Bryan W. Shaw, Ph.D., *Chairman*
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Blas J. Coy, Jr., *Public Interest Counsel*

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

July 11, 2011

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

Re: **CITY OF BOVINA**
**TCEQ DOCKET NO. 2011-0878-MWD**

Dear Ms. Chao:

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

Sincerely,

Amy Swanholm

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



printed on recycled paper using soy-based ink

**TCEQ DOCKET NO. 2011-0878-MWD**

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| **IN THE MATTER OF THE APPLICATION OF THE CITY OF BOVINA FOR PERMIT NO. WQ0014730001** | **§ § § § § §** | **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:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) with a Response to Requests for Hearing in the above-referenced matter.

## I. INTRODUCTION

### A. Background of Facility

City of Bovina, P.O. Box 720, Bovina, Texas 79009-0720 (Bovina), has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to TCEQ Permit No. WQ0014730001, to authorize a reduction in BOD5 monitoring frequency and to clarify that the number of ponds mentioned in Special Provision 15 of the existing permit should be 2. The current permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 250,000 gallons per day via surface irrigation of 63 acres of non-public access pastureland, which will remain the same. This permit will not authorize a discharge of pollutants into waters in the State. TCEQ received this application on September 7, 2010.

The wastewater treatment facility and disposal site are located approximately 0.75 mile northeast of the intersection of State Highway 86 and East Street, to the south of State Highway 86 in Parmer County, Texas 79009.

The wastewater treatment facility and disposal site are located in the drainage basin of White River Lake in Segment No. 1240 of the Brazos River Basin.

### B. Procedural Background

The permit application for a major amendment to the existing permit was received on September 7, 2010 and declared administratively complete on October 25, 2010. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on November 11, 2010 in *State Line Tribune*. The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published on January 27, 2011 in *State Line Tribune*. The public comment period ended on February 28, 2011. The ED's Response to Comments was mailed on May 6, 2011. The deadline to request a contested case hearing was June 6, 2011.

TCEQ received timely hearing requests from Laurance Kreigel on November 8, 2010, and May 23, 2011. OPIC recommends referring this application to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

## II. ANALYSIS OF REQUESTS FOR CONTESTED CASE HEARINGS

### A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 5.556 added by Acts 1999, 76th Leg., ch 1350 (commonly known as "House Bill 801"). 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 application. 30 TAC § 55.201(d). 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." This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will 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.

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, pursuant to 30 TAC § 55.209(e), 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 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.

## B. Determination of Affected Person Status

TCEQ received two timely hearing requests from Laurance Kriegel on November 8, 2010, and May 23, 2011. In his hearing requests, he states that has a farm located 3 miles east of the current facility. He also states that he owns the land the current facility is located upon.

Mr. Kriegel is concerned about the pathogens from the discharge impacting the value of his property, his health, his livestock, the land he uses to produce crops, and his vehicles. He is also concerned about whether the facility meets TCEQ rules governing the location of the facility. Mr. Kriegel expresses concern regarding human health and air quality. He states that Bovina is operating under an incorrect set of rules and that the TCEQ should establish the correct ownership of the property before going further with this permitting matter.

Mr. Kriegel raises numerous issues that show a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. He claims to own the property on which the facility is located and may be used for surface irrigation, as well as a farm located about three miles away. OPIC acknowledges that Mr. Kriegel's requests assert that the applicant is using Mr. Kriegle's property illegally without Mr. Kriegel's consent. Moreover OPIC acknowledges that 30 TAC § 305.122(c) does not authorize Bovina's interference with others' property rights and that the issuance of a

permit does not convey property rights. If Mr. Kriegel's sole complaint was that Bovina did not have the necessary property interest to seek this authorization, OPIC would not support the hearing request. However, Mr. Kriegel's two letters assert that he is the owner of the property where the facility is located, and that he is concerned about human health and invironmental impacts- issues within the Commission's jurisdiction. For these reasons, OPIC finds that Mr. Kriegel has personal justiceable interests which are not common to the public.

## C. Issues Raised in the Hearing Requests

Should the Commission recommend that this matter be sent to the State Office of Administrative Hearings, OPIC provides the following analysis on what issues may be appropriate to refer to a hearing. Mr. Kriegel raises the following issues:

1. Whether the proposed facility would impact property values.
2. Whether the proposed facility would impact human health.
3. Whether the proposed facility would impact livestock.
4. Whether the proposed facility would impact surrounding soil and crops.
5. Whether the proposed facility would impact vehicles travelling nearby.
6. Whether the proposed facility would meet rules regarding the location of the facility.
7. Whether the proposed facility complies with rules relating to property ownership.
8. Whether the proposed facility is using freshwater to meet effluent limits.
9. Whether the proposed facility would comply with rules protecting groundwater.
10. Whether the proposed facility would contaminate nearby storage tanks.
11. Whether the proposed facility is properly sized for the population it seeks to serve.

12. Whether the proposed facility would comply with TCEQ rules governing odor.

13. Whether the proposed facility complies with TCEQ rules.

## D. Issues raised in Comment Period

All of the hearing requests raise issues that were also raised during the comment period.

## E. Disputed Issues

There is no agreement between hearing requestors and the Applicant or Executive Director on the issues raised in the hearing requests.

## F. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. All of the issues raised in timely hearing requests by affected parties are issues of fact. *See* 30 TAC §55.211(b)(3)(A) and (B).

## G. Relevant and Material Issues

Hearing requests may raise issues relevant and material to the Commission's decision under 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.[1] Relevant and material issues are those governed by the substantive law under which this permit is to be issued.[2]

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[1] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

[2] *Id.*

TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307 and 309, as well as under specific rules related to wastewater systems found at 30 TAC Chapters 30 and 217. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit "maintain the quality of water in the state consistent with public health and enjoyment." 30 TAC § 307.1. Furthermore, 30 TAC § 309.10 states that TCEQ's regulatory intent is to minimize the possibility of exposing the public to nuisance conditions.

Mr. Kriegel raises several issues that are outside the jurisdiction of the TCEQ. 30 TAC § 305.122(c) provides that the issuance of any permit does not authorize injury or invasion of private property rights. Therefore OPIC does not find relevant the issues of whether the permitting action would impact surrounding property values or vehicles.

Based on this analysis, OPIC finds the issues set forth in section H to be relevant and material.

## H. Issues Recommended for Referral

Should the Commission refer this matter to the State Office of Administrative Hearings for a contested case hearing OPIC recommends the Commission refer the following disputed issues of fact:.

1. Whether the proposed facility would impact human health.
2. Whether the proposed facility would impact livestock.
3. Whether the proposed facility would impact surrounding soil and crops.
4. Whether the proposed facility would meet rules regarding the location of the facility.
5. Whether the proposed facility complies with rules relating to property ownership.
6. Whether the proposed facility is using freshwater to meet effluent limits.

7. Whether the proposed facility would comply with rules protecting groundwater.

8. Whether the proposed facility would contaminate nearby storage tanks.

9. Whether the proposed facility is properly sized for the population it seeks to serve.

10. Whether the proposed facility would comply with TCEQ rules governing odor.

## III. MAXIMUM EXPECTED DURATION OF HEARING

Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be one year from the first date of the preliminary hearing until the proposal for decision is issued.

## IV. CONCLUSION

OPIC recommends the Commission find that Laurance Kriegel is an affected person, and refer this matter to the State Office of Administrative Hearings for a contested case hearing on the issues listed in Section II.H above.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

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## CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2011 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Requests for Hearing were 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 or by deposit in the U.S. Mail.

Amy Swanholm

Amy Swanholm

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**TCEQ DOCKET NO. 2011-0878-MWD**

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