

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

December 29, 2011

Bridget Bohac, 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 DENISON
TCEQ DOCKET NO. 2011-1490-MWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanholm".

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2010-1490-MWD

**IN THE MATTER OF
THE APPLICATION
OF
THE CITY OF
DENISON FOR
PERMIT NO. WQ
0010079003**

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§

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTS FOR HEARING AND REQUESTS FOR
RECONSIDERATION**

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 and Requests for Reconsideration* in the above-referenced matter.

I. INTRODUCTION

A. Background of Facility

The City of Denison (The City) has applied for a renewal of TPDES Permit No. WQ0010079003, that would authorize the Paw Paw Wastewater Treatment Facility to discharge treated domestic wastewater at an annual average flow not to exceed 6,000,000 gallons per day (gpd).

The facility is located east of the City of Denison, approximately 1,600 feet east and 2,200 feet north of the intersection of Center Street and Farm-to-Market Road 120 in Grayson County, Texas 75021. The treated effluent is discharged via pipeline to the Red River Below Lake Texoma in Segment No. 0202 of the Red River Basin. The designated uses for Segment No. 0202 are contact recreation,

public water supply and high aquatic life use. Segment No. 0202 is not currently listed on the State's inventory of impaired and threatened waters (the Clean Water Act §303(d) list). This is a renewal application for a public domestic wastewater treatment facility and should not contribute to the impairment of this segment.

The Paw Paw Wastewater Treatment Facility is an activated sludge process plant operated in the conventional mode. Treatment units include bar screens, grit chambers, primary clarifiers, aeration basins, final clarifiers, aerobic digesters, a belt filter press, sand drying beds, two shaving basins, and an ultraviolet (UV) system.

In accordance with the recent amendments to 30 TAC Chapters 309 and 319 and to ensure disinfection, an effluent limitation for *E. coli* bacteria has been added to the draft permit. The effluent limitations in the draft permit will maintain and protect the existing instream uses. The effluent limitations in the draft permit, based on a 30-day average, are 20 mg/l five-day Biochemical Oxygen Demand (BOD₅), 20 mg/l Total Suspended Solids (TSS), 126 *E. coli* Colony Forming Units (CFU) or Most Probable Number (MPN) per 100 ml, and 2.0 mg/l minimum dissolved oxygen (DO). The Applicant will use an UV system for disinfection purposes.

B. Procedural Background

TCEQ received the application on November 30, 2010 and declared it administratively complete on December 15, 2010. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on December 26, 2010 in the *Herald Democrat*. The Notice of Application and Preliminary Decision (NAPD) was published on May 1, 2011 in the *Herald Democrat*. The public comment period ended on May 31, 2011 and the deadline to request a hearing was August 22, 2011.

TCEQ received one comment and four hearing requests from Mrs. James "Patsy" Clement on August 19, 2011. The requests also ask that the Commission reconsider the ED's decision. The comment and the requests were timely. As discussed below, OPIC finds that there is no right to a contested case hearing on

this application and recommends that the hearing request be denied. Should the Commission decide to hold a hearing on this application, OPIC recommends the Commission find that Mrs. Clement would be affected.

II. REQUESTS FOR RECONSIDERATION

Any person may file a request for reconsideration of the ED's decision. 30 TEX. ADMIN. CODE (TAC) § 55.201(e). The request must be in writing and filed with the Chief Clerk no later than 30 days after the Chief Clerk mails the ED's decision and response to comments. *Id.* The request must expressly state that the person is requesting reconsideration of the ED's decision and give reasons why the decision should be reconsidered. *Id.*

The request for reconsideration relies on the same issues cited to support the hearing requests, but an evidentiary record would be necessary for OPIC to make a recommendation to the Commission on whether the ED's decision to issue the permit should be reconsidered. Accordingly, OPIC recommends denying the request for reconsideration.

III. RIGHT TO A CONTESTED CASE HEARING

A. Right to a Contested Case Hearing

Texas Water Code (TWC) §26.028(d) states that the Commission may approve an application to renew a permit without a public hearing, under certain conditions.¹ 30 TAC §55.201(i) provides that no right to a hearing exists for certain water quality discharge permits. These authorizations include applications to renew or amend a permit if the applicant will not:

- (A) increase significantly the quantity of waste to be discharged;
- (B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;
- (C) any required opportunity for public meeting has been given;
- (D) consultation and response to all timely received and significant public comment has been given; and

¹ See also 30 TAC § 50.113(d)(4), and 55.211(d)(4).

(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;

The draft permit would not increase the quantity of waste that could be discharged from the existing permit. Effluent limitations and monitoring requirements would remain the same or be more protective than the existing permit requirements. Opportunity for a public meeting was given, and the executive director has filed a response to comments that addresses all timely and significant public comment. Furthermore, the applicant's compliance history is "average." Therefore, OPIC finds that the Commission may approve the application without holding a contested case hearing.

For these reasons, OPIC recommends that the hearing requests be denied. If the Commission disagrees, OPIC provides the following analysis of the requests.

IV. 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

One individual, Mrs. James "Patsy" Clement, requested a hearing on this application. She submitted four identical timely hearing requests on August 19, 2011.

Mrs. Clement's hearing requests state that she lives at 1267 Georgetown Rd., Pottsboro, TX 75076-6095, located immediately adjacent to the site where the wastewater discharge enters the Red River. She states that she is adversely affected by an island in the Red River, which she believes is caused by the discharge's disruption of the natural river flow. This flow disruption, she states, is also causing unnatural growth and erosion on her property-leading to a decrease in her usable land. She is also concerned with the impact of nutrients sediment, and suspended solids in the discharge.

Mrs. Clement disputes the ED's statements in the Response to Comments. Specifically, she disagrees that the discharge is relatively small compared to the size of the receiving body. She states that the receiving body is actually intermittent on most days, and at these times the discharge is not relatively small compared to the amount of water flowing. She also disputes the ED's conclusion that the island is pre-existing and that the discharge point is downstream of the island and peninsulas. She would like to present evidence to show that the islands have been caused by the discharge and that they are located in front of the location where the discharge enters the Red River. Finally, she believes that the vegetation is present because of the nutrient-rich discharge. She raises numerous fact issues related to these topics.

C. Issues Raised in the Hearing Requests

The following issues were raised in hearing requests;

1. Whether the growth of trees and vegetation is causing islands to develop in the channel of the Red River.
2. Whether the growth of trees and vegetation is diverting the natural flow of the Red River.
3. Whether the proposed discharge is causing erosion of Mrs. Clement's property.
4. Whether the proposed discharge is causing the growth of vegetation such as trees, algae, and moss.
5. Whether the proposed discharge is impacting Mrs. Clement's property.
6. Whether the proposed discharge is small compared to the water levels of the Red River.
7. Whether the islands in the Red River near the discharge location were preexisting.
8. Whether nutrients in the discharge are adversely impacting the receiving waters.

D. Issues raised in Comment Period

Although the hearing request presented much more detail than Mrs. Clement's comment, all of the issues raised in the hearing requests relate to the impact that the discharge would have on the receiving waters and on Mrs. Clement's property. Therefore 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, with the exception of “Is it appropriate to include more stringent effluent limitations in a renewal permit?” 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.² Relevant and material issues are those governed by the substantive law under which this permit is to be issued.³

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.

All of the issues raised by Mrs. Clement may be considered by the Commission. Further, OPIC notes that 30 TAC § 305.122(c) states that the issuance of any permit does not authorize injury or invasion of private property rights. This permit would not authorize the City to use private property to convey

² 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.”)

³ *Id.*

its discharge to a waterway. Any use of private property would require the permission of the landowner.

H. Issues for Referral

Should the Commission grant a hearing, OPIC would recommend the Commission refer the following disputed issues of fact to the State Office of Administrative Hearings for a contested case hearing:

1. Whether the growth of trees and vegetation is causing islands to develop in the channel of the Red River.
2. Whether the growth of trees and vegetation is diverting the natural flow of the Red River.
3. Whether the proposed discharge is causing erosion of Mrs. Clement's property.
4. Whether the proposed discharge is causing the growth of vegetation such as trees, algae, and moss.
5. Whether the proposed discharge is impacting Mrs. Clement's property.
6. Whether the proposed discharge is small compared to the water levels of the Red River.
7. Whether the islands in the Red River near the discharge location were preexisting.
8. Whether nutrients in the discharge are adversely impacting the receiving waters.

V. 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

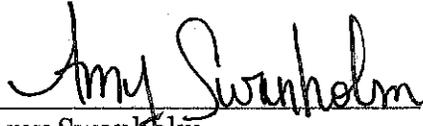
proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

VI. CONCLUSION

OPIC finds that the Commission may approve the application without holding a contested case hearing and recommends that the Commission deny the hearing requests. Should the Commission choose to hold a contested case hearing, OPIC recommends that Mrs. James "Patsy" Clement be found affected. OPIC also would recommend referring the above issues to the State Office of Administrative Hearings for a contested case hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2011 the original and seven true and correct copies of the *Office of the Public Interest Counsel's Response to Requests for Hearing and Requests for Reconsideration* 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

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