

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*

July 19, 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 ROCKPORT**  
**TCEQ DOCKET NO. 2010-0895-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,

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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Austin, Texas 78711-3087

512-239-1000

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**TCEQ DOCKET NO. 2010-0895-MWD**

**IN THE MATTER OF  
THE APPLICATION OF  
THE CITY OF  
ROCKPORT FOR  
PERMIT NO.  
WQ0010054001**

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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:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) with a Response to Requests for Hearing in the above-referenced matter.

**I. INTRODUCTION**

**A. Background of Facility**

The City of Rockport has applied for a renewal of its existing TPDES Permit No. WQ0010054001. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,500,000 gallons per day (gpd). The current and draft permit also authorize the disposal of a portion of the treated domestic wastewater via irrigation of 200 acres, at a maximum application rate of 2.2 acre-feet per year per acre irrigated.

Effluent limits in the current and draft permit are, based on a 30-day average, 10 mg/L Carbonaceous BOD5 (CBOD5), 15 mg/L total suspended solids (TSS), 3 mg/L  $\text{NH}_3\text{-N}$ , and 5.0 mg/L minimum dissolved oxygen.

The changes from the existing permit include updates to the Standard Permit Conditions, Sludge Provisions, Other Requirements, Pretreatment Requirements, and

Biomonitoring sections. There is also an a provision in the Other Requirements section indicating the Executive Director's (ED) intention to initiate rulemakings and/or changes to procedural documents that may result in bacteria effluent limits and monitoring requirements for the facility. In response to public comments, the ED has included effluent monitoring requirements for Total Nitrogen and Total Phosphorous and stated in in the Response to Comments that if the results of the monitoring indicate that effluent limits are warranted, the ED will require appropriate permit limitations for nutrients.

The facility is located on the west side of Farm-to-Market Road 2165, approximately 1,200 feet south of the intersection of Farm-to-Market Road 2165 and Enterprise Boulevard in Aransas County, Texas 78732. The treated effluent is discharged to Tulle Ditch; thence to an unnamed ditch (non-tidal); thence to an unnamed ditch (tidal); thence to Little Bay; thence to Aransas Bay in Segment No. 2471 of the Bays and Estuaries. The unclassified receiving water uses are no significant aquatic life uses for Tulle Ditch, limited aquatic life uses for the unnamed ditch (non-tidal), and high aquatic life uses for the unnamed ditch (tidal) and Little Bay. The designated uses for Segment No. 2471 are exceptional aquatic life uses, oyster waters, and contact recreation. An antidegradation review has not been conducted.

## **B. Procedural Background**

TCEQ received this application on July 13, 2009. On July 22, 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 Rockport Pilot* on August 1, 2009. The Notice of Application and Preliminary Decision (NAPD) was published in *The Rockport Pilot* on November 4, 2009. A public meeting was held on February 25, 2010, in Rockport Texas, at which the public comment period ended. The Chief Clerk mailed the Executive Director's Response to Comments and the Executive Director's Decision on April 26, 2010. The deadline to request a contested case hearing or request for reconsideration was June 1, 2010.

TCEQ received numerous individual, timely hearing requests as discussed in further detail in Section II below. The following individuals and groups requested a contested case hearing; Elayne Arne, Charles Belaire, Jim Blackburn on behalf of The

Little Bay Foundation, Jim Blackburn on behalf of Dr. Ronald Outen, Jim Blackburn on behalf of Captain Tommy Moore, Anne Brasher, Monica Hudgins, Don Jackson, Raymond Kirkwood, Fred Lanoue, Linda Lanoue, Lynne Lee, Robin Melvin on behalf of the Texas Chapter of the Coastal Conservation Association (CCA), Leslie Moore, Jr., Diane Moore, Ronald Moore, John M. Nelson, Donna Pazera, Diana Rushing, Sandy Swanson, and Frances Symank.

Hearing requestors have questioned whether this renewal would increase the amount of wastewater to actually be discharged (even though the permitted discharge amount would not change) and whether the ED should have conducted an antidegradation review of the proposed discharge's impact on the receiving waters. Requestors have also raised questions relating to the current discharge's impacts on the receiving waters, including whether the discharge is contributing to increased turbidity and the destruction of seagrass in the receiving waters. Therefore, should the Commission choose to hold a hearing on this matter, OPIC has provided an analysis of the hearing requests and would recommend that the following individuals and entities be found affected; Charles Belaire, The Little Bay Foundation, Dr. Ronald Outen, Captain Tommy Moore, CCA, and Leslie Moor, Jr.

## **II. RIGHT TO A CONTESTED CASE HEARING**

### **A. Right to a Contested Case Hearing**

Texas Water Code (TWC) §26.028(d) states that the Commission may approve an application to renew a permit without a public hearing, under certain conditions.<sup>1</sup> 30 TAC §55.201(i) provides that no right to a hearing exists for certain water quality discharge permits. These authorizations include applications to renew or amend a permit if the applicant is not trying to:

- (A) increase significantly the quantity of waste to be discharged;
- (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;

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<sup>1</sup> See also 30 TAC § 50.113(d)(4), and 55.211(d)(4).

(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;

The draft permit would not increase the quantity of waste that could be discharged from the existing permit. Effluent limitations and monitoring requirements would remain the same or be more protective than the existing permit requirements. Opportunity for a public meeting was given,<sup>2</sup> and the executive director has filed a response to comments that addresses all timely and significant public comment. Furthermore, the applicant's compliance history is "average." Therefore, OPIC finds that the Commission may approve the application without holding a contested case hearing on the proposed renewal.

OPIC notes that the ED has included monitoring requirements for Total Nitrogen (TN) and Total Phosphorous (TP), in response to comments from the public. The draft permit states that, should the results of the monitoring indicate that effluent limits are warranted, the ED will require appropriate permit limitations for nutrients. OPIC further notes that the hearing requestors or other affected persons may petition the Commission to amend the permit<sup>3</sup> if they determine that the required monitoring results or other documentation supports additional permit limitations and special provisions.

For these reasons, OPIC recommends that the hearing requests be denied. If the Commission disagrees, OPIC provides the following analysis of the requests.

### **III. 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

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<sup>2</sup> The TCEQ conducted a public meeting on this matter in Rockport, Texas on February 25, 2010.

<sup>3</sup> 30 TAC § 305.62.

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 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.

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, 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**

The following individuals and citizens groups request a contested case hearing; Elayne Arne, Charles Belaire, The Little Bay Foundation, Dr. Ronald Outen, Captain Tommy Moore, Anne Brasher, Monica Hudgins, Don Jackson, Raymond Kirkwood, Fred Lanoue, Linda Lanoue, Lynne Lee, the Texas Chapter of the Coastal Conservation Association (CCA), Leslie Moore, Jr., Diane Moore, Ronald Moore, John M. Nelson, Donna Pazera, Diana Rushing, Sandy Swanson, and Frances Symank.

### **1. Individuals and Groups Not "Affected"**

The following individuals requested a contested case hearing but did not list any personal justiciable interest; Elayne Arne, Anne Brasher, Monica Hudgins, Don Jackson, Raymond Kirkwood, Fred Lanoue, Linda Lanoue, Lynne Lee, Diane Moore,

Ronald Moore, John M. Nelson, Donna Pazera, Diana Rushing, Sandy Swanson, and Frances Symank.

Several of these individuals raised concerns in their hearing requests. Elayne Arne states that she is concerned with the amount of nitrogen currently being released into Aransas Bay, and is concerned this is harming bay grasses and wildlife in the area. She thinks TCEQ should regulate nitrogen from this facility and require them to install a filtration system.

Don Jonson states that the discharge levels are causing changes to Little Bay, and that the discharge limits should be more stringent.

Raymond Kirkwood is concerned that the facility is a significant source of nitrogen for Little Bay, and that the discharge is causing a decline in the bay's water quality. He also believes that the discharge impairs waterfowl and recreational fishing.

Fred Lanoue is concerned that the current permit allows too much nitrogen to be released into Little Bay.

Linda Lanoue is concerned that the current permit may be degrading water quality in Little Bay.

Lynne Lee is concerned that the proposed discharge would damage Little Bay.

Leslie Moore Jr. is concerned with restoring the Little Bay's health, and believes that this proposed permit is a step in the wrong direction.

John Nelson is concerned with water quality and believes that the draft permit should contain limits on the amount of nitrogen and phosphorous that can be discharged into the receiving waters.

Donna Pazera is concerned about the amount of nitrogen in the proposed discharge.

Diana Rushing is concerned with the harm being done to Little Bay and what the City of Rockport will be doing to mitigate this.

Sandy Swanson is concerned that the draft permit would not have any nitrogen and phosphorous limits.

Although many of these individuals raised concerns, OPIC cannot recommend that any be determined "affected" because they have not indicated how they are personally impacted by the proposed renewal. None of the individuals have provided

sufficient information to show that a reasonable relationship exists between the interest claimed and the activity regulated. Without additional information showing how the individuals are impacted in a manner not common to the general public, OPIC cannot recommend that any of these hearing requestors are affected because they have not stated any personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.<sup>4</sup>

## **2. Individuals and Groups who are “Affected”**

OPIC finds the following individuals and groups “affected”: Charles Belaire, The Little Bay Foundation, Dr. Ronald Outen, Captain Tommy Moore, the Texas Chapter of the Coastal Conservation Association (CCA), Leslie Moor, Jr.

### **i. Charles Belaire**

Charles Belaire states that he is a local resident of Rockport and the owner of an environmental consulting firm that has been experimenting with transplanting seagrass plots in Little Bay, in hopes of re-establishing seagrass beds in the area. He is concerned that the daily loading of nutrients from the current Facility and uncontrolled stormwater runoff are contributing to water quality degradation and seagrass destruction in Little Bay.

Mr. Belaire has shown that a reasonable relationship exists between the interest claimed and the activity regulated. He has an interest in seagrass degradation in the receiving waters which he believes is caused by the currently permitted discharge. He also states he lives in the area. Therefore OPIC concludes that he is affected.

### **ii. The Little Bay Foundation, Dr. Ronald Outen, and Captain Tommy Moore**

The Little Bay Foundation, Dr. Ronald Outen, and Captain Tommy Moore all submitted identical hearing requests, although each states separately why they are affected. The Little Bay Foundation states that it is a nonprofit organization created to

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<sup>4</sup> 30 TAC §55.203.

protect, restore, maintain and enhance Little Bay. The request states that the participation of the group's individual members is not required. Two members, Ed Rainwater and Thomas Pazera, would have standing to protest in his own right. Ed Rainwater owns property on Little Bay, about 200 yards from where the effluent enters Little Bay. He also recreates in Little Bay and is afraid that the permit renewal would continue to adversely impact his enjoyment of these activities. Thomas Pazera owns property along the discharge route, within one mile of the facility.

Dr. Ronald Outen claims that he is affected because he owns property within 1.6 miles of the facility and within one mile of where the effluent begins to mix with Little Bay. He also uses his property and Little Bay for recreational activities such as fishing, swimming, kayaking, and bird watching.

Captain Tommy Moore states that he owns a birding and kayaking company and uses Little Bay to conduct sight-seeing tours. He claims that his business has been adversely impacted by the degradation of Little Bay and will continue to be impacted by the renewal.

All three hearing requests raise numerous issues in their hearing requests.<sup>5</sup> The requests state that the basis of the request is concern about water quality and the ability of the facility and the receiving waters to meet water quality standards. Specifically, the requestors are concerned with the place of discharge, the level of treatment, and the failure to regulate nutrients and other pollutants in relation to the sensitive nature of the receiving waters.

The requestors state that Little Bay has experienced an increase in turbidity and algae growth, as well as the disappearance of seagrass. They believe that the current discharge from the facility (that will continue under the proposed permit) contributes significantly to these problems. They argue that these conditions represent new information that must be considered in the permit renewal process. Further, the original permitting process did not take these considerations into account. This evidence showing significant physical change to the bay warrants a new analysis of the discharge's impact upon the receiving waters. This should now be used to develop effluent limits that ensure compliance with the TSWQS.

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<sup>5</sup> See Attachment A for a copy of the hearing request.

They question whether the proposed discharge should have limits similar to other recently approved permits in the area that discharge into larger water bodies, but have more protective limits and treatment requirements.

The requestors also question whether the draft permit complies with antidegradation provisions in the TSWQS. They state that the permit renewal would increase the amount of effluent actually discharged and that the permit, regardless of type, is subject to antidegradation rules. They request a full review under the TSWQS, in order to establish protective nutrient limits.

In addition to the concerns raised by all three requestors, Dr Outen and Captain Moore state that they have personally witnessed the deterioration of Little Bay, through the loss of seagrass and migratory bird habitat. They also witnessed the waters becoming increasingly turbid and murky.

OPIC concludes that The Little Bay Foundation, Dr. Ronald Outen, and Captain Tommy Moore are “affected.” The Little Bay Foundation has met the requirements for associational standing, and Dr. Ronald Outen, and Captain Tommy Moore have shown they have a personal justiciable interest related to their property ownership in the area and their recreational use of the receiving waters. All three have raised questions that the Commission may consider, should it choose to hold a hearing on this matter.

### **iii. The CCA**

CCA is a non-profit marine conservation organization whose purpose is to conserve, promote, and enhance coastal resources. The request states that the participation of the group’s individual members is not required, but several members would have standing in their own right. Edwin Rainwater owns property on Little Bay, about 1.5 miles from the facility. He also recreates and fishes in Little Bay and is afraid that the permit renewal would continue to adversely impact his enjoyment of these activities. Gary and Karen Godwin Wiatrek live about 2.5 miles from the facility, and recreate in the receiving waters. Robby Byers, the Executive Director of CCA, lives less than 2 miles from the facility and 1.5 miles from Little Bay. He has been fishing and recreating in the area for 25 years.

CCA raises numerous factual issues in its hearing request, mostly related to the decline of seagrass in the receiving waters and degradation of the Little Bay. CCA states that the current and proposed discharge would increase the total amount of TSS and nutrients in Little Bay, even if it may not be the sole source. CCA questions whether the proposed effluent limits and discharge route protect the designated uses of Little Bay and Aransas Bay as required by the TSWQS, and believes that more stringent permit limitation should improve water quality. CCA also argues that permit limits in permits issued to Aransas County MUD and RR Development Texas are appropriate here, and should be implemented.

OPIC concludes that CCA is affected. It has met the requirements for associational standing through several of its members who are individually affected, the interests it seeks to protect are germane to the organization, and the interests it seeks to protect do not require the participation of individual members.

**iv. Leslie Moore, Jr.**

Leslie Moore Jr. states that she uses the bay for boating, swimming, and wildlife observation and the address she lists is located on Little Bay. She is concerned with restoring the Little Bay's health, and believes that this proposed permit is a step in the wrong direction. OPIC finds her affected because of her proximity to and recreational use of Little Bay.

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

The following issues were raised in hearing requests;

1. Whether the facility is contributing to water quality degradation in the receiving waters, including Little Bay, and Aransas Bay. (Charles Belaire) (Little Bay Foundation, Outen, Moore)(CCA)
2. Whether the draft permit should contain nitrogen and phosphorous limits. (Charles Belaire) (Little Bay Foundation, Outen, Moore) (CCA)
3. Whether the proposed permit meets the requirements of the Texas Surface Water Quality Standards (TSWQS). (Little Bay Foundation, Outen, Moore) (CCA)

4. Whether the discharge has/will cause or significantly contribute to the loss of seagrass beds, the increase in turbidity, and the presence of algae blooms in the downstream waterway. (Charles Belaire) (Little Bay Foundation, Outen, Moore)
5. Whether this permit should contain limits similar to those issued in permits for Aransas MUD 1 and R&R Development. (Little Bay Foundation, Outen, Moore) (CCA)
6. Whether the discharge would degrade the receiving waters. (Little Bay Foundation, Outen, Moore)
7. Whether the discharge complies with the Texas Coastal Management Plan. (Little Bay Foundation, Outen, Moore)
8. Whether the proposed effluent limitations and discharge route protect designated uses in Little Bay and Aransas Bay in accordance with the TSWQS. (CCA)
9. Is it appropriate to include more stringent effluent limitations in a renewal permit? (CCA)

**D. Issues raised in Comment Period**

All of the hearing requests raise issues that were also raised during the comment period.

**E. Disputed Issues**

There is no agreement between hearing requestors and the Applicant or Executive Director on the issues raised in the hearing requests.

**F. 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. All of the issues raised in timely hearing requests by affected parties are issues of fact, with the exception of “Is it appropriate to include more stringent effluent limitations in a renewal permit?” *See* 30 TAC §55.211(b)(3)(A) and (B).

## **G. Relevant and Material Issues**

Hearing requests may raise issues relevant and material to the Commission's decision under 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>6</sup> Relevant and material issues are those governed by the substantive law under which this permit is to be issued.<sup>7</sup>

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. TCEQ is also charged with ensuring that wastewater discharges into coastal areas are protective and consistent with the Coastal Management Plan. 31 TAC § 501.21, 31 TAC § 505.11(a)(6)(A).

## **H. Issues for Referral**

Should the Commission grant a hearing, OPIC would recommend the Commission refer the following disputed issues of fact to the State Office of Administrative Hearings for a contested case hearing:

1. Whether the facility is contributing to water quality degradation in the receiving waters, Little Bay, and Aransas Bay.
2. Whether the draft permit should contain nitrogen and phosphorous limits.
3. Whether the proposed permit meets the requirements of the TSWQS.
4. Whether the discharge has/will cause or significantly contribute to the loss of seagrass beds, the increase in turbidity, and the presence of algae blooms in the downstream waterway.

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<sup>6</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>7</sup> *Id.*

5. Whether this permit should contain limits similar to those issued in permits for Aransas MUD 1 and R&R Development.
6. Whether the proposed discharge would degrade the receiving waters.
7. Whether the discharge complies with the Texas Coastal Management Plan.
8. Whether the proposed effluent limitations and discharge route protect designated uses in Little Bay and Aransas Bay in accordance with the TSWQS.

#### **IV. MAXIMUM EXPECTED DURATION OF HEARING**

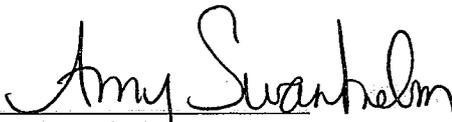
Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. 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 one year from the first date of the preliminary hearing until the proposal for decision is issued.

## V. CONCLUSION

OPIIC finds that the Commission may approve the application without holding a contested case hearing. Should the Commission choose to hold a contested case hearing, OPIIC recommends finding that Charles Belaire, The Little Bay Foundation, Dr. Ronald Outen, Captain Tommy Moore, CCA, Leslie Moore, Jr. are affected, and referring the above issues to the State Office of Administrative Hearings for a contested case hearing.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By:   
Amy Swanholm  
Assistant Public Interest Counsel  
State Bar No. 24056400  
(512)239-6823 PHONE  
(512)239-6377 FAX

**CERTIFICATE OF SERVICE**

I hereby certify that on July 19, 2010 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Requests for Hearing 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

# **Attachment A**



**BLACKBURN CARTER**  
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MARY W. CARTER  
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June 1, 2010

*Via TCEQ's Electronic Filing System*  
LaDonna Castañuela, Chief Clerk  
Chief Clerk's Office, MC-105  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Houston, Texas 78711-3087

RE: City of Rockport TPDES Permit No. WQ0010054001

Dear Ms. Castañuela:

This letter is being submitted on behalf of the Little Bay Foundation, a non-profit corporation organized under the laws of the State of Texas. Little Bay Foundation's ("LBF") temporary address is 61 Blue Heron Drive, Rockport Texas 78382-3711. The purpose of this letter is to request a contested case hearing on the application by the City of Rockport for renewal of its existing TPDES Permit No. WQ0010054001. We are requesting a contested case hearing in accordance with the Executive Director's Response to Comments and opportunity to request a contested case hearing issued by the Chief Clerk's Office on April 30, 2010. LBF is represented in this contested case hearing request by Blackburn Carter, P.C., 4709 Austin Street, Houston, Texas 77004, (713) 524-1012.

This permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,500,000 gallons per day. According to the Executive Director's Response to Comments, the current and draft permits also authorize disposal of a portion of the treated domestic wastewater via irrigation on 200 acres. The facility is located on the west side of FM Road 2165, approximately 1200 feet south of the intersection of FM Road 2165 and Enterprise Blvd. in Aransas County, Texas. The treated effluent is discharged to Tulle Ditch, then to an unnamed ditch (nontidal); then to an unnamed ditch (tidal); then to Little Bay; then to Aransas Bay in Segment No. 2471 of the bays and estuaries. The receiving water uses are high aquatic life uses for Little Bay and the designated uses for Segment No. 2471 are exceptional aquatic life uses, oyster waters, and contact recreation.

According to its Certificate of Formation, the purpose of Little Bay Foundation is to protect, restore, maintain and enhance the environmental, ecological, and aesthetic wellbeing of Little Bay in Rockport, Texas. It is also the purpose of LBF to raise community, corporate, and governmental awareness of the importance of and need to protect, restore, maintain and enhance Little Bay. The interests that LBF seeks to protect in a contested case hearing are germane to these purposes.

**PUBCOMMENT-OCC2 - Fwd: Public comment on Permit Number WQ0010054001**

**From:** PUBCOMMENT-OPA  
**To:** PUBCOMMENT-OCC2  
**Date:** 6/1/2010 1:43 PM  
**Subject:** Fwd: Public comment on Permit Number WQ0010054001  
**Attachments:** CCH Request 6-01-10.pdf

HR

MWD  
69298

>>> PUBCOMMENT-OCC 6/1/2010 11:34 AM >>>

>>> <[jbblaw@blackburncarter.com](mailto:jbblaw@blackburncarter.com)> 6/1/2010 11:26 AM >>>

**REGULATED ENTY NAME** CITY OF ROCKPORT

**RN NUMBER:** RN101916575

**PERMIT NUMBER:** WQ0010054001

**DOCKET NUMBER:**

**COUNTY:** ARANSAS

**PRINCIPAL NAME:** CITY OF ROCKPORT

**CN NUMBER:** CN600634810

**FROM**

**NAME:** James B. Blackburn, Jr.

**E-MAIL:** [jbblaw@blackburncarter.com](mailto:jbblaw@blackburncarter.com)

**COMPANY:** Blackburn Carter, P.C.

**ADDRESS:** 4709 AUSTIN ST

HOUSTON TX 77004-5004

**PHONE:** 7135241012

**FAX:**

**COMMENTS:** Please see attached comments and request for contested case hearing.

MWD

In accordance with 30 T.A.C. § 55.205, Ed Rainwater, who is a member of LBF, has standing to request a contested case hearing in his own right. Neither the claim asserted nor the relief requested requires the participation of individual members in this case.

Mr. Rainwater's address is 61 Blue Heron Drive, Rockport, Texas 78382-3711, which is on Little Bay. Mr. Rainwater lives at this address with his wife and has owned the property and their house for 15 years. Mr. Rainwater enjoys fishing from his dock on Little Bay, sailing his sailboat on Little Bay up through the canals, and his grandchildren have enjoyed swimming off the deck in Little Bay. However, the continued impact of the wastewater discharge has cut back his enjoyment of these activities. The location of Mr. Rainwater's property is approximately 200 yards from the point where the effluent from the City of Rockport Wastewater Treatment Plant enters Little Bay. Mr. Rainwater is an affected person with a personal justiciable interest related to an economic interest, namely his property interest, which is not common to the general public. In addition, his recreational enjoyment and the recreational interests of his family of Little Bay are also impacted by this application for renewal of the City of Rockport permit. Mr. Rainwater is also concerned about his family's health and safety as a result of the continued discharge into Little Bay.

In accordance with 30 T.A.C. § 55.205, Mr. Thomas Pazera is also a member of LBF and also has standing to request a contested case hearing in his own right. Neither the claim asserted nor the relief requested requires the participation of individual members in this case.

Mr. Pazera owns property located at 1899 N. Live Oak, Rockport Texas, 78382. Mr. Pazera's property backs up to and has frontage on Tule Ditch within one mile of the City of Rockport's WWTP discharge. Mr. Pazera is an affected person with personal justiciable interests that are not common to the general public. Mr. Pazera's justiciable interests include his economic interest in the property he own on Tule Ditch. Mr. Pazera also enjoys the natural beauty of Little Bay and as such is harmed by the decline in Little Bay.

#### **DISPUTED ISSUES OF FACT**

In accordance with the notice and the ED's Response to Public Comments issued by the Chief Clerk's office April 30, 2010, the following disputed issues of fact are relevant and material to the Commission's decision on this application.

#### **The Discharge is Violating the Texas Water Code and the Texas Surface Water Quality Standards (Comments 3, 4, 5, 6, 9, 10, 12, 13, 15, 16, 17, and 19)**

The basis of this request for a contested case hearing is water quality and the ability of the WWTP and the receiving waters to meet water quality standards. There are several aspects about the proposed discharge that raise water quality issues, including the place of discharge, the level of treatment, and the failure to regulate nutrients and other pollutants in relation to the special sensitivity of the receiving waters. The Texas Surface Water Quality Standards (TSWQS) apply to all surface waters of the state and specifically apply to substances attributable to waste discharges or the activities of man. 30 TEX. ADMIN. CODE § 307.4 (a). The TSWQS require that "surface water shall be maintained in an aesthetically attractive condition," and "waste discharges shall not cause substantial and persistent changes from ambient conditions of turbidity or color." *Id.* at § 307.4(b)(4) and (5). The TSWQS require that "[n]utrients from

permitted discharges or other controllable sources shall not cause excessive growth of aquatic vegetation which impairs an existing, attainable, or designated use." *Id.* at § 307.4 (e).

Since the original permit was issued in 1994, Little Bay has experienced a tremendous increase in turbidity, algae growth, and a corresponding disappearance of seagrass. In fact the shallows of Little Bay adjacent to the western shoreline were a thriving seagrass dominated ecosystem a short while ago. Seagrass beds are essential habitat for shrimp, finfish, crab, and many other aquatic species. Seagrass is an indispensable component of the extremely high quality estuarine ecosystems that are preferred by waterfowl, wading birds, sea turtles, and many important game fish in this area.

The either total or near total loss of seagrass beds in Little Bay, the corresponding increase in turbidity, and the algae blooms are caused or significantly contributed to by the pollutants discharged from the City of Rockport WWTP. This is in clear violation of the TSWQS and the Texas Water Code. Seagrass propagation, likely due to its ecological significance, is specifically and broadly protected under the TSWQS: "seagrass propagation... will be maintained and protected for all water in the state in which these uses can be achieved." 30 TEX. ADMIN. CODE § 307.7(b)(4). The TCEQ must address these various and ongoing violations of the TSWQS before action is taken to approve the renewal of the offending discharge.

#### **New Information Regarding the Receiving Waters Requires Modification of Permit Parameters to Prevent a Violation of TSWQS (Comment 12)**

As the ED plainly states, "in some cases, when TCEQ staff obtain new information regarding physical changes to the receiving waters, it may be necessary to modify a TPDES permit's effluent limitation in order to accommodate the receiving waters based on the new information so that a violation of the TSWQS will not occur." ED's Response to Comments at 16. LBF argues that the severe disruption of Little Bay, including the loss of seagrass, increased turbidity, and reoccurring algae blooms represents new information that must be included in any permit renewal. The Texas Water Code and the TSWQS require that these changes to the receiving water be taken into account, especially in a case such as this one where the changes themselves were significantly contributed to be the discharge in question. The original permitting process, for whatever reason, failed to adequately consider what impacts this discharge would have on Little Bay. Now that those impacts are obvious, they should be utilized to develop effluent limits protective of the receiving waters in compliance with the TSWQS. There is more than enough evidence of significant physical changes in Little Bay to require a new analysis of the discharge's impact and the corresponding necessary permit parameters under the TSWQS. Such changes represent a fact issue and a legal issue to be resolved in the contested case hearing process.

#### **Comparison to Neighboring Discharges Designed to Meet TSWQS Expose Obvious Inadequacies (Comments 4, 5, and 10)**

In many respects, this application is very similar to the applications of neighboring entities Aransas County MUD No. 1 (for discharge into Aransas Bay) and R&R Development (for discharge into Port Bay). Both of these neighboring entities sought permission to discharge treated effluent into a high quality estuarine area in the immediate vicinity of Rockport, Texas.

Both applications were into water bodies significantly larger than Little Bay and yet the final permits required discharges into wetland polishing ponds and with strict limitations on nutrients. The City of Rockport's discharge, which is much larger than the other discharges and flows into a much smaller body of water, should have similar or stricter requirements to ensure compliance with the Texas Water Code and TSWQS.

**The Discharge and the ED's Review are in Violation of the Antidegradation Provisions of the TSWQS (Comment 12)**

The TSWQS's antidegradation section states that, "[e]xisting uses and water quality sufficient to protect those existing uses will be maintained." 30 TEX. ADMIN CODE § 307.5(b)(1). The ED argues that the antidegradation provisions of the TSWQS do not apply to the proposed draft permit because the draft permit is merely a renewal of an existing wastewater discharge permit and therefore it does not have the capacity to increase pollution of state waters. The ED's refusal to implement the TSWQS antidegradation section stems from the following requirement that, "[t]he antidegradation policy and implementation procedures set forth in this section shall apply to actions regulated under state and federal authority which would increase pollution of the water in the state. Such actions include authorized wastewater discharges." *Id.* at (a). The ED's refusal to implement the antidegradation section is based on the erroneous factual assumption that the proposed permit, because it is a mere renewal, will not increase pollution loading in Little Bay.

For several reasons the ED's assumption with regard to antidegradation implementation is plainly wrong. First and most importantly, the approval of the draft permit without changes will continue to increase the actual amount of total nitrogen and other pollutants that enter Little Bay over time. At present, the actual amount of effluent discharged from the city's WWTP is only half of what is permitted. The City of Rockport has experienced tremendous growth over the last 10 ten years and this growth is expected to continue into the future. Despite the current recession, the City of Rockport has continued to annex neighboring territory and extend its sewer mains to new developments. It is an absolute certainty, that the amount of effluent actually discharged will increase in the near future. At the current level of operation the City of Rockport's WWTP discharges an estimated average of 206 lbs per day of Nitrate nitrogen. This amount will continue to increase and will approach 573 lbs per day (more than double) as the City's discharge increases towards the maximum permitted flow. From a factual standpoint, the approval of this draft permit will result in a measurable and demonstrable increase in pollution loading in the receiving waters and this conflicts directly with the ED's assumptions that no increase in pollution will occur.

Second, the permit itself is subject to the TSWQS's antidegradation requirements. For example, the ED states that, "The TCEQ also requires applicants to comply with all provisions of the draft permit and all applicable regulations in the TWC and TCEQ rules including the antidegradation provision in 30 TEX. ADMIN. CODE § 307.5." *See* ED's Response to Comments at 6. The permit is undoubtedly subject to the TSWQS including the antidegradation provisions. It is factually demonstrable that this discharge has contributed significantly to the degradation of Little Bay. The discharge as it exists is in violation of Texas law and TCEQ regulations and should be analyzed as such by the TCEQ in this permitting process. Antidegradation review is essential to ensure that new permits limitations required to bring this discharge within gambit of legality will be stringent enough to do their job.

**The ED's attempt to Compromise on the Issue of Nutrients is not Enough; Full Review and Analysis Under the TSWQS are Required (Comments 3, 4, 5, 6, 12, and 19)**

The ED has attempted to compromise on the issue of nutrients and will require additional monitoring of nutrients in the discharge, promising to require permit limits on nutrients if warranted by the results of this additional monitoring. More than enough information exists and is available to create and set appropriate effluent limits to meet the mandates of the Texas Water Code and the TSWQS. The TCEQ has developed and approved more appropriate permit limits for neighboring WWTPs. There is no reason why that cannot be done for the City of Rockport's discharge. New permit limits and a more stringent analysis of the discharge are specifically required by the TSWQS. A compromise is neither necessary or appropriate.

**There is a Factual Dispute Concerning Whether the Discharge has Caused the Decline of Little Bay (Comments 3, 4, 5, 6, 12, and 19)**

As previously mentioned there is no dispute over whether Little Bay has experienced a significant decline. The ED, however, continues to ignore the City of Rockport's WWTP discharge as the most likely contributor to the bay's decline. For the majority of commenters, including LBF, there is an obvious connection between the city's WWTP discharge and the decline of Little Bay. Little Bay is suffering from an overabundance of nutrients and other pollutants that are known to be present in the city's WWTP discharge in significant quantities. The ED chooses to ignore this obvious connection and instead focuses on a false temporal discrepancy between Little Bay's decline and the TCEQ's issuance of the original permit. The ED for example repeatedly relies on the statement that:

*Speakers at the Public Meeting on February 25, 2010 indicated increased degradation of Little Bay over the course of the last five years. The City of Rockport has been operating under the same permitted effluent limitations and flow restriction since 1994. This suggests that the recent degradation observed in Little Bay is from another source or sources.*

ED's Response to Comments (*passim*) (emphasis added).

In fact, TCEQ staff members present at the February 25, 2010 meeting informed the hundreds of concern citizens that the TCEQ could only consider changes to Little Bay "in the last five years" in its analysis of the city's renewal application. The citizens naturally seized on this statement and prefaced their remarks with the phrase "in the past five years" to make them relevant. There is evidence that the decline of Little Bay stretches back at least eight years or more. See Dr. Ron Outen's Written Comments dated December 4, 2009.

However, there was likely some delay between the initial discharge and the subsequent decline of Little Bay. This should not be a surprise. Impacts take time to be felt and noticed and the City of Rockport's actual discharge has increase significantly over the last 10 years. Even if the ED's five year time-line were accurate for the start of the decline of Little Bay it would not negate the city's WWTP discharge from being the most likely and most significant contributing factor. It is a scientifically demonstrable fact that the now barren murky waters of Little Bay were at the very least significantly contributed to by the nutrients and other pollutants being

LaDonna Castañuela  
June 1, 2010  
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discharged by the city's WWTP. The link between pollution discharge and ecological decline, especially with respect to seagrass abundance, is well documented and well understood. We know with certainty that the discharge and the receiving waters of Little Bay are violating the TSWQS. The TSWQS now require appropriate review and permit limits before a renewal permit can be issued.

#### CONCLUSION AND SUMMARY

Little Bay was once a thriving nursery for juvenile shrimp, finfish, and blue crab. The shallows of Little Bay are now turbid and barren and have become useless for the propagation of these species. Additional permit limits are required for the City of Rockport's discharge and the receiving water to comply with Texas law. Additional review is required in order for the applicant and the ED to meet the requirements of the TSWQS. LBF believes that alternatives exist that can halt and even reverse the deterioration of the water quality and that such alternatives must be considered under the TSWQS.

In addition to the disputed issues of fact detailed above, this contested case hearing is also requested regarding the compliance of TCEQ and this proposed discharge with the rules of the Texas Coastal Management Program. Among other things, important natural resource areas are to be protected under the coastal management regulations and the coastal management plan that is to be implemented by the Texas Commission on Environmental Quality. There is no doubt that Little Bay falls within the Texas coastal zone and that all property owners in the Key Allegro Subdivision have standing under the Texas coastal management program to request a contested case hearing from an agency that is "networked" under the Texas CMP.

In summary, LBF requests a contested case hearing and requests that the hearing be designated to determine compliance with the following issues/regulations: meeting water quality standards, 30 TEX. ADMIN. CODE §§ 307.1 *et seq.* and 309.1 *et seq.*; antidegradation of waters of the state, 30 TEX. ADMIN. CODE § 307.5; existence of less damaging alternative discharge sites; compliance with applicable provisions of the Texas Coastal Management Program, 30 TEX. ADMIN. CODE § 281.40 *et seq.*, Chapter 33, Subchapters C and F, Texas Natural Resources Code, and 31 TEX. ADMIN. CODE §§ 501, 503, and 505; and other important issues. (Comment Nos. 3, 4, 5, 6, 9, 10, 12, 13, 15, 16, 17, and 19)

Thank you for your consideration of these brief comments, and contested case hearing request, as well as LBF's request to be maintained on the mailing list of the above referenced application. Should you have any questions or concerns, I can be reached at (713) 524-1012.

Sincerely,

BLACKBURN CARTER, P.C.

by James B Blackburn Jr  
James B. Blackburn, Jr.  
by permission  
Mary W Carter

c: Ed Rainwater



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