

Bryan W. Shaw, Ph.D., *Chairman*
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Mark R. Vickery, P.G., *Executive Director*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 28, 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: VEOLIA ES TECHNICAL SOLUTIONS LLC
TCEQ DOCKET NO. 2011-0272-WR**

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Request 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

DOCKET NO. 2011-0272-WR

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|------------------------------|----------|------------------------------|
| VEOLIA ES TECHNICAL | § | BEFORE |
| SOLUTIONS LLC | § | TEXAS COMMISSION ON |
| TEMPORARY WATER USE | § | ENVIRONMENTAL QUALITY |
| PERMIT NO. WRTP 12445 | § | |

**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUEST**

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 request in the above-referenced matter.

I. Introduction

On March 27, 2009, Veolia ES Technical Solutions L.L.C. ("Veolia" or "Applicant") applied to the TCEQ for a temporary water use permit. The permit would authorize the diversion and use of a maximum of 2,000 acre-feet of water within one year from two diversion points on an unnamed tributary of Fish Box Gully, Neches-Trinity Coastal Basin for industrial and domestic purposes in Jefferson County.

The application was declared administratively complete July 16, 2009. On November 13, 2009, TCEQ mailed notice of this application, and the comment and hearing request period closed December 4, 2009.

TCEQ received one timely hearing request from Roy R. Petersen. For the reasons stated herein, OPIC recommends this hearing request be denied.

II. Applicable Law

A. Temporary Water Use Permit

The TCEQ can issue temporary permits for beneficial purposes to the extent that they do not interfere with or adversely affect prior appropriations or vested rights on the stream from which water is to be diverted under such temporary permit. TWC § 11.138(a). The TCEQ can prescribe rules governing notice and procedure for the issuance of temporary permits. TWC § 11.138(b). The TCEQ may not issue a temporary permit for a period exceeding three years. TWC § 11.138(d). A temporary permit does not vest in its holder a permanent water right. TWC § 11.138(e). A temporary permit expires and shall be cancelled by the TCEQ in accordance with the terms of the permit. TWC § 11.138(f). A temporary permit may also have conditions for the protection of instream uses, water quality, aquatic and wildlife habitat, and freshwater inflows to bays and estuaries. 30 TAC § 297.13(b).

Notice of a temporary water use permit application must be mailed to diverters of record who are located below the applicant's proposed diversion point. 30 TAC § 295.154(a).

B. Hearing Request

Because this application was declared administratively complete after September 1, 1999, it is subject to the requirements of 30 TAC §§ 55.250–55.256. 30 TAC §§ 55.250, 295.171. Under those provisions, the Commission, Executive Director (ED), applicant and affected persons may request a contested case hearing. 30 TAC §§ 55.251(a), 295.171.

A hearing requestor must make their request in writing within the time period specified in the notice and identify the requestor's personal justiciable interest affected by the application, specifically noting the "requestor's location and distance relative to the activity" 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." 30 TAC § 55.251(b)–(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 § 55.256(a). An interest common to members of the general public does not qualify as a personal justiciable interest. *Id.* Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.256(b). 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 (1) the request is made by the applicant or the ED, or (2) the request is made by an affected person, timely filed with the chief clerk, and made pursuant to a right to hearing authorized by law. 30 TAC § 55.255(b).

III. Analysis

Mr. Petersen is concerned that Veolia is seeking this permit for the purpose of flushing polluted water. He is also concerned about the restoration of his wetland marsh and wildlife nurseries. In his hearing request, Mr. Petersen states that he is a downstream and adjacent property owner and water right holder of record. However, based on OPIC's review of agency records, Mr. Petersen is not a downstream water right holder. He apparently received mailed notice of this application because he is on the TCEQ Chief Clerk's mailing list for all notices concerning Jefferson County.

Without a downstream water right, Mr. Petersen does not qualify as an affected person in this matter. Veolia's proposed diversion could potentially impact a downstream water right holder, but because Mr. Petersen is not a downstream diverter, he lacks a personable justiciable interest which can be distinguished from interests common to the general public. Mr. Petersen needs to show that the quantity of water to be diverted by Veolia will adversely impact a personal justiciable interest, such as a water right. Absent documentation that Mr. Petersen is a downstream diverter, OPIC cannot find that a reasonable relationship exists between his claimed interests and Veolia's proposed diversion.

We further note, however, that Mr. Petersen may file a reply by April 11, 2011. OPIC may reconsider its position based on a timely filed reply which shows that Mr. Petersen is a downstream water right holder and addresses how his personal interests or uses of property or natural resources may be impacted by Veolia.

IV. Conclusion

At this time, OPIC cannot find that Roy Petersen qualifies as an affected person in this matter. Under 30 TAC § 55.255(b), the Commission can only grant a hearing request if the request is made by an affected person. Therefore, OPIC respectfully recommends the Commission deny Mr. Petersen's hearing request.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
Garrett Arthur
Assistant Public Interest Counsel
State Bar No. 24006771
P.O. Box 13087, MC 103
Austin, Texas 78711
(512) 239-5757
(512) 239-6377 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2011, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.

A handwritten signature in cursive script, appearing to read "Garrett Arthur", is written over a horizontal line.

Garrett Arthur

MAILING LIST
VEOLIA ES TECHNICAL SOLUTIONS L.L.C.
DOCKET NO. 2011-0272-WR

FOR THE APPLICANT:

Duncan Daniel
Veolia ES Technical Solutions L.L.C.
P.O. Box 2653
Port Arthur, Texas 77643-2653
Tel: (409) 736-4146
Fax: (409) 736-4197

FOR THE EXECUTIVE DIRECTOR:

via electronic mail:

Todd Galiga, Staff Attorney
Texas Commission on Environmental
Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

Iliana Marie Delgado, Technical Staff
Michael Gill, Technical Staff
Texas Commission on Environmental
Quality
Water Supply Division, MC- 160
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3678
Fax: (512) 239-2214

FOR OFFICE OF PUBLIC

ASSISTANCE:

via electronic mail:

Bridget Bohac, Director
Texas Commission on Environmental
Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE
RESOLUTION

via electronic mail:

Kyle Lucas
Texas Commission on Environmental
Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental
Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

REQUESTER:

Roy R. Petersen
515 Roland Ln.
Kyle, Texas 78640-5620