

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 3, 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: TCEQ Docket No. 2010-0973-DIS
Petition By Cape Royale Utility District for Approval to Levy Standby Fees

Dear Ms. Castañuela:

Enclosed for filing, please find an original and 7 copies of the *Executive Director's Response to Hearing Requests*.

Please file stamp these documents and return a file-stamped copy to James Aldredge, Staff Attorney, Environmental Law Division, MC 173.

If you have any questions, please do not hesitate to contact me at (512) 239-2496.

Sincerely,

A handwritten signature in black ink, appearing to read "James Aldredge", written over a horizontal line.

James Aldredge
Staff Attorney
Environmental Law Division

CC: Mailing List

Enclosure

MAILING LIST
CAPE ROYALE UTILITY DISTRICT
DOCKET NO. 2010-0973-DIS; INTERNAL CONTROL NO. 05052009-D04

For the Applicant:

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Cape Royale Utility District
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For the Public Interest Counsel
via electronic mail:

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For the Office of Public Assistance
via electronic mail:

Bridget Bohac
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Quality
Office of Public Assistance, MC-108
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Requestors:

Ena Starling-Wildman
21065 N. Miami Ave.
Miami, Florida 33169

Carlo and Eden Taboada
6040 Forest Hill Blvd. #104
West Palm Beach, Florida 33415

Sally Holland
827 Saboda Ct.
Houston, Texas 77079

Kim and Glenn Horst
7615 Old English Ct.
Sugar Land, Texas 77479

Gaudioso and Linda Taboada
5022 El Claro Circle
West Palm Beach, Florida 33415

TCEQ DOCKET NO. 2010-0973-DIS

PETITION BY CAPE ROYALE	§	BEFORE THE
UTILITY DISTRICT FOR	§	
APPROVAL TO LEVY NON-	§	
UNIFORM OPERATION AND	§	TEXAS COMMISSION ON
MAINTENANCE STANDBY FEES	§	
IN SAN JACINTO COUNTY, TEXAS	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to hearing requests received by the Commission in response to a petition filed by the Cape Royale Utility District (District) to levy non-uniform operation and maintenance standby fees in San Jacinto County. The Petition was filed pursuant to section 49.231 of the Texas Water Code and title 30, section 293.141 of the Texas Administrative Code. The District seeks to levy an annual operation and maintenance standby fee of \$66 per connection for connections eligible to receive water and wastewater service and \$33 per connection for connections eligible to receive only water service.

I. BACKGROUND

On May 5, 2009, the District filed its petition to levy an annual operation and maintenance standby fee. The District has charged a standby fee pursuant to TCEQ authorizations every year since 1997. Authorizations for three-year increments were approved in 1997, 2000, 2003, and 2006. The District mailed the notice of its petition on August 20, 2009, and the notice was published on September 3, 2009 and September 10, 2009. The notice specified that hearing requests must be filed on or before October 12, 2009.

In response to the notice, the TCEQ received four hearing request letters. Requests were timely submitted by Sally Holland, Kim and Glenn Horst, and Ena Starling-Wildman. A fourth letter was filed with the Chief Clerk after the close of the hearing request period by Gaudioso and Linda Taboada, and Carlo and Eden Taboada. Each request letter states that the requestor owns undeveloped property within the

District and wishes to protest the petition. Executive Director staff composed a memorandum, dated June 9, 2010, summarizing its findings and recommendations. A copy of the memorandum is attached to this Response as Attachment A. The Executive Director has not issued an order in this case.

II. LEGAL AUTHORITIES

The application is subject to the TCEQ rules governing requests for contested case hearings found in title 30, chapter 55, subchapter F of the Texas Administrative Code.¹ Under section 55.251(a), an affected person may request a contested case hearing. The request must be in writing and filed with the chief clerk within the time period specified in the notice.² The request must also substantially comply with the requirements found in section 55.251(c). A document that comments on an application but does not request a hearing is treated as public comment.³

To be an affected person, a person must have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the petition.⁴ An interest common to members of the general public is not a personal justiciable interest.⁵ Section 55.256(c) lists other factors that shall be considered when determining if someone is an affected party. If someone is an affected person, then their hearing request shall be granted if it complies with the section 55.251 requirements, is timely filed, and is pursuant to a right to hearing authorized by law.⁶ Section 293.145 authorizes the right to a hearing for standby fee applications.

III. ANALYSIS

A. Request from Ena Starling-Wildman

1. Summary of the letter

In her letter, Ms. Starling-Wildman stated that she owns a vacant lot within the District. Though Ms. Starling-Wildman did not provide a specific location for her property, a representative of the District verified that Ms. Starling-Wildman does own

¹ 30 TEX. ADMIN. CODE §55.250 (West 2007).

² *Id.* §55.251(b), (d).

³ *Id.* §55.251(e).

⁴ *Id.* §55.256(a).

⁵ *Id.*

⁶ *Id.* §55.255(b).

an undeveloped lot in a subdivision within the District's boundaries. Ms. Starling-Wildman's letter expressly requests a contested case hearing. The letter was stamped as filed by the Chief Clerk on September 23, 2009.

2. The requirements in section 55.255(b) have been met.

Under section 55.251(a), Ms. Starling-Wildman may request a contested case hearing if she is an affected person. While Ms. Starling-Wildman did not specifically state how or why she believes she will be affected by the standby fees in a manner not common to members of the general public, it is implied that she believes she will be subject to paying the annual fees. She states that she lives out of state and that the property in the district is a vacant lot. She appears to be concerned about paying a fee for property that is uninhabited and unused.

Having satisfied all other requirements in section 55.251(c), Ms. Starling-Wildman's hearing request substantially complies with that section as required.⁷ The Executive Director recommends that the Commission grant the hearing request pursuant to section 55.255(b)(2).

B. Withdrawn Hearing Requests

The District submitted a letter dated June 9, 2010 stating that it had obtained agreements from several hearing requestors to withdraw their requests from consideration by the Commission. Attached to the District's letter were statements of withdrawal from Sally Holland, Kim and Glenn Horst, and Gaudioso and Linda Taboada. The Executive Director considers the hearing requests from those individuals withdrawn and will not address the merits of those requests here.

C. Untimely Hearing Requests

An additional hearing request was received from Carlo and Eden Taboada. This letter was submitted on behalf of Carlo and Eden Taboada as well as Gaudioso and Linda Taboada. It is dated October 12, 2009, but was not received and stamped as filed by the Chief Clerk until October 15, 2009. By rule, the time of filing of documents is upon receipt by the Chief Clerk as evidenced by the date stamp affixed to the document by the Chief Clerk.⁸ Hearing requests not filed with the Chief Clerk before the deadline

⁷ *Id.* §§55.251(c), .255(b).

⁸ *Id.* §1.10(e).

stated in the notice are not considered timely.⁹ Because the letter from the Taboadas was not filed on or before the deadline, it is not timely. The Executive Director does not consider this to be a valid hearing request, and will not address the merits of the request here.

IV. CONCLUSION

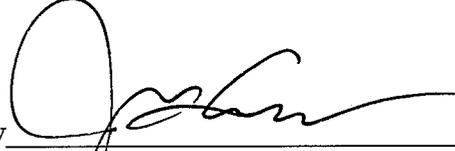
The Executive Director respectfully recommends that the Commission grant the request for a contested case hearing submitted by Ena Starling-Wildman. All other hearing requests on this matter were either withdrawn or were not timely filed with the Commission.

Respectfully submitted,

Texas Commission on Environmental
Quality

Mark R. Vickery, P.G.
Executive Director

Robert Martinez, Director
Environmental Law Division

By 

James Adredge, Staff Attorney
Environmental Law Division

State Bar No. 24058514
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
512-239-2496

Representing the Executive Director of the
Texas Commission on Environmental
Quality

⁹ *Id.* §55.251(d), (f)(1).

CERTIFICATE OF SERVICE

I certify that on September 3, 2010, an original and seven copies of the "Executive Director's Response to Hearing Requests" was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, and a complete copy was served by mail or electronic mail on the applicant, the Office of Public Interest Counsel, the Office of Public Assistance, and all persons who filed a hearing request in this matter.



James Aldredge, Staff Attorney
Environmental Law Division
State Bar No. 24058514

Attachment A

CAPE ROYALE UTILITY DISTRICT

Districts Review Team Executive Summary Memorandum

Texas Commission on Environmental Quality

TECHNICAL MEMORANDUM

To: Linda Brookins, Director
Water Supply Division

Date: June 9, 2010

Thru: *RN for* Tammy Benter, Manager, Utilities and Districts Section
RN for Alex A. (Skip) Ferris, P.E., Acting Leader, Districts Bond Team

From: Districts Creation Review Team

Subject: Cape Royale Utility District of San Jacinto County; Application for Approval to Levy Non-Uniform Operation and Maintenance Standby Fees; Pursuant to Texas Water Code Section 49.231. DT-FEE.
TCEQ Internal Control No. 05052009-D04 (TC)
CN: 602761645 RN: 102670601

A. GENERAL INFORMATION

The above referenced application was received on May 5, 2009. The District is requesting Commission approval to levy non-uniform operation and maintenance (O&M) standby fees in the maximum amount allowable under the provisions of the Texas Water Code and Commission Rules per year per equivalent single-family connection (ESFC) for a three year period against all vacant lots (1,141) in the District which have available water and/or wastewater facilities and services which are being operated and maintained by the District.

Non-Uniform Standby Fees

According to information received by staff, there are 1,129 unimproved lots in the District that have water and wastewater facilities and service available and 12 unimproved lots in the District which only have water facilities and services available. Standby fees should be levied non-uniformly, based on two levels (tiers) of service available. Tier 1 is represented by unimproved lots in the District which have water and wastewater facilities and services available. Tier 2 is represented by a group of unimproved lots in The Reserves Nos. 1 and 2, which have only water facilities and services available.

Existing Standby Fees

Previously, the Commission approved standby fees for the District in 1997, 2000, 2003, and 2006. In 2006, the Commission approved fees were \$71 for tier 1 and \$33 for tier 2, for 2006, 2007, and 2008.

Existing Rates and Taxes

According to information obtained from the Municipal Advisory Council, the District levied a maintenance tax rate of \$0.3038 and a debt service tax rate of \$0.2797 per \$100 assessed valuation for 2008. The District adopted a rate order on April 1, 2009 which established new residential water and wastewater rates. Based on this rate order, the monthly rate for 10,000 gallons of water and wastewater is \$69.31 per month.

B. STANDBY FEES FOR OPERATIONS AND MAINTENANCE

Conclusion on Eligibility

Based on documentation provided, the District's general operating fund had a beginning balance of \$292,730 as of July 1, 2009. Assuming no standby fees and no growth related revenues or expenses, the District's budget (fiscal year end June 30, 2010) indicates a deficit of \$162,250 (\$742,075 in revenues less \$904,325 in expenses). Since the District has a four-year history of including capital expenses in their budget, staff considers that the \$261,085 in capital expenses are part of the \$904,325 in annual expenses. Based on the \$904,325 in expenses, a three-month reserve requirement would be \$226,081 ($\$904,325 \div 4$). Since the District's fund balance is greater than the three-month reserve requirement, the surplus amount of \$66,649 ($\$292,730 - \$226,081$) should be drawn down over the three-year standby fee period, resulting in a net annual deficit of \$140,034 ($\$162,250 - \$22,216$). Based on the \$140,034 deficit, a 90% collection rate in accordance with 30 TAC §293.143(d)(1)(A), and 1,141 unimproved ESFCs, the maximum total allowable fee is \$136 per ESFC per year.

The District's resolution requested the maximum allowable fee; however, application material estimates that the fee would not exceed \$66 per ESFC per year. The District's consultants have indicated that the fee should not exceed the \$66 amount estimated in the application. Therefore, an annual fee of \$66 per vacant ESFC per year which have water and wastewater facilities and services available, and \$33 per vacant ESFC per year which have only water facilities and services available are the recommended fees.

C. CONCLUSIONS

1. Standby fees of \$66 per ESFC for unimproved lots with water and wastewater services and \$33 per ESFC for unimproved lots with water service are eligible.
2. The recommendations are made under authority delegated by the Executive Director of the Texas Commission on Environmental Quality.

Linda Brookins, Director

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June 9, 2010

D. RECOMMENDATIONS

1. Approve an annual non-uniform operations and maintenance standby fees, for the three calendar year periods 2009, 2010, and 2011, of \$66 per ESFC per year against all unimproved lots in the District which have water and wastewater facilities and services available (tier 1), and \$33 per ESFC per year against all unimproved properties in the District which have only water facilities and services available (tier 2), as shown on the attached standby fee map.
2. Direct the District that all funds collected from the standby fee levy shall be used to supplement the operation and maintenance account.
3. Advise the District that any increase in the amounts of the approved standby fee, or assessment of such fees to any additional tracts not indicated herein, will require Commission approval.
4. Advise the District that the fees approved herein may be imposed for monthly, quarterly, or annual billing periods, but should not be assessed prior to January 1, 2009.

E. ADDITIONAL INFORMATION

The District's representatives are:

Attorney: Ms. Lori G. Aylett – Smith Murdaugh Little & Bonham

Fiscal Agent: Ms. Jan Bartholomew – RBC Dain Rauscher Inc.

Craig Barnes

Craig Barnes
Districts Creation Review Team

Attachment: Standby Fee Levy Map