jody Daniel. For the reasons stated herein, OPIC recommends the Commission deny the hearing request and deny the request for reconsideration.

II. Applicable Law

A. Hearing Requests

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;

- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

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. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to 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.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;

- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

B. Requests for Reconsideration

Section 55.201(e) of the TCEQ procedural rules states that any person may file a request for reconsideration of the ED's decision, and the request must expressly state that the person is requesting reconsideration of the ED's decision and give reasons why the decision should be reconsidered.

III. Analysis

A. Hearing Request

According to his hearing request, Mr. Daniel and his family reside approximately 200 feet east of the Fair Oaks Plant. He states that the plant emits significant nuisance odors and causes vector issues in the form of flies. Mr. Daniel further states that these nuisance conditions have prevented the reasonable use and enjoyment of his yard and the areas outside his home. Finally, Mr. Daniel asserts that the application does not qualify as a no-change renewal due to the magnitude of proposed changes at the plant.

B. Right to Contested Case Hearing

Under 30 TAC § 55.211(c)(2)(C), a hearing request shall be granted if the request is made pursuant to a right to hearing authorized by law. Therefore, the Commission must determine as an initial matter whether a right to hearing exists on this application. As provided by 30 TAC § 55.201(i)(5), there is no right to a contested case hearing on a renewal application under Texas Water Code Chapter 26 if:

- (A) the applicant is not applying to increase significantly the quantity of waste authorized to be discharged or change materially the pattern or place of discharge;
- (B) the activity to be authorized by the renewal will maintain or improve the quality of waste authorized to be discharged;
- (C) any required opportunity for public meeting has been given;
- (D) consideration 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.

According to the information reviewed by OPIC, this renewal application satisfies each of these requirements. If all of these criteria are met, Texas Water Code § 26.028(d) allows the Commission to approve the renewal application without holding a hearing.

The Fair Oaks Plant is not authorized to discharge, and the Applicant is not seeking to change this. Therefore, the Applicant is not applying to increase the quantity of waste authorized to be discharged or materially change the pattern or place of discharge, and the application satisfies § 55.201(i)(5)(A).

Again, the Fair Oaks Plant is not authorized to discharge, but as required by §55.201(i)(5)(B), this renewal will maintain the quality of waste authorized to be disposed via surface irrigation. The current permitting action is for renewal only, and the quality of waste authorized to be disposed remains unchanged.

The published notices regarding this application informed the public of the opportunity for a public meeting, and stated that the TCEQ holds a public meeting if the ED determines there is significant public interest or if requested by a local legislator. Although Mr. Daniel requested a public meeting, his was the only request, and the ED declined to hold a public meeting for this

case. As required by § 55.201(i)(5)(C), it appears that any required opportunity for a public meeting has been given.

Section 55.201(i)(5)(D) requires TCEQ to consider and respond to all timely received and significant public comment. The ED's Response to Comments document indicates that this criterion has been met.

For the previous five years, TCEQ rates the Applicant's compliance history as "Average". The Fair Oaks Plant is also rated "Average". According to 30 TAC § 60.2, an "Average" performer generally complies with environmental regulations. Given this description, it appears the Applicant's compliance history raises no issues regarding its ability to comply with a material term of this permit and satisfies § 55.201(i)(5)(E).

OPIC finds the Applicant's permit renewal application satisfies the requirements of Texas Water Code § 26.028(d) and 30 TAC § 55.201(i)(5), no right to a contested case hearing exists on this application, and the Commission may approve the application without a hearing.

C. Request for Reconsideration

Mr. Daniel requests reconsideration of the ED's decision that the permit application meets the requirements of applicable law. Under 30 TAC § 55.201(e), a request for reconsideration must give reasons why the ED's decision should be reconsidered. In support of his request for reconsideration, Mr. Daniel gives reasons which are substantially similar to the issues raised in his hearing request. Additionally, Mr. Daniel states that the plant's drying beds are located within the minimum buffer distance provided in the draft permit.

Issues concerning nuisance odors, operational changes, and buffer zones are governed by the law applicable to this permit. These concerns are within the jurisdiction of the Commission to address in the context of proceedings on this application. However, an evidentiary record

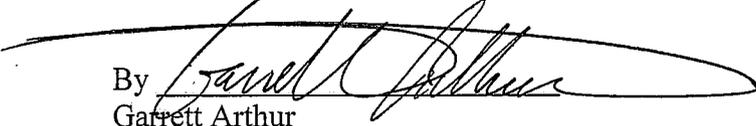
would be necessary for OPIC to make a recommendation to the Commission as to whether the ED's decision to renew this permit should be reconsidered. At this time, an evidentiary record does not exist, and therefore OPIC cannot recommend that the request for reconsideration be granted.

IV. Conclusion

The City's application seeks renewal of an existing permit with no changes. As a result, there is no right to a contested case hearing on this application. In accordance with Texas Water Code § 26.028(d) and 30 TAC § 55.201(i)(5), OPIC concludes the Commission may approve this permit renewal without holding a hearing. Therefore, OPIC respectfully recommends the Commission deny Mr. Daniel's hearing request. We recommend the request for reconsideration also be denied.

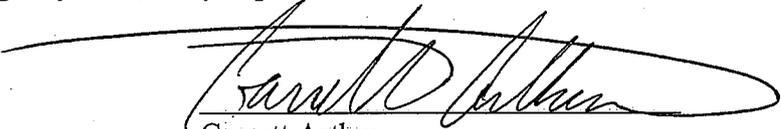
Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2010, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties listed below via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.



Garrett Arthur

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