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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 31, 2011

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: LOWER COLORADO RIVER AUTHORITY
TCEQ DOCKET NO. 2010-0105-MWD**

Dear Ms. Castañuela:

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

Sincerely,


James Murphy, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ Docket No. 2011-0105-MWD

**In the Matter of the Application
of the Lower Colorado River
Authority for Renewal of TPDES
Permit No. WQ0014404001**

**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

A. Background of Facility

The Lower Colorado River Authority (LCRA or Applicant) has applied for renewal of Texas Pollution Discharge Elimination System (TPDES) Permit No. WQ0014404001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 25,000 gallons per day (gpd) from the Matagorda Bay Nature Park and Preserve Wastewater Treatment Facility (Matagorda Bay WWTF). The draft permit also authorizes the disposal of sludge at a TCEQ authorized land application site or co-disposal landfill.

The Matagorda Bay WWTF is an activated sludge process plant operated in the extended aeration mode. Treatment units include a bar screen, aeration basin, final clarifier, chlorine contact chamber, sludge digester, and sludge holding tank. The facility is currently in operation. It is located approximately 2,700 feet east of Farm-to-Market

Road 2031 (Beach Road) and approximately 1,200 feet north of the Gulf of Mexico in Matagorda County.

The treated effluent is discharged to Colorado River Tidal in Segment No. 1401 of the Colorado River Basin. The designated uses for Segment No. 1401 are high aquatic life use and contact recreation. Segment No. 1401 is currently listed on the State's inventory of impaired and treated waters, otherwise known as the Section 303(d) list. The listing is for bacteria from the confluence with the Gulf of Mexico in Matagorda County to a point 1.3 miles downstream of the Missouri-Pacific Railroad in Matagorda County. The draft permit adds an effluent limitation for *Enterococci* bacteria with once per quarter monitoring, in accordance with recent amendments to 30 TEX. ADMIN. CODE (TAC) Chapters 309 and 319.

The effluent limitations in the draft permit, based on a 30-day average, are 10 milligrams per liter (mg/l) biochemical oxygen demand (BOD₅), 15 mg/l total suspended solids (TSS), 35 colony-forming units (CFU) or Most Probable Number (MPN) of *Enterococci* per 100 milliliters (ml), and 4.0 mg/l minimum dissolved oxygen (DO). The effluent shall contain a chlorine residual of at least 1.0 mg/l and shall not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow.

B. Procedural Background

TCEQ received this application on June 1, 2010. On June 29, 2010, the TCEQ Executive Director (ED) declared the application administratively complete. Applicant published the Notice of Receipt of Application and Intent to Obtain Water Quality Permit Renewal (NORI) on July 8, 2010 in the *Matagorda Advocate* and in Spanish

language on July 21–27, 2010 in *La Neta*. The ED completed technical review of the application, and prepared a draft permit. Applicant published the Notice of Application and Preliminary Decision for TPDES Permit for Municipal Wastewater Renewal (NAPD) on September 23, 2010 in the Matagorda Advocate and in Spanish language on September 22–28, 2010 in *La Neta*. The public comment period ended on October 25, 2010. On December 13, 2010, the TCEQ Office of Chief Clerk mailed the ED's decision and Response to Public Comment to those persons who submitted comments on the application. The deadline to request a contested case hearing was January 12, 2011.

TCEQ received timely comments and requests for a contested case hearing from: Beverly Cain on July 20, 2010; Lance Cain on July 14, 2010; Andrew Griffith on July 14, 2010; Susie Hutson on August 4, 2010; Rick Potthoff on July 14, 2010; and Julie Sullivan on July 14, 2010. The comments and hearing requests from Lance Cain, Susie Hutson, Rick Potthoff, and Julie Sullivan included the permit number for the Matagorda Bay WWTF, but referred to a different application for the White Stallion Energy Center. For the reasons discussed below, OPIC recommends denying the hearing requests.

II. Applicable Law

This application was declared administratively complete on June 29, 2010. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. WATER CODE (TWC) § 5.556).

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 the application.

30 TEX. ADMIN. CODE (TAC) § 55.201(d).

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 § 55.203(a). This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(a). Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons.

30 TAC § 55.203(b). Relevant factors considered in determining whether a person is affected 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 and safety of the person, and on the 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 § 55.203(c).

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, 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 of 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.

30 TAC § 55.209(e).

There is no right to a contested case hearing on an application to renew or amend a permit under Chapter 26 of the TWC if:

- (1) the applicant is not applying to:
 - (A) increase significantly the quantity of waste authorized to be discharged; or
 - (B) change materially the pattern or place of discharge;
- (2) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;
- (3) any required opportunity for public meeting has been given;
- (4) consultation and response to all timely received and significant public comment has been given; and
- (5) 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[.]

30 TAC § 55.201(i)(5).

III. Discussion

Pursuant to 30 TAC § 55.201(i)(5), there is no right to a contested case hearing on this renewal application. Applicant is not applying to increase the quantity of waste or change the discharge location. 30 TAC § 55.201(i)(5)(A). The renewal application maintains the discharge limits in the original permit, and adds an additional effluent limitation for bacteria. 30 TAC § 55.201(i)(5)(B). The ED did not conduct a public meeting because he concluded that the number and nature of the received comments did not meet the applicable criteria. 30 TAC § 55.201(i)(5)(C). *See also* 30 TAC § 55.154(c) (requiring a public meeting when the ED determines there is a substantial or significant degree of public interest in the application or a member of the legislature who represents the general area requests one). The ED's Response to Public Comment was mailed to interested persons on December 13, 2010. 30 TAC § 55.201(i)(5)(D). TCEQ rates the compliance history of both LCRA and the Matagorda Bay WWTF as average, and there do not appear to be violations since TCEQ rated Applicant in July 2010. Applicant entered an agreed enforcement order on November 13, 2009 for

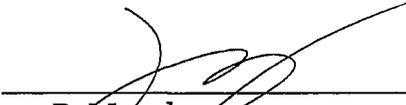
alleged violations of the TSS effluent limitation from October 2008 to December 2008. During a site visit on May 25, 2010, an investigator from the TCEQ regional office determined that all violations have been resolved. OPIC concludes this violation does not raise an issue regarding Applicant's ability to comply with a material term of the permit. 30 TAC § 55.201(i)(5)(E). Accordingly, the hearing requests should be denied.

IV. Conclusion

OPIC recommends denying the hearing requests.

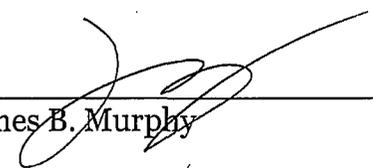
Respectfully submitted,

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Certificate of Service

I hereby certify that on January 31, 2011 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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DOCKET NO. 2011-0105-MWD; PERMIT NO. WQ0014404001

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