

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*

March 26, 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: **SOUTH CENTRAL WATER COMPANY**  
**SOAH DOCKET NO. 582-08-4290**  
**TCEQ DOCKET NO. 2008-0473-MWD**

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Exceptions to the Proposal for Decision in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanholm".

Amy Swanholm, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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**TCEQ DOCKET NO. 2008-0473-MWD  
SOAH DOCKET NO. 582-08-4290.**

**IN THE MATTER OF  
THE APPLICATION OF  
SOUTH CENTRAL  
WATER COMPANY  
FOR TPDES PERMIT  
NO. WQ0014804001**

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**BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL  
QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS AND ADMINISTRATIVE LAW JUDGE  
O'MALLEY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files these Exceptions to the Administrative Law Judge's Proposal for Decision in the above-referenced matter.

**I. INTRODUCTION**

South Central Water Company (South Central or Applicant) has applied for a new permit that would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 75,000 gallons per day (gpd) in Phase I, a daily average flow not to exceed 150,000 gpd in Phase II, and a daily average flow not to exceed 950,000 gpd in the final phase. The wastewater treatment plant would serve the Dolphin Cove development service area.

The treated effluent would be discharged to an unnamed tidal tributary; then to Dickinson Bayou Tidal in Segment No. 1103 of the San Jacinto-Brazos Coastal Basin. The Executive Director (ED) has determined that the unnamed tidal tributary use is high aquatic life. Segment No. 1103 uses are high aquatic life and contact recreation. The facility would be located approximately 300 yards east of the intersection of 29<sup>th</sup> Street and Avenue S, on the north side of Avenue S in Galveston County, Texas.

The application for a new permit was received on May 8, 2007 and declared administratively complete on July 10, 2007. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on August 16, 2007 in the *Houston Chronicle*. On August 15, 2007, the alternative language NORI was published in *La Voz De Houston*. The TCEQ Executive Director completed the technical review of the application, and prepared a draft permit. The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published on October 18, 2007 in the *Houston Chronicle*. On October 17, 2007, the alternative language NAPD was published in *La Voz De Houston*. The public comment period ended on November 19, 2007. Two letters were filed by Phillip Livingston on behalf of Richard T. Gustafson, and Mr. and Mrs. Robinson (the Robinsons or Protestants). Only the Robinsons requested a contested case hearing on this application.

On August 4, 2008, the Commission considered the hearing request filed by the Robinsons and determined that they were affected persons. The matter was then referred to the State Office of Administrative Hearings (SOAH) to conduct a contested case hearing on the following issues:

1. Whether the discharge of effluent will harm marine life and wildlife in the receiving waters of and the wetlands maintained by Mr. and Mrs. Robinson; and
2. Whether the discharge will violate water quality standards in the receiving stream or in Dickinson Bayou.

On October 20, 2008, a preliminary hearing on this matter was held. The following parties were named; The Robinsons, the ED, OPIC and South Central. On November 10, 2009 in Houston, Texas, SOAH conducted a hearing on the merits. The ALJ issued his Proposal for Decision (PFD) on March 9, 2010, recommending the Commission approve South Central's application.

## II. ANALYSIS

The Applicant must present evidence to meet its burden of proof on whether the discharge will harm marine or wildlife and meet TCEQ water quality standards. The

Applicant improperly relied on the ED's case to meet its burden of proof on both referred issues. Because the application and subsequent draft permit have been challenged by the Protestants, the Applicant has the burden to present evidence proving its position on the two referred issues. And relying on the ED's presentation of evidence in order to meet its burden of proof is improper.

First, the ED is participating for the sole purpose of providing information to complete the administrative record.<sup>1</sup> The ED is also prohibited from assisting the Applicant in meeting its burden of proof.<sup>2</sup> In practice, this means that the Applicant can utilize the ED's administrative and technical review of the application, but it cannot rely on this alone, and it cannot rely on the ED's case to meet its burden of proof.

The Commission has previously rejected the argument that an Applicant can exclusively use the ED's case to meet its burden of proof.<sup>3</sup> Like the Applicant's witnesses in this case, the applicant witness in UA Holdings deferred exclusively to the ED's evaluation of the application on water quality issues.<sup>4</sup> This is improper, the ALJ concluded, and not enough for the Applicant to meet its burden of proof. In the UA Holdings PFD, the ALJ stated:

Applicant essentially offered two explanations for its failure to offer evidence in support of its application concerning water quality issues. First, Applicant suggested it could present its water quality evidence "at first blush" on rebuttal. In the alternative, Applicant asserted it could rely on the other parties, including the ED, to meet its burden of proof on the water quality issue. Applicant is mistaken on both accounts... [T]he ALJ addresses Applicant's intention to rely on the ED's expert witnesses to meet Applicant's burden of proof. This, too, is a very curious position. During the prehearing conference and in a subsequent order, the parties examined and the ALJ detailed his understanding of §5.228(e) of the Texas Water Code and its prohibition against the ED assisting a permit

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<sup>1</sup> 30 TEX. ADMIN. CODE (TAC) § 80.108(d).

<sup>2</sup> 30 TAC § 80.108(e).

<sup>3</sup> *PFD In Re: Application of UA Holdings, 1994-95, Inc., for a new TPDES Permit No. WQ-14468-001* (UA Holdings PFD), SOAH Docket No. 582-06-0393, TCEQ Docket No. 2005-1184-MWD, p. 7-10 (November 10, 2006). See also *Commission Order in UA Holdings 1994-1995, Inc. (UA Holdings Order)*, SOAH Docket No. 582-06-0393, TCEQ Docket No. 2005-1184-MWD, (August 2, 2007).

<sup>4</sup> *OPIC's Closing Argument*, p. 8-9.

applicant in meeting its burden of proof.<sup>5</sup> Further, Applicant was made aware that Commission rules restate this prohibition, adding that the ED shall not rehabilitate the testimony of a witness other than his own witness testifying for the sole purpose of providing information to complete the administrative record.<sup>6</sup> Clearly, Applicant's intention here is prohibited by law.

On the issue of whether the discharge will violate water quality standards in the receiving stream or in Dickinson Bayou, the Applicant, as well as the ALJ's analysis, relies exclusively on the ED's evaluation of the application.<sup>7</sup> OPIC offers no opinion on the results of the modeling conducted by the ED during its technical review of the application, as OPIC does not maintain technical staff and typically does not put forth technical witnesses. But, OPIC does note that the Applicant did not introduce any evidence on the modeling conducted by the ED, as part of its direct case. Nor did the Applicant present any witnesses that could credibly testify on the ED's modeling, submit evidence to support its witnesses opinions on the ED's technical review of the application, nor did it submit any technical evidence to support its witnesses opinions.

In the PFD, the ALJ states that there is no expert, rule, or statutory provision requiring additional water quality testing.<sup>8</sup> OPIC objects to this characterization of its arguments. OPIC has not argued that the ED conducted an incomplete technical and administrative review. To the extent that the TCEQ could, it evaluated the information submitted by the applicant, and created a draft permit based on the information available during the application process. The draft permit, however, is just that; a "draft permit" and subject to challenge.

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<sup>5</sup> "The executive director or the executive director's designated representative may not assist a permit applicant in meeting its burden of proof in a hearing before the commission or the State Office of Administrative Hearings unless the permit applicant fits a category of permit applicant that the commission by rule has designated as eligible." Applicant does not fit the criteria for an applicant who may receive assistance from the ED.

<sup>6</sup> 30 TEX. ADMIN. CODE (TAC) § 80.127(a)(4).

<sup>7</sup> *PFD In RE: In the matter of the Application of South Central Water Company, Proposed TPDES, Permit No. WQ0014804001* (South Central PFD), SOAH Docket No. 582-08-4290, TCEQ Docket NO. 2008-0473-MWD, p. 12, (March 9, 2010).

<sup>8</sup> *Id.* at 12-13.

Since this application has been challenged, 30 TAC § 80.17 places the burden of proof on the Applicant to present evidence on the issues referred to SOAH by the Commissioners. In order to satisfy this burden, the Applicant must present evidence on each specific issue. To satisfy its burden, the Applicant must be required to present some evidence-- beyond the mere existence of ED's technical and administrative review of the application-- in order to support its assertion that the discharge will meet water quality standards. Instead, all three of the Applicant's witnesses deferred exclusively to the ED on matters of water quality.<sup>9</sup> As the Commission has previously determined, this alone is not enough for the Applicant to meet its burden of proof.

OPIC also objects to the ALJ's statement that OPIC did not suggest any additional evaluation the Applicant could have conducted. First, it is the Applicant's responsibility to show the Commission that the discharge would be protective of water quality standards. It is not OPIC's responsibility to show the Applicant how it could have made its case. Second, there was testimony within the record suggesting additional information the Applicant could have submitted, in order to meet its burden of proof. OPIC cited to this testimony, when discussing the first referred issue, and incorporated these arguments into its discussion of whether the discharge complies with water quality standards.

ED witness Mark Rudolf discussed several studies and veins of further inquiry the Applicant could have conducted, to provide more information on the impact of the effluent and the physical characteristics of the waterway. If he had the opportunity, he would have conducted a water level study to understand the impact of the tide in the wetlands, and determine whether they are inundated by the tide.<sup>10</sup> He also would have verified the depth of the channel bisecting the wetlands, to include in his model.<sup>11</sup> He also noted that he only conducted modeling on DO levels, not any other constituents regulated by the TCEQ,<sup>12</sup> such as bacteria levels.

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<sup>9</sup> Transcript, p. 22 lns. 17-24; p., 24, lns. 14-19; p. 29, line 25, to p. 30, line 17; p. 48, line 13 to p. 49, line 3.

<sup>10</sup> Transcript, p. 128, lns. 6-11.

<sup>11</sup> Transcript, p. 128, lns. 14-16.

<sup>12</sup> Transcript, p. 120, ln. 1 to p. 121, ln. 2.

OPIC also respectfully takes exception to the ALJ's statement that OPIC attempts to characterize the relevant portion of Dickinson Bayou as impaired. OPIC does not attempt to characterize this portion of Dickenson Bayou as impaired. Evidence clearly shows that the segment that the Applicant proposes to discharge into is not on the 303(d) list of impaired waterways. But, OPIC questions whether the Applicant has thoroughly met its burden to show that the discharge will not violate water quality standards. There is no evidence in the record to confirm or deny the discharge will not impact the already impaired upstream segments, and very little evidence to allow the ALJ to determine, based on scientific evidence, whether the discharge will impact bacterial levels in the receiving waters. The Applicant argues that the upstream segments with unhealthy bacteria levels are irrelevant, but it presented no evidence to verify this conclusion.

Jerry Ince, testifying for the Applicant, was not even aware that several segments upstream of the discharge were on the 303(d) list.<sup>13</sup> And even though Mark Rudolph, testifying for the ED, took the upstream 303(d) segments into account when completing his modeling, he only modeled for dissolved oxygen levels;<sup>14</sup> the upstream segments are also bacteria impaired. Lili Murphy, for the ED, states that she did not take the upstream 303(d) segments into account, although she may have been aware of them when completing her water quality analysis.<sup>15</sup> She is also unclear how the TCEQ would have incorporated this information into the permit review, beyond Mark Rudolph's modeling for dissolved oxygen levels.<sup>16</sup>

The ALJ states that the impaired portions are 4 miles upstream from the discharge point and cites to Mark Rudolph's and Lili Murphy's testimony. But, they testified during the hearing that they did not evaluate the discharge's impact upon bacteria levels. Therefore OPIC cannot verify, based on the record, whether the discharge will be fully protective of water quality.

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<sup>13</sup> Transcript, p. 68, lns 14-17.

<sup>14</sup> Transcript, p. 119, ln, 19 to p. 120, ln. 20.

<sup>15</sup> Transcript, p. 133 ln. 20 to p. 134, ln. 14.

<sup>16</sup> Transcript, p. 131, ln. 23 to p. 132, ln. 7.

Because this application has been challenged, the administrative process contemplates that the Applicant must provide evidence on the specific referred issues raised by the affected parties; information beyond what the application process requires. Simply relying on the TCEQ's prior review and preliminary approval of the challenged application ignores the purpose of an administrative hearing. If an Applicant could rely exclusively on the ED's prior approval of an application to satisfy its burden of proof, then it would not, in reality, carry the burden of proof. It would instead effectively shift to the ED, on cases where the ED participates as a party. The Commission has promulgated rules<sup>17</sup> and adopted Findings of Fact and Conclusions of Law<sup>18</sup> indicating that an Applicant may not simply rely on the ED's case to meet its burden of proof.

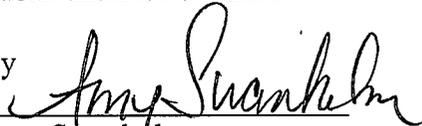
### III. CONCLUSION

Therefore, OPIC urges the Commission to overturn the PFD because the ALJ improperly applied the law and agency rules regarding the Applicant's reliance on the ED's case and witnesses in meeting its burden of proof.<sup>19</sup>

Respectfully submitted,

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By

  
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<sup>17</sup> 30 TAC § 80.108(d); 30 TAC § 80.108(e);

<sup>18</sup> See UA Holdings Order.

<sup>19</sup> Texas Government Code § 2001.058(e)(1).

**CERTIFICATE OF SERVICE**

I hereby certify that on March 26, 2010, the original and seven true and correct copies of the *Office of the Public Interest Counsel's Exceptions to PFD* 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.

  
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Amy Swanholm  
Assistant Public Interest Counsel

**MAILING LIST**  
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**SOAH DOCKET NO. 582-08-4290**  
**TCEQ DOCKET NO. 2008-0473-MWD**

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