

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

September 3, 2010

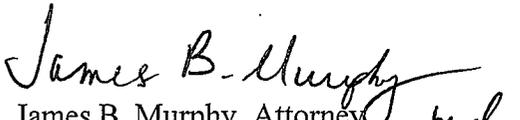
LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: CAPE ROYALE UTILITY DISTRICT
TCEQ DOCKET NO. 2010-0973-DIS**

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 *by file*
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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Internet address: www.tceq.state.tx.us

TCEQ DOCKET NO. 2010-0973-DIS

**IN THE MATTER OF THE
APPLICATION OF CAPE ROYALE
UTILITY DISTRICT FOR
APPROVAL TO LEVY AN
OPERATION AND
MAINTENANCE STANDBY FEE,
NO. 05052009-D04**

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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

Cape Royale Utility District (Cape Royale or Applicant) has applied to the TCEQ for
authority to levy an operation and maintenance standby fee on unimproved property within the
district for calendar years 2009–2011 in the maximum amount allowable under the provisions of
the Texas Water Code (TWC) and applicable Commission rules. The ED declared the
application administratively complete on May 12, 2009. Applicant published notice of the
application on September 3, 2009 and September 10, 2009 in the *San Jacinto News-Times*.
Applicant mailed notice via first-class mail to all landowners within the service area on
September 8, 2009.

TCEQ received the following requests for a contested case hearing: Sally Holland on
September 4, 2009; Kim and Glenn Horst on September 16, 2009; Ena Starling-Wildman on

September 23, 2009; and Gaudioso and Linda Taboada and Carlo and Eden Taboada on October 15, 2009. Subsequently, Applicant sent a letter to each of the hearing requesters explaining the purpose and use standby fees and asking for withdrawal of the hearing requests. The letter included a withdrawal form to be returned to Applicant. Sally Holland, Kim and Glenn Horst, and Gaudioso and Linda Taboada withdrew their requests using this form. Of the remaining hearing requests, OPIC recommends granting the request of Ena Starling-Wildman and denying the request of Carlo and Eden Taboada.

II. APPLICABLE LAW

Section 49.231 of the Texas Water Code governs a district's authority to impose standby fees. *See also* 30 TAC §§ 293.141–293.150. “The intent of the standby fee is to distribute a fair portion of the cost burden for operating and maintaining the facilities and for financing capital costs of the facilities to owners of property who have not constructed improvements but have potable water, sewer, or drainage capacity available.” TWC § 49.231(b). A district may impose standby fees in different amounts to fairly reflect the service and facility requirements of different properties. TWC § 49.231(b). Revenues from the fees must be used to pay operation and maintenance expenses. TWC § 49.231(b).

The district must publish notice of the standby fee application in a newspaper of general circulation in the county or counties in which the district is located once a week for two consecutive weeks, with the last publication date not later than the 30th day before the date the Commission considers the application. TWC § 49.231(e); 30 TAC § 293.145(b)(1). In addition, the district must send copies of the notice by certified mail, return receipt requested, to each owner of undeveloped property in the district not later than the 30th day before the date the

Commission considers the application. TWC § 49.231(e); 30 TAC § 293.145(b)(2). The district must submit an affidavit to the Commission certifying compliance with the public notice requirements at least one week prior to Commission consideration of the application. 30 TAC § 293.145(c).

The Commission, ED, or an affected person may request a contested case hearing within 30 days following publication of the notice or receipt of mail containing the notice. TWC § 49.231(e); 30 TAC § 293.145(d). A hearing request is governed by 30 TAC § 55.251, which provides:

- (c) A hearing request must substantially comply with the following:
- (1) give the name, address, and daytime telephone 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 activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public;
 - (3) request a contested case hearing; and
 - (4) provide any other information specified in the public notice of application.

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 § 55.256(a).

"An interest common to members of the general public does not qualify as a personal justiciable interest." 30 TAC § 55.256(a). Relevant factors to be considered in determining whether a person is affected include but are not limited to:

- (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.

30 TAC § 55.256(c). The Commission shall grant a request for a contested case hearing if the request complies with the requirements of 30 TAC § 55.251 and is made by an affected person, timely filed with the chief clerk, pursuant to a right to hearing authorized by law. 30 TAC § 55.255(b)(2).

The Commission may approve an application only if it finds the fee is necessary to maintain the financial integrity and stability of the district and fairly allocates the costs of district facilities and services among property owners of the district. TWC § 49.231(f). Commission rules provide criteria and factors to determine whether a fee is necessary and fairly allocates costs. *See* 30 TAC § 293.143 (Application Requirements for Standby Fees to be Used to Supplement the Operation and Maintenance Fund).

III. DISCUSSION

A. Ena Starling-Wildman

Ena Starling-Wildman submitted her hearing request on September 23, 2009, within 30 days of both the second notice publication date and the notice mailing date, and thus her request is timely under TWC § 49.231(e) and 30 TAC § 293.145(d). Her request provides her address and phone number, identifies her as a property owner within the district, and requests a contested case hearing, and therefore meets the requirements of 30 TAC § 55.251. As a property owner subject to the standby fee, she is an affected person under the factors in 30 TAC § 55.256(c). Accordingly, she is entitled to a contested case hearing on the application.

B. Carlo and Eden Taboada

Carlo and Eden Taboada submitted their hearing request on October 15, 2009 jointly with co-owners of the property Gaudioso and Linda Taboada, who subsequently withdrew their request. Carlo and Eden Taboada's hearing request was not timely filed. TWC § 49.231(e) and 30 TAC § 293.145(d) require affected persons to file a request for a contested case hearing within 30 days following publication of the notice or receipt of mail containing the notice. The second notice publication date was September 10, 2009. The notice mailing date was September 8, 2009. Absent a showing to the contrary, Commission rules add three days for mail to arrive, so the notice is presumed received on September 11, 2009. The hearing request was filed more than 30 days from both the notice publication date and mail receipt date. Accordingly, Carlo and Eden Taboada's hearing request is untimely, and they are not entitled to a contested case hearing.

C. Additional Issues

First, OPIC is concerned the notice prepared by TCEQ and sent to Applicant for publication and mailing states only that the application is for a standby fee in the "maximum amount allowable" under the law. Without a specific dollar amount or range, it is difficult for property owners to understand the extent of their obligation and whether the fee "is necessary to maintain the financial integrity and stability of the district and fairly allocates the costs of district facilities and services among property owners of the district" as required by TWC § 49.231(f) and 30 TAC § 293.143. OPIC recommends the Commission consider specifying the amount of the fee or a fee range in notices for future applications.

Second, the affidavit of mailing provided to Applicant by TCEQ requires Applicant to certify that notice was mailed *via first-class mail*. However, the Texas Water Code, Commission

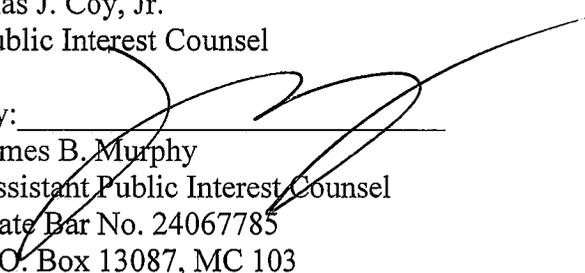
rules, and the August 20, 2009 notice instructions letter from TCEQ require notice to be mailed *via certified mail*, return receipt requested. TWC § 49.231(e); 30 TAC § 293.145(b)(2). It is unclear from this affidavit whether Applicant mailed notice via certified mail, return receipt requested, as required. OPIC recommends the Commission revise the affidavit form to accurately reflect the notice requirements. OPIC also requests Applicant provide verification that the notice was sent via certified mail, return receipt requested, in its reply brief due September 20, 2010.

IV. CONCLUSION

OPIC recommends granting the hearing request submitted by Ena Starling-Wildman and denying the hearing request submitted by Carlo and Eden Taboada.

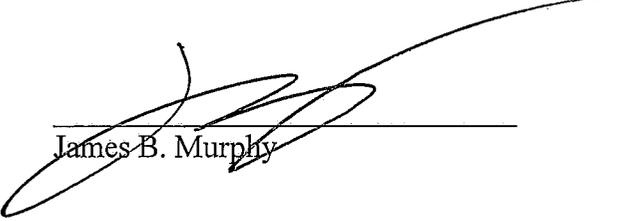
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 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

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TCEQ DOCKET NO. 2010-0973-DIS

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