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

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**  
*Protecting Texas by Reducing and Preventing Pollution*

September 3, 2010

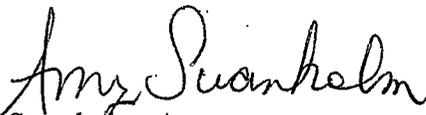
LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

**Re: REED LAMAR BOWERS SHRIMP FARM  
TCEQ DOCKET NO. 2010-1293-MWD**

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Reed Lamar Bowers Shrimp Farm's Motion to Overturn the Executive Director's Decision in the above-entitled matter.

Sincerely,

  
Amy Swanholm, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 P.O. Box 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

P.O. Box 13087 Austin, Texas 78711-3087 512-239-1000 Internet address: [www.tceq.state.tx.us](http://www.tceq.state.tx.us)

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**TCEQ DOCKET NO. 2010-1293-MWD**

<b>MOTION TO OVERTURN</b>	<b>§</b>	<b>BEFORE THE TEXAS</b>
<b>THE EXECUTIVE</b>	<b>§</b>	
<b>DIRECTOR'S ORDER</b>	<b>§</b>	<b>COMMISSION ON</b>
<b>REGARDING THE</b>	<b>§</b>	
<b>APPLICATION BY REED</b>	<b>§</b>	<b>ENVIRONMENTAL</b>
<b>LAMAR BOWERS SHRIMP</b>	<b>§</b>	
<b>FARM FOR TPDES PERMIT</b>	<b>§</b>	<b>QUALITY</b>
<b>NO. WQ0004005000</b>	<b>§</b>	
	<b>§</b>	

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO  
REED LAMAR BOWERS SHRIMP FARM'S MOTION TO OVERTURN THE  
EXECUTIVE DIRECTOR'S DECISION**

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 Reed Lamar Bowers Shrimp Farm's Motion to Overturn* in the above-referenced matter.

**I. INTRODUCTION**

Reed Lamar Bowers, 24781 State Highway 35 South, Palacios, Texas 77465, which operates Bowers Shrimp Farm, has received a permit from the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0004005000, which authorizes the discharge of process wastewater (aquaculture pond effluent) at a daily average flow not to exceed 8,000,000 gallons per day via Outfalls 001, 002, 003, and 004. This application was submitted to the TCEQ on May 29, 2009.

The facility is located adjacent to Tres Palacios Bay at the end of Cockburn Road, approximately two (2) miles south of the City of Collegeport, Matagorda County, Texas 77465. The effluent is discharged via Outfalls 001, 002, and 003 to Matagorda County

Drainage District #3 Ditch, thence to an unnamed natural tidal channel, thence to Little Redfish Lake; thence to Tres Palacios Bay/Turtle Bay; and via Outfall 004 to an unnamed natural tidal channel, thence to Little Redfish Lake, thence to Tres Palacios Bay/Turtle Bay in Segment No. 2452 of the Bays and Estuaries. The unclassified receiving waters have no significant aquatic life use for Matagorda County Drainage District Ditch #3, and high aquatic life use for the unnamed natural tidal channel and Little Redfish Lake. The designated uses for Segment No. 2452 are exceptional aquatic life use, contact recreation, and oyster waters.

**A. Reed Lamar's Motion to Overturn**

Reed Lamar requests that the Commission overturn the ED's decision to include weekly monitoring requirements for selenium and copper. Reed Lamar argues that instead of including weekly monitoring for these constituents, the Commission should remand the matter to the ED, so that it can retest the water for copper and selenium levels. Presumably the results from the retest would then be used by the ED to set effluent limits or monitoring requirements.

Reed Lamar states in its motion to overturn that during the application process, Reed Lamar requested the ED allow it to sample each outfall only once, instead of four separate times, in the interest of saving money. The ED approved this. When the Applicant screened these samples, the samples were found to contain elevated levels of selenium and copper. Reed Lamar states that this led the ED placing selenium and copper limits in the draft permit. On January 18, 2010, Reed Lamar requested the ED's approval to modify the draft permit to allow it to retest each outfall for selenium and copper. Reed Lamar states in its motion that it believed the ED was going to allow retesting.

The EPA, however, in a letter originally dated March 5, 2010, sent an interim objection to the ED. The EPA objected to Reed Lamar's permit because submitted calculations for water-quality based effluent limits indicate that effluent limitations would be required for copper and selenium. The EPA noted that the draft permit contained none. The ED acknowledged that Reed Bowers indicated that the samples obtained were

erroneous due to matrix interference and that Reed Bowers requested to complete additional sampling. The EPA stated, though, that Reed Bowers had adequate opportunity to conduct more sampling during the 2009 summer harvest season and that final effluent limitations with an appropriate compliance schedule should be included in the permit. EPA also invited additional information from the TCEQ.

Reed Lamar acknowledged in its motion that the EPA will have to be convinced that retesting for copper and selenium is appropriate. But it believes this is justified due to the financial constraints that would be placed upon it. It argues that the previous results were inaccurate. Further, it cannot afford to test its waters with the "clean sampling method" on a weekly basis. It can, however, use this method for one-time retesting. Therefore, Reed Bowers requests that the permit be remanded to allow retesting of copper and selenium in lieu of monitoring and effluent limitations in the current permit.

#### **B. Reed Lamar's Permit Requirements for Selenium and Copper**

The permit issued on July 12 by the ED contains monitoring and effluent limits for copper and selenium. Reed Bowers is required to collect weekly samples of the total copper and total selenium in the discharge, for two years.<sup>1</sup> After two years, Reed Bowers must meet specific effluent limitations for selenium and copper,<sup>2</sup> although Special Condition 14 allows Reed Bowers three years to attain the final effluent limitations.<sup>3</sup> It must also report the results of the sampling to the ED on a quarterly basis, as well as develop and implement a plan for preventing exceedence of the permit limitations.<sup>4</sup>

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<sup>1</sup> See *Permit to Discharge Wastes*, TPDES Permit No. WQ0004005000, issued on July 12, 2010, at 2.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 14.

<sup>4</sup> *Id.* at 14.

## II. APPLICABLE LAW

TCEQ rules permit an applicant, the Public Interest Counsel, or another person to file a motion to overturn the ED's action on an application.<sup>5</sup> A motion to overturn must be filed no later than 23 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director.<sup>6</sup> When a time extension is granted on a motion to overturn, the period for TCEQ to take action may not extend beyond 90 days after the approval notice is mailed.

## III. THE COMMISSION MAY CONSIDER REED LAMAR'S MOTION TO OVERTURN

The Commission may consider an MTO that has been brought in a timely manner<sup>7</sup> and challenges the ED's "action on an application."<sup>8</sup> Reed Lamar is challenging the permit issued by the ED on July 12, 2010. This permit constitutes the ED's final action on the application filed by Reed Lamar.

The motion has also been filed in a timely manner. The Executive Director (ED) approved the permit on July 12, 2010 and the deadline to submit a Motion to Overturn the permit was August 9, 2010, the same day Reed Lamar filed its motion. Therefore, Reed Lamar filed its motion to overturn within the statutory deadline. 30 TAC § 50.139(e).

## IV. DISCUSSION

Reed Lamar raises only one issue, whether the ED's decision to require effluent sampling for copper and selenium on a weekly basis should be overturned. Instead of

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<sup>5</sup> 30 Texas Administrative Code (TAC) § 50.39(a) and 30 TAC § 50.139(a)

<sup>6</sup> 30 TAC § 50.39(b) and 30 TAC § 50.139(b).

<sup>7</sup> 30 TAC § 50.139(b).

<sup>8</sup> 30 TAC § 50.139(a).

weekly testing, Reed Lamar requests that it be allowed to submit only one round of testing, and that the permit requirements regarding copper and selenium be based on that round of sampling. In support of this, it argues the initial round of sampling it submitted to the TCEQ was inaccurate, and future sampling would show that there is no need for copper or selenium monitoring (and presumably effluent limits). Further, it argues that using the "clean sampling method" is very expensive. It implies that if it used the clean sampling method, the results would indicate that there are not elevated levels of copper or selenium, and so monitoring requirements are not necessary. It cannot afford to use the clean sampling method on a weekly basis, though it could afford to use the clean sampling method if it were allowed to retest the effluent once.

Reed Lamar's motion to overturn the ED's decision should be denied. First, it does not raise any issue that the ED was not aware of during the application process. Reed Lamar submitted a letter to the ED making the same request in January of 2010, over six months before the ED issues its draft permit. In addition, Reed Lamar's request to only submit one sample per outfall rather than four samples per outfall left the ED with limited information on which to base its decision. If the ED had concluded that more information was necessary to make a decision on the regulation of copper and selenium, it could have denied Reed Lamar's initial request to submit only one sample per outfall, or requested additional testing be completed based on the results of the sample Reed Lamar submitted.

OPIC acknowledges that the samples submitted by Reed Lamar may indeed have shown inaccurate results. However, Reed Lamar wanted to submit only one round of sampling. Further, if the sampling indeed yielded inaccurate results, this will become apparent through the monitoring requirements currently in the draft permit, to which Reed Lamar objects.

OPIC also acknowledges that weekly sampling of every outfall with the "clean sampling method" may be expensive. However, Reed Lamar has not shown that it is financial unable to sample on a weekly basis, in accordance with 30 TAC § 319.11 and 319.12.

**V. CONCLUSION**

OPIC respectfully requests that the Commission deny Reed Lamar's Motion to Overturn the ED's decision on TPDES permit No. WQ0004005000.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By:   
Amy Swanholm  
Assistant Public Interest Counsel  
State Bar No. 24056400  
(512)239.6363 PHONE  
(512)239.6377 FAX

**CERTIFICATE OF SERVICE**

I hereby certify that on September 3, 2010, the original and seven true and correct copies of the Office of the Public Interest Counsel's *Response to Reed Lamar Bowers Shrimp Farm's Motion to Overturn* 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

**MAILING LIST**  
**REED LAMAR BOWERS SHRIMP FARM**  
**TCEQ DOCKET NO. 2010-1293-MWD**

Reed Lamar Bowers  
24781 State Highway 35 South  
Palacios, Texas 77465

Fred B. Werkenthin, Jr.  
Booth, Ahrens & Werkenthin, P.C.  
515 Congress Avenue, Suite 1515  
Austin, Texas 78701-3503  
Tel: 512/472-3263 Fax: 512/473-2609

Patricia Radloff  
Texas Parks & Wildlife Department  
4200 Smith School Road  
Austin, Texas 78744-3218

Ben Rhame  
Tammy Brooks  
Coastal Coordination Council  
PO Box 12873  
Austin, Texas 78711-2873

Chris Ekoh  
Texas Commission on Environmental Quality  
Litigation Division MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-0600 Fax: 512/239-0606

Tres Koenings  
Texas Commission on Environmental Quality  
Water Quality Division MC-148  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-6682 Fax: 512/239-4430

Bridget Bohac, Director  
Texas Commission on Environmental Quality  
Office of Public Assistance, MC-108  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-4000 Fax: 512/239-4007

LaDonna Castañuela  
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

