

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*

October 26, 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: U.S. DEPARTMENT OF THE ARMY  
TCEQ DOCKET NO. 2010-1602-MWD**

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Requests 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. 2010-1602-MWD

APPLICATION BY	§	BEFORE THE
U.S. DEPARTMENT OF THE ARMY	§	TEXAS COMMISSION ON
PERMIT NO. WQ0012074001	§	ENVIRONMENTAL QUALITY

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OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO HEARING REQUESTS

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**To the Members of the Texas Commission on Environmental Quality:**

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

**I. Introduction**

On July 23, 2009, the U.S. Department of the Army ("DA" or "Applicant") applied to the TCEQ for renewal of a domestic wastewater permit. Renewal of the permit would authorize the continued operation of the Canyon Lake Wastewater Treatment Plant. The plant is located approximately 3,300 feet east of FM 306 and 2,500 feet north of Jacob Creek Park Road in Comal County. The permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 12,500 gallons per day. The treated effluent is discharged directly to Canyon Lake in Segment No. 1805 of the Guadalupe River Basin.

The application was declared administratively complete September 10, 2009. The first notice was published October 4, 2009 in *La Prensa de San Antonio* newspaper, and October 9, 2009 in the *New Braunfels Herald-Zeitung*. The second notice was published January 17, 2010.

and January 20, 2010, respectively, in the same newspapers. On June 24, 2010, the TCEQ conducted a public meeting in New Braunfels. The final decision letter and the Executive Director's (ED) Response to Comments (RTC) were mailed August 26, 2010, and the deadline for hearing requests was September 27, 2010.

The TCEQ timely received 29 hearing requests. For the reasons stated herein, OPIC recommends the Commission deny all hearing requests.

## **II. Applicable Law**

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.

### III. Analysis of Hearing Requests

The TCEQ timely received hearing requests from the following people:

Ted Bowen	Jan Kennady
Richard and Jeanette Brace	Kris Kilmer
David Brown	Paul Klein
Joy Buckels	Diana Melancon
John and Edith Coble	Tony Overman
Norman Cooper	Rose and Judy Pizzitola
Belinda and Ron Frisk	Jeff Quinn
Kenneth Fuller	Patrick and Lois Ricci
James Gansle	Marvin and Joanne Serr
Steve Hart	Phillip and Frances Strickland
David Hayes	Larry and Sandi Taylor
Paul Holm	Douglas and Therese Wagner
Don Johnson	Frank Walsh
Milo Johonnett	Robert Wickman
Charles and Xena Jones	

#### A. 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.

After review of the hearing requests, the application, and other information filed with TCEQ, OPIC concludes the 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 Applicant is not applying to increase the quantity of waste authorized to be discharged from the Canyon Lake Wastewater Treatment Plant or materially change the pattern or place of discharge. The application therefore satisfies § 55.201(i)(5)(A).

As required by §55.201(i)(5)(B), this renewal will maintain the quality of waste authorized to be discharged. The current permitting action is for renewal only, and the quality of waste authorized to be discharged remains unchanged.

The published notices regarding this application informed the public of the opportunity for a public meeting, and on June 24, 2010, the TCEQ conducted a public meeting in New Braunfels. The public meeting in New Braunfels indicates that any required opportunity for public meeting has been given and § 55.201(i)(5)(C) has been satisfied.

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 Plant's compliance history 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).

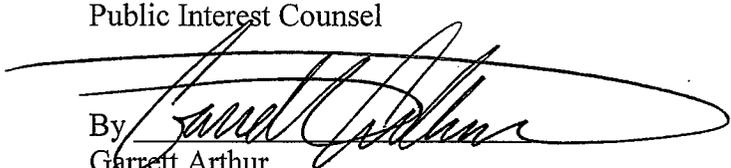
OPIC finds the Applicant's permit renewal application satisfies the requirements of Texas Water Code § 26.028(d) and 30 TAC § 55.201(i)(5), no right to a contested case hearing exists on this application, and the Commission may approve the application without a hearing.

#### **IV. Conclusion**

The DA'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 all hearing requests.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
Garrett Arthur  
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## CERTIFICATE OF SERVICE

I hereby certify that on October 26, 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

### FOR THE APPLICANT

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### HEARING REQUESTERS

*See attached list*



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