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 16, 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 ALEDO**
TCEQ DOCKET NO. 2011-2016-MWD

Dear Ms. Bohac:

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

Sincerely,

Amy Swanholm

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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CITY OF ALEDO
TCEQ DOCKET NO. 2011-2016-MWD

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REQUESTER:
Martin O. Siegmund
10 Taylor Court
Aledo, Texas 76008-4438

TCEQ DOCKET NO. 2010-2016-MWD

IN THE MATTER OF THE APPLICATION OF THE CITY OF ALEDO FOR PERMIT NO. WQ 0010847001	§ § § § § §	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

The City of Aledo has applied to the TCEQ for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0010847001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day. The wastewater treatment facility serves the City of Aledo.

The facility is located at 600 Barnwell Road, approximately 0.5 mile west of the intersection of Farm-to-Market Road 5 and Farm-to-Market Road 1187 in the City of Aledo in Parker County, Texas 76008. The treated effluent is discharged to an unnamed tributary; thence to Clear Fork Trinity River Below Lake Weatherford in Segment No. 0831 of the Trinity River Basin. The unclassified receiving water use is no significant aquatic life use for the unnamed

tributary. The designated uses for Segment No. 0831 are high aquatic life use, public water supply, and contact recreation.

The treated effluent is currently discharged to an unnamed tributary and then to Clear Fork Trinity River below Lake Weatherford, in Segment No. 0831 of the Trinity River Basin. The unclassified receiving water use is no significant aquatic life use for the unnamed tributary. The designated uses for Segment No. 0831 are high aquatic life use, public water supply, and contact recreation.

B. Procedural Background

The application for a new permit was received on March 4, 2011 and declared administratively complete on April 12, 2011. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on April 29, 2011 in *The Community News*. The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published on July 29, 2011 in *The Community News*. The public comment period ended on August 29, 2011 and the deadline to request a hearing was October 31, 2011.

TCEQ received four hearing requests from Martin O. Siegmund on August 29, 2011, October 31, 2011 (10:43 a.m.), October 31, 2011 (3:36 p.m.), and November 2, 2011. Three of these 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 Mr. Siegmund would be affected.

II. 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
(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 on the proposed renewal.

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

III. 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

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

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, Martin O. Siegmund, requested a hearing on this application. He submitted three timely hearing requests on August 29, 2011, October 31, 2011 (10:43 a.m.), and October 31, 2011 (3:36 p.m.). He also submitted another identical hearing request on November 1, 2011, however the deadline to submit hearing requests expired on October 31, 2011.

Mr. Siegmund's hearing requests state that he lives at 10 Taylor Court, Aledo TX, 76008. He states that he and his family are adversely affected by odors from the facility, and would continue to be impacted if the permit were renewed. He also states that the proposed renewal would limit his ability to fish and ride four-wheelers on his property. Application maps indicate that he owns property that borders the facility on the North. He was also a party in a previous contested case hearing involving this facility.[2]

He is concerned with the following issues; compliance with buffer zone requirements, odor control, overflow of sewage onto his property, ongoing

[2] TCEQ Docket No. 2007-0020-MWD; SOAH Docket No. 582-07-3998.

violations relating to odor control as well as stormwater runoff and sewage overflow, and his decreased property value. Based on the location of his property and the issues he raises in his hearing request, he has shown that he has a personal justicable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. Therefore OPIC finds that he is affected.

C. Issues Raised in the Hearing Requests

The following issues were raised in hearing requests;

1. Whether the application and facility comply with TCEQ rules regarding odor control and buffer zones.
2. Whether the facility would interfere with nearby landowners' use and enjoyment of their property.
3. Whether the application and facility comply with TCEQ rules regarding siting, facility design, and stormwater runoff.
4. Whether the facility would impact surrounding property values.

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, 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.[3] Relevant and material issues are those governed by the substantive law under which this permit is to be issued.[4]

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 Mr. Siegmund, with the exception of Issue No. 4, are relevant and material. 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.

H. Issues for Referral

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[3] *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.")

[4] *Id.*

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 application and facility comply with TCEQ rules regarding odor control and buffer zones.

2. Whether the facility would interfere with nearby landowners' use and enjoyment of their property.

3. Whether the application and facility comply with TCEQ rules regarding siting, facility design, and stormwater runoff.

IV. 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.

V. 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 Martin O. Siegmund 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,

Blas J. Coy, Jr.
Public Interest Counsel

By: Amy Swanholm

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 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