

DOCKET NO. 2013-1507-MWD

AVALON WATER	§	BEFORE THE
SUPPLY AND SEWER	§	TEXAS COMMISSION ON
SERVICE CORPORATION	§	ENVIRONMENTAL QUALITY
PERMIT WQ0013981001	§	

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

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 request in the above-referenced matter.

I. Background

Avalon Water Supply and Sewer service Corporation ("Applicant") has applied to the TCEQ for a major amendment that would authorize a variance to the buffer zone requirements of 30 TAC § 309.13(e), reactivation of an existing oxidation ditch which is currently being used as an equalization basin, installation of an additional clarifier, and an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 25,000 gallons per day (gpd) in the Interim Phase (current existing phase) to a daily average flow not to exceed 40,000 gpd in the Final Phase. The existing wastewater treatment facility, the Avalon Wastewater Treatment Facility, serves the community of Avalon and is located in Ellis County.

The facility is a proprietary moving-bed bioreactor system designed by Hydroxi Systems, Inc. The facility retained the pre-existing oxidation ditch and stabilization ponds for equalization and emergency storage. Treatment units in the Interim Phase include a bar screen, an equalization basin (formerly an oxidation ditch), two emergency storage ponds, a primary dissolved air flotation (DAF) unit, a fixed-bed bioreactor, a moving-bed bioreactor, a secondary DAF unit, a polymer feed system, two cone-bottom clarifier tanks, an aerobic sludge digester, and a chlorine contact chamber. Treatment units in the Final Phase will also include an oxidation ditch, and a final clarifier. The facility is currently operating in the Interim phase. The effluent limitations in both the Interim and Final Phases of the draft permit, based on a 30-day average, are 20 mg/l Biochemical Oxygen Demand (BOD5), 20 mg/l Total Suspended Solids (TSS), Report mg/l Ammonia-Nitrogen (NH₃-N), 126 CFU or MPN of *E. coli* per 100 ml and 4.0 mg/l minimum dissolved oxygen (DO).

The treated effluent is discharged through a pipe approximately 100 feet to an unnamed tributary; then to an unnamed reservoir; then to an unnamed tributary; then to Chambers Creek Above Richland Chambers Reservoir in Segment No. 0814 of the Trinity River Basin. The unclassified receiving water uses are minimal aquatic life use for the unnamed tributary and high aquatic life use for the unnamed reservoir. The designated uses for Segment No. 0814 are high aquatic life use, public water supply, and

primary contact recreation. The 2010 Clean Water Act Section 303(d) list, the State's inventory of impaired and threatened waters, does not currently list Segment No. 0814. However, in an effort to ensure that the proposed discharge meets the stream bacterial standard, the executive director has added an effluent limitation of 126 CFU or MPN of *E. coli* per 100 ml to the draft permit.

The permit application for a renewal, originally received on June 14, 2011, was withdrawn on February 9, 2012 and replaced with a permit application for a major amendment on the same date. It was declared administratively complete on March 26, 2012. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in the *Waxahachie Daily Light* on April 4, 2012. The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published in the *Waxahachie Daily Light* on October 25, 2012. The original public comment period ended on November 26, 2012. Because the application documents were not located at the same address as stated in the published notices, the Applicant subsequently re-noticed this application. A combined NORI/NAPD was published in the *Waxahachie Daily Light* on April 10, 2013 and the extended comment period ended on May 10, 2013.

Ms. Carol Gillespie filed 56 pages of information in comments dated May 1, 2012. On the last page of this submittal, in stating concerns that her issues had not been adequately addressed by the applicant, Ms. Gillespie

stated "I believe the only fair solution is for the TCEQ to hold a public hearing on the application." The 2012 comments and hearing request were also referenced in Ms. Gillespie's comments filed on May 9, 2013. For the reasons stated herein, OPIC recommends the Commission grant the hearing request.

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 requestor is an affected person

Carol Gillespie states that she and her two sisters own land adjacent to the facility. This property is listed on the application's adjacent landowners list and is also shown to be adjacent to the facility of the map prepared by the executive director for purposes of consideration of the hearing request. Ms. Gillespie is concerned that the Applicant is exercising its powers of eminent domain improperly without disclosing with specificity the portions of her land affected and without complying with the notice provisions of the Texas Open Meetings Act applicable to the actions of a Texas water supply corporation. Ms. Gillespie alleges the Applicant is failing to comply with buffer zone requirements and restrictive easement requirements of the TCEQ and has improperly requested variances from such requirements. Ms. Gillespie contends that her family has offered to negotiate with the Applicant to grant a restrictive easement to comply with buffer zone requirements. She further states that Applicant's request for a variance is based on a misrepresentation that the property owners were demanding purchase of their entire tract of land. According to Ms. Gillespie, in other negotiations to resolve this dispute, the family did offer to sell 11 of their 36 acres to the

Applicant in 2012, however; Ms. Gillespie states that the landowners have never demanded purchase of the entire tract.

Ms. Gillespie also contends that current operations of the facility have resulted in a raw sewage leaking from a pipeline crossing her property. She claims the Applicant has failed to maintain and repair the pipeline and failed to comply with terms of the legal easement the Applicant does currently have to transport sewage by pipeline over her land. In support of this contention, Ms. Gillespie's May 1, 2012 submittal includes copies of a TCEQ Investigation Report dated April 13, 2012 alleging that the Applicant failed to maintain its collection system, resulting in exposure of a line and significant deterioration in a portion of the facility's collection system.

Ms. Gillespie also expresses concern that the increase in discharged effluent authorized by this permit amendment, when piped to the small stream that crosses her land, will cause overflows from the stream and contaminate her property. In her May 2012 submittal to TCEQ, she states that even under current conditions, she has felt constrained from using this pasture for livestock because of concerns about the contamination of grazing land and water supply for livestock. In her May 9, 2013 comments, Ms. Gillespie expresses concern about the effect of contamination on cotton, wheat, sunflower, soybean and corn crops. She raises questions as to whether the receiving stream can accommodate the proposed volume increase in discharged effluent. She further questions whether the

Applicant's 40-year-old, deteriorated and ill-maintained collection system can handle the proposed increase in transported effluent.

Under 30 TAC § 55.203(a), Ms. Gillespie is an affected person with a personal justiciable interest not common to members of the general public. Given the location of her property adjacent to the facility and the fact that raw sewage as well as wastewater effluent from the facility is piped across her land, there is a reasonable relationship between Ms. Gillespie's concerns about possible contamination of her property and the ability of the poorly maintained collection system and capacity of the receiving stream to accommodate the proposed increase in discharged effluent. As an adjacent landowner, her proximity to the facility increases the likelihood of an adverse impact to her property if the applicant fails to meet buffer zone requirements, maintain its collection system, and demonstrate the adequacy of the receiving stream to accommodate the increased discharge. For these reasons, OPIC finds that Carol Gillespie is an affected person.

B. Which issues raised in the hearing requests are disputed

Ms. Gillespie's May 1, 2012 comments and request noted that the application was not available for public viewing in the location stated in the notices published in 2012. Because of this notice defect, Applicant was required to re-notice the application on April 10, 2013. The notice defect raised by Ms. Gillespie in 2012 was not disputed and appears to have been resolved by the re-noticing of the application in 2013. Therefore, OPIC finds

that the notice issue is no longer in dispute. All of the remaining issues raised in the hearing request are disputed.

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

Issues of whether the Applicant has complied with Texas Open Meetings Act requirements and requirements relating to an exercise of powers of eminent domain are issues of law that are not within the Commission's jurisdiction to address. All other concerns raised by Ms. Gillespie involve disputed issues 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 public comment which has been withdrawn.

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

Buffer Zone Requirements

The hearing request raises the issue of whether the Applicant should be granted a variance from buffer zone requirements. Under 30 TAC § 309.13(e)(1) and(2), a permittee for a waste water treatment facility must maintain a 500 foot buffer zone around un-aerated treatment units with anaerobic zones (in this instance, the Applicant's emergency holding ponds) and a 150 foot buffer zone around other treatment units or submit a

nuisance odor prevention plan for approval. Otherwise, under 30 TAC § 309.13(e)(3), a permittee must submit sufficient evidence of legal restrictions prohibiting residential structures within the part of the buffer zone not owned by the permittee. (See also, Executive Director's Response to Comments at page 6).

Here, the Applicant cannot meet the buffer zone distance restrictions. Applicant claims it cannot obtain the legal restrictions required concerning the land within the buffer zone because (a) it does not own this property, (b) the landowners are unwilling to grant restrictive easements; and (c) rather than granting restrictive easements, the landowners are requesting their entire tract of land be purchased. On these grounds, Applicant has requested a buffer zone variance under 30 TAC § 309.13(f), which provides that a variance shall be considered on a case-by-case basis and may be granted if consistent with the policies set out in Texas Water Code § 26.003. The policies of Texas Water Code § 26.003 include maintaining the quality of water in the state consistent with public health and enjoyment.

Ms. Gillespie claims the Applicant's assertions are incorrect and that the landowners have been willing to sell a portion of their land, or alternatively sell to the Applicant rights for a restrictive easement. She disputes Applicant's assertion that the landowners have insisted on the purchase of the entire tract of their property. Because the buffer zone requirements and variance alternative are addressed by the Commission's

Chapter 309 rules, the disputed issue of whether Applicant has shown good cause to receive a variance is relevant and material to the Commission's decision.

Water Quality and Health Effects

Ms. Gillespie questions whether overflow of contaminated water from the receiving stream may cause adverse health effects for humans and animals. Ms. Gillespie expresses concern about possible effects on crops raised for human consumption and water supplies and grazing pasture for livestock. This issue relates to the Texas Surface Water Quality Standards found in the Commission's Chapter 307 rules and is therefore relevant and material to the Commission's decision on this application.

Site Suitability and Adequacy of the Discharge Route

Ms. Gillespie questions whether the small stream running through her property can accommodate the increase in the volume of effluent authorized for discharge under the proposed major amendment. Her hearing request expresses concern about the effects of an overflow of effluent in the event the stream's capacity is not adequate. The Commission's Chapter 309 rules address location standards for water quality permits. As stated in 30 TAC § 309.10(b), the purpose of the Commission's Chapter 309 rules is to prohibit placing facilities in locations with unsuitable site characteristics that may contribute to contamination or nuisance conditions. A properly functioning discharge route is crucial to site suitability and is considered in modeling

conducted by the executive director's staff when reviewing permit applications. The capacity and proper functioning of a discharge route is relevant to assessing the potential water quality and environmental impacts of the proposed activities. TCEQ models the discharge route to assess potential impacts to water quality and the uses of the water body, and therefore an issue related to the actual functioning of the discharge route compared to the modeled functioning is relevant to the Commission's determination on the application.

Failure to Maintain and Repair the Existing Collection System

Ms. Gillespie states the permit amendment should be denied unless outstanding operational violations are resolved and Applicant repairs and properly maintains its existing collection system, portions of which cross her property. The permit requires that the permittee must at all times ensure that the facility and all of its systems of collection, treatment, and disposal are properly operated and maintained. (Executive Director's Response to Comments at page 11.) Under 30 TAC § 305.125(1), failure to comply with any permit condition is a violation of the permit and statutes under which it was issued and is grounds for enforcement action, as well as grounds for permit amendment, revocation or suspension. Accordingly, issues related to the Applicant's ability to maintain its systems and comply with TCEQ regulations and permit provisions are relevant and material to a decision on this application.

Trespassing, Illegal Easements and Eminent Domain

The hearing request alleges that while the Applicant has had a legal easement to transport raw sewage across her family's property to the existing treatment plant, it has not had an easement for another pipeline that has been used to transport effluent for discharge. Ms. Gillespie alleges that this constitutes a trespass. Under 30 TAC § 305.122(c) and (d), a permit does not grant any property rights to the permittee nor authorize any invasion of property rights. The TCEQ does not have jurisdiction to consider issues of trespass or the legality of easements. Furthermore, the Commission does not have jurisdiction to consider issues of law related to alleged improper exercises of eminent domain powers.

IV. Conclusion

OPIC finds that Carol Gillespie is an affected person. OPIC further finds that Ms. Gillespie has 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 the 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 Applicant has shown good cause for obtaining a buffer zone variance consistent with the requirements of the Commission's Chapter 309 rules?
2. Whether the proposed discharge will adversely impact crops raised for human consumption and water supplies and grazing pasture for livestock?

3. Whether the Applicant's facility has an adequately functioning discharge route with capacity suitable to accommodate the increased volume of effluent authorized for discharge by the proposed permit amendment?
4. Whether the proposed amendment should be denied based on the Applicant's failure to maintain and repair the wastewater collection system used in currently permitted operations?

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 *Vic McWherter*
Vic McWherter, Senior Attorney
Office of Public Interest Counsel
State Bar No. 0785565
P.O. Box 13087, MC 103
Austin, Texas 78711
(512) 239-5757
(512) 239-6377 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 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.

Vic McWherter
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