

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: TALL TIMBERS UTILITY COMPANY, INC.  
TCEQ DOCKET NO. 2013-0775-MWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez".

Eli Martinez, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2013-0775-MWD**

<b>IN THE MATTER OF THE</b>	<b>§</b>	<b>BEFORE THE</b>
<b>APPLICATION BY TALL</b>	<b>§</b>	
<b>TIMBERS UTILITY COMPANY</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>FOR WATER QUALITY PERMIT</b>	<b>§</b>	
<b>NO. WQ0013000001</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO HEARING REQUEST AND REQUEST 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) and files this Response to Hearing Request and Request for Reconsideration in the above-referenced matter.

**I. INTRODUCTION**

Tall Timbers has applied to the TCEQ for a renewal of its existing permit that authorizes it to discharge treated domestic wastewater at a daily average flow not to exceed 445,000 gallons per day. The existing wastewater treatment plant (WWTP) serves the sanitary sewer service area covered by Certificate of Convenience and Necessity (CCN) 20694.

The treated effluent is discharged to an unnamed tributary, then to West Mud Creek; then to Mud Creek; then to Angelina River Above Sam Rayburn Reservoir in Segment No. 0611 of the Neches River Basin. The unclassified receiving water uses are intermediate aquatic life use for the unnamed tributary and limited aquatic life use for West Mud Creek. The designated uses for Segment No. 0611 are high aquatic life use, public water supply, and contact recreation.

The plant is located on Country Road 128, approximately 2,800 feet north and 6,500 feet west of the intersection of Highway 69 South and Farm-to-Market Road 2813 and 6.1 miles south-southwest of the City of Tyler in Smith County, Texas 75703.

The TCEQ received Tall Timbers' application to renew its TPDES permit on February 14, 2011 and declared it administratively complete on May 4, 2011. The notice of receipt and intent to obtain a water quality permit (NORI) was published on May 17, 2011 in the *Tyler Morning Telegraph*; the notice of application and preliminary decision (NAPD) was published on December 10, 2012 in the *Tyler Morning Telegraph*. The comment period ended on January 9, 2013. The Executive Director's decision and Response to Comments was mailed March 13, 2013, extending the deadline for requests for reconsideration or contested case hearing thirty calendar days to April 12, 2013.<sup>1</sup> A hearing request and request for reconsideration were filed by the City of Tyler on April 15, 2013. Since this application was administratively complete after September 1, 1999, it is subject to the procedural requirements of House Bill 801 (76th Legislature, 1999).

After reviewing the requests and information available in the Chief Clerk's Office, OPIC recommends that the Commission deny the City of Tyler's request for hearing and request for reconsideration because the Applicant is not applying to increase the quantity or pattern of waste to be discharged, water quality will be maintained, public participation and comment requirements have been observed, and the Applicant's compliance history does not indicate an inability to comply with a material term of the permit.

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<sup>1</sup> 30 TAC §55.201(a)

## II. REQUEST FOR RECONSIDERATION

### A. Applicable Law

House Bill 801 created the request for reconsideration as a procedural mechanism which allows the Commission to review and reconsider the Executive Director's decision on an application without a contested case hearing. Following the Executive Director's technical review and issuance of the Executive Director's decision and response to comments, a person may file a request for reconsideration or a request for contested case hearing, or both. TEXAS WATER CODE §5.556; 30 TEXAS ADMINISTRATIVE CODE ("TAC") §55.201(e).

Any person may file a request for reconsideration of the executive director's decision. 30 TAC 55.201(e). The request for reconsideration must state the reasons why the Executive Director's decision should be reconsidered. 30 TAC 55.201(e). Responses to requests for reconsideration should address the issues raised in the request. 30 TAC §55.209(f).

### B. Basis of Request

The City of Tyler (Tyler) requests reconsideration of the Executive Director's decision because Tall Timbers failed to construct facilities necessary to comply with its existing permit and because the application contains misrepresentations regarding buffer zones and the capacity of the plant. Specifically, Tall Timbers failed to enlarge its chlorine contact chamber within 18 months after issuance of its last permit.

### C. Discussion

The existing permit was prepared in 2006, and is a renewal of a previous permit which had authorized daily average flow not to exceed 0.445 million gallons per day (MGD) and a two-hour peak flow not to exceed 927 gpm. At that time, the two-hour peak flow of 927 gallons per minute

(gpm) was moved to a final phase and an interim phase was introduced with a two-hour peak flow of 527 gpm to accommodate a 20-minute detention time in the chlorine contact chamber existing at that time. Consequently, the 2006 permit has two phases instead of one: an interim phase for a daily average flow not to exceed 0.445 MGD and a two-hour peak flow of 527 gpm, and a final phase that was a continuation the permit being renewed. The permit was issued on December 29, 2006, and the permittee was given a compliance schedule of 18 months to expand the capacity of the chlorine contact chamber so it would accommodate a two-hour peak flow that corresponds to a daily average flow of 0.445 MGD, i.e., a final phase two-hour peak flow limit of 927 gpm.

On February 24, 2011, Tall Timbers applied for a renewal, requesting a renewal of the interim phase. The request to renew the interim phase could not be granted because the 18-month compliance period could not be renewed. Tall Timbers was then asked to perform a capacity analysis and submit its findings to the TCEQ. The capacity analysis (Capacity Analysis) was submitted in October 2011 and showed the existing plant capacity to be a daily average of 0.312 MGD and a two-hour peak flow of 650 gpm with minor modifications.

It should be noted that the final phase daily average flow of 0.445 MGD is a maximum not to be exceeded, not a minimum. It is based on flow projections. If the actual flows received at the wastewater treatment plant do not require that capacity, a lower flow capacity wastewater treatment phase could be proposed. The application requested a continuation of the interim phase of the existing permit, which was denied given the 18-month compliance period. Nevertheless, the proposed interim phase was modified to reflect the flows from the Capacity Analysis, which showed the existing plant capable of handling a daily average of 0.312 MGD and a two-hour peak flow of 650 gpm with minor modifications. The draft permit corrects the requested interim phase flow by providing an interim phase for a daily average flow not to exceed 0.312 MGD, corresponding to the

as-built capacity of the wastewater treatment plant with a corresponding two-hour peak flow of 650 gpm achieved by incorporating modifications to the post-aeration basin.

Regarding buffer zone, the draft permit addresses odor in its "other requirements" section, which requires preventing nuisance odor for the plant in accordance with 30 TAC § 309.13(e)(2). Further, Tall Timbers has submitted an odor reduction plan that contains the following odor reduction features: (1) the wastewater treatment plant is surrounded by a thicket of pine and deciduous trees that help disperse odors that may leave the property; (2) operation procedures will be conducted to reduce odors.

The request therefore does not state why the as built facilities are incapable of handling interim phase flows or adequately protect against nuisance odors, and OPIC cannot recommend denial of the permit authorization based on the issues raised by Tyler.

### **III. HEARING REQUEST**

#### **A. Requirements of Applicable Law**

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code § 5.556 added by Acts 1999, 76<sup>th</sup> 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 TEXAS ADMINISTRATIVE CODE (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 and safety of the person, and on the 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.

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.

### III. DISCUSSION

#### A. Right to a Contested Case Hearing

Texas Water Code §26.028(d) and 30 TAC §55.201(i) provide that no right to a hearing exists for certain water quality discharge permits. These authorizations include under Texas Water Code, Chapter 26, to renew or amend a permit if:

- (A) the applicant is not applying to:
  - (i) increase significantly the quantity of waste authorized to be discharged; or
  - (ii) change materially the pattern or place of discharge;
- (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.

Under the current application, Applicant would not increase the quantity of waste to be discharged from its existing permit and effluent limitations and monitoring requirements would remain the same as the existing permit requirements. In fact, the only changes that would take place under the renewal is the introduction of an interim phase with a 0.312 MGD, which is a

*decrease* from the 0.445 MGD authorization previously in place—and the addition of *E. coli* limits—which is a condition more stringent than the current permit.

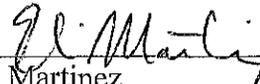
Further, the executive director has filed a response to comments that addresses all timely and significant public comment, and the applicant's compliance history over the last five years is listed as "satisfactory." OPIC therefore finds that no right to a hearing exists on the proposed renewal.

#### IV. CONCLUSION

For the reasons outline above, OPIC recommends that the Commission deny Tyler's request for reconsideration and find that no right to a hearing exists for the proposed permit.

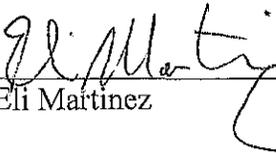
Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2013, the original and seven true and correct copies of the Office of the Public Counsel's Response to Request for Reconsideration and Hearing Request 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.

  
Eli Martinez

**MAILING LIST**  
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**TCEQ DOCKET NO. 2013-0775-MWD**

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