

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 24, 2013

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: CHAPPELL HILL SERVICE COMPANY, LLC
TCEQ DOCKET NO. 2013-0589-MWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett Arthur", written in a cursive style.

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

DOCKET NO. 2013-0589-MWD

**CHAPPELL HILL
SERVICE COMPANY, LLC
PROPOSED PERMIT
WQ0015031001**

**§
§
§
§**

**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

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

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 requests in the above-referenced matter.

I. Background

On February 6, 2012, Chappell Hill Service Company, LLC (Applicant) applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) permit. The proposed permit would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 400,000 gallons per day. The wastewater treatment plant would be located approximately 0.25 mile north and 0.35 mile east of the intersection of FM 1155 and Highway 290 in Washington County. The treated effluent would flow into an unnamed tributary, then Little Cedar Creek, then New Year Creek, and then to the Brazos River below the Navasota River in Segment No. 1202 of the Brazos River Basin.

TCEQ declared the application administratively complete on February 29, 2012. The first newspaper notice was published March 2, 2012 in the *Brenham Banner-Press*. The second newspaper notice was published July 6, 2012 in the same newspaper. TCEQ held a public meeting December 11, 2012 in Chappell Hill, and the public comment period closed at the conclusion of the public meeting. The Executive Director's (ED) Response to Comments was mailed February 19, 2013.

The deadline to submit a hearing request was March 21, 2013. TCEQ timely received hearing requests from John Calderone, Mark Cegielski, Maureen and Thomas Holy, Elizabeth and David Lancaster, Laura Snell, and State Senator John Whitmire. For the reasons stated herein, OPIC recommends the Commission deny John Calderone's hearing request and grant all other hearing requests.

II. Applicable Law

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining

in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;

- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

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. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to 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.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;
- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

III. Analysis of Hearing Requests

A. Whether the requestors are affected persons

John Calderone

John Calderone is concerned about flooding, mosquitos, water safety, and erosion. He states that his property borders Little Cedar Creek. According to a map prepared by ED staff, Mr. Calderone's property is on the discharge route, but not within one mile downstream of the proposed discharge point. His property is also not adjacent to the proposed plant site.

Under 30 TAC § 55.203(a), an affected person has a personal justiciable interest not common to members of the general public. Given the location of Mr. Calderone's property, OPIC finds that he lacks the proximity

necessary to distinguish his concerns from those of the general public. Further, the distance of his property from the proposed discharge point and the proposed plant site decreases the likelihood of an impact to his health, safety, or property. As a result, OPIC finds that John Calderone does not qualify as an affected person.

Mark Cegielski

Mark Cegielski is concerned about whether the discharged wastewater will be safe for his livestock to drink. He is also concerned that the proposed plant will cause odors and negatively impact his property value. According to the ED's map, Mr. Cegielski's property is immediately adjacent to the proposed plant site and bisected by the proposed discharge route.

Because of Mr. Cegielski's proximity to the proposed plant site and discharge route, his concerns regarding water quality and odor should be considered personal justiciable interests which are not common to the general public. Also, water quality and minimization of odor are interests which are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of a wastewater treatment plant. Finally, the proximity of Mr. Cegielski's property to the proposed plant site and discharge route increases the likelihood of impacts to his health, safety, and use of property. Therefore, OPIC finds that Mark Cegielski qualifies as an affected person.

Maureen and Thomas Holy

Maureen and Thomas Holy are concerned about mosquitos, odor, human and animal health, and the discharge of untreated wastewater. They are also concerned about flooding, erosion, and property value. According to the ED's map, the proposed discharge route runs through the Holy property less than a mile from the proposed discharge point.

Due to the proximity of the Holy property to the proposed plant site and discharge route, their concerns regarding vectors, odor, health effects, and plant design should be considered personal justiciable interests which are not common to the general public. Also, the Holys' concerns involve interests which are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of a wastewater treatment plant. Finally, the proximity of the Holy property to the proposed plant site and discharge route increases the likelihood of impacts to their health, safety, and use of property. Therefore, OPIC finds that Maureen and Thomas Holy qualify as affected persons.

Elizabeth and David Lancaster

Elizabeth and David Lancaster are concerned about flooding, the ability of the proposed plant to withstand a flood, noise, light pollution, and mosquitos. The ED's map indicates that the proposed discharge route crosses the Lancaster property within one mile of the proposed discharge point.

When combined with the proximity of the Lancaster property to the proposed plant site and proposed discharge route, the Lancasters' concerns regarding plant design and vectors constitute personal justiciable interests which are not common to the general public. Further, their interests are addressed by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of a wastewater treatment plant. The proximity of the Lancaster property to the proposed plant site and discharge route also increases the likelihood of impacts to their health, safety, and use of property. OPIC therefore finds that Elizabeth and David Lancaster qualify as affected persons.

Laura Snell

Laura Snell is concerned about water quality, human and animal health effects, noise, odor, and property value. According to the ED's map, Ms. Snell's property is approximately 0.2 mile from the proposed discharge point, but not on or adjacent to the proposed discharge route.

Ms. Snell states that she has five miniature horses, and these horses often use hearing requestor Mark Cegielski's pasture. As noted previously, the proposed discharge route runs through the Cegielski property, and Ms. Snell is concerned that her horses will drink wastewater. Though Ms. Snell's land is not adjacent to the proposed plant site or on the proposed discharge route, she is raising the possibility of impacts to her horses, and her horses are her property. Given that the horses use the Cegielski property, the

proposed discharge route crosses the Cegielski property, and Ms. Snell has a property interest in the horses, OPIC finds she does have a personal justiciable interest in this matter and should be considered an affected person.

John Whitmire

Senator Whitmire is concerned about health effects, water quality, odor, and plant design. As shown on the ED's map, Senator Whitmire's property is adjacent to the proposed discharge route, within one mile of the proposed plant site, and just beyond one steam mile downstream from the proposed discharge point.

Because Senator Whitmire's property is adjacent to the proposed discharge route and within one mile of the proposed plant site, his concerns regarding health effects, water quality, odor, and plant design qualify as personal justiciable interests which are not common to the general public. Also, these interests are protected or addressed by the law under which this application will be considered, and a reasonable relationship exists between the interests and the regulation of a wastewater treatment plant. Finally, the proximity of Senator Whitmire's property to the proposed plant site and discharge route increases the likelihood of impacts to his health, safety, and use of property. Therefore, OPIC finds that John Whitmire qualifies as an affected person.

B. Which issues raised in the hearing requests are disputed

All of the issues raised in the hearing requests are disputed.

C. Whether the dispute involves questions of fact or of law

All of the disputed issues involve questions of fact.

D. Whether the issues were raised during the public comment period

All of the issues were raised during the public comment period.

E. Whether the hearing requests are based on issues raised solely in a public comment which has been withdrawn

The hearing requests are not based on issues raised solely in a public comment which has been withdrawn.

F. Whether the issues are relevant and material to the decision on the application

Odor

The hearing requestors have raised the issue of odor. Odor is specifically addressed by TCEQ regulations concerning the siting of domestic wastewater plants.¹ Therefore, odor is an issue which is relevant and material to the Commission's decision on this application.

¹ See 30 TAC § 309.13.

Water Quality

The hearing requestors have raised the issue of water quality. Water quality is an issue addressed by the Chapter 307 Texas Surface Water Quality Standards, and the issue is therefore relevant and material to the Commission's decision on this application.²

Health Effects

The hearing requestors have raised the issue of health effects for humans and animals, including livestock. This issue concerns the Texas Surface Water Quality Standards and is therefore relevant and material to the Commission's decision on this application.³

Vectors

The hearing requestors have raised the issue of vectors, specifically mosquitos. This issue concerns nuisance conditions, and TCEQ rules regulate the siting of treatment plants to minimize the possibility of exposing the public to nuisance conditions.⁴ The issue of vectors is therefore relevant and material to the Commission's decision on this application.

Plant Design

The hearing requestors question whether the proposed plant will discharge untreated wastewater in the event of heavy rains and flooding. Under 30 TAC § 309.13(a), the proposed plant cannot be located in the 100-year flood plain unless it is protected from inundation and damage that could

² See 30 TAC Chapter 307.

³ *Id.*

⁴ See 30 TAC § 309.10(b).

occur during a 100-year flood. This aspect of proper plant design is therefore relevant and material to the Commission's decision on the application.

Property Value

The hearing requestors have raised the issue of decreased property value. The TCEQ does not have jurisdiction to consider property value, and this issue is therefore not relevant and material to the Commission's decision.

Noise

The hearing requestors have raised the issue of noise. The TCEQ does not have the authority to regulate noise levels at a wastewater treatment plant. Therefore, this issue is not relevant and material to the Commission's decision.

Lighting

The hearing requestors have raised the issue of light pollution from the proposed plant. The TCEQ does not have the authority to regulate lighting at a wastewater treatment plant. Therefore, this issue is not relevant and material to the Commission's decision.

Flooding

The hearing requestors question whether the proposed discharge will cause flooding. Flooding is an issue which is addressed locally by floodplain administrators, and as such, it is beyond the scope of TCEQ's regulatory

authority. The issue of flooding is therefore not relevant and material to the Commission's decision on this application.

IV. Conclusion

OPIC finds that Mark Cegielski, Maureen and Thomas Holy, Elizabeth and David Lancaster, Laura Snell, and John Whitmire all qualify as affected persons. We also find that all of these requestors have raised disputed issues of fact that are relevant and material to the Commission's decision on this application. Therefore, OPIC respectfully recommends the Commission grant their hearing requests.

Having found that John Calderone is not an affected person in this matter, we respectfully recommend the Commission deny his hearing request.

OPIC further recommends that the following issues be referred to the State Office of Administrative Hearings for a contested case hearing:

1. Whether the proposed plant or discharge will cause nuisance odors?
2. Whether the proposed plant or discharge will adversely impact water quality?
3. Whether the proposed plant or discharge will adversely impact human or animal health?
4. Whether the proposed plant or discharge will cause nuisance conditions in the form of vectors?
5. Whether the proposed plant will be designed to prevent the release of untreated wastewater during rain and flooding?

For the contested case hearing, OPIC recommends a duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

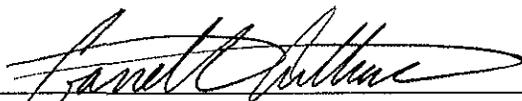
Respectfully submitted,

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 May 24, 2013, 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.


Garrett Arthur

MAILING LIST
CHAPPELL HILL SERVICE COMPANY, LLC
TCEQ DOCKET NO. 2013-0589-MWD

FOR THE APPLICANT:

Steve Barry, P.E.
Jones & Carter, Inc.
8701 New Trails Drive, Suite 200
The Woodlands, Texas 77381-4241
Tel: 281/363-4039 Fax: 281/363-3459

S.J. Gaido, IV
4201 Running River Lane
Washington, Texas 77880-1513

Duncan C. Norton
Lloyd Gosselink
816 Congress Avenue, Suite 1900
Austin, Texas 78701
Tel: 512/322-5884 Fax: 512/472-0532

FOR THE EXECUTIVE DIRECTOR

Kathy Humphries, 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

Kellie Crouch-Elliott, Technical Staff
Texas Commission on Environmental
Quality
Water Quality Division, MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-2435 Fax: 512/239-4430

Brian Christian, Director
Texas Commission on Environmental
Quality
Small Business and Environmental
Assistance Division
Public Education Program, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678

FOR ALTERNATIVE DISPUTE
RESOLUTION

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:

Bridget Bohac
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

REQUESTERS:

John Calderone
10850 Old Stagecoach Rd
Chappell Hill, Texas 77426-6028

Mark Cegielski
5159 Church St.
Chappell Hill, Texas 77426-6317

Maureen E. & Thomas Holy
4069 Cottonwood Rd.
West, Texas 76691-1804

David S. Lancaster
1350 Copelyn Springs Rd.
Brenham, Texas 77833-7294

Laura Snell
3718 Chevy Chase Dr.
Houston, Texas 77019-3012

The Honorable John Whitmire
Texas Senate
PO Box 12068
Austin, Texas 78711-2068