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FROM: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
 Name Amy Swanholm
 Division/Region Office of Public Interest Counsel
 Telephone Number 512/239-6823
 FAX Number 512/239-6377

NOTES:

**RE: CITY OF PATTON VILLAGE
 SOAH DOCKET NO. 582-10-0353
 TCEQ DOCKET NO. 2009-0913-MWD**

The Honorable Rebecca Smith	SOAH	512/475-4994
Emily Rogers	Bickerstaff Heath et al	512/320-5638
Mac Ducson	Blackburn & Carter	713/524-5165



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

May 12, 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: **CITY OF PATTON VILLAGE**
SOAH DOCKET NO. 582-10-0353
TCEQ DOCKET NO. 2009-0913-MWD

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Closing Argument in the above-entitled matter.

Sincerely,

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

Amy Swarholm, 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

**TCEQ DOCKET NO. 2009-0913-MWD
SOAH DOCKET NO. 582-10-0353**

**IN THE MATTER OF
THE APPLICATION OF
CITY OF PATTON
VILLAGE FOR PERMIT
NO. WQ0014926001**

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§
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§
§

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
CLOSING ARGUMENT**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE REBECCA S. SMITH:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Closing Argument in the above-referenced matter.

I. INTRODUCTION

A. Background of Facility

The City of Patton Village has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014926001. The facility would be located within the city limits of Patton Village, approximately 550 feet west of the intersection of South Lakeview Drive and Lakeview Drive, in Montgomery County, Texas. The proposed permit would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 350,000 gallons per day. The treated effluent would be discharged to Peach Creek in Segment No. 1011 of the San Jacinto River Basin.

The designated uses for Segment No. 1011 are high aquatic life uses, public water supply and contact recreation. In accordance with 30 TAC §307.5 and the TCEQ implementation procedures (January 2003) for the Texas Surface Water Quality Standards, an antidegradation review of the receiving waters was performed. The Executive Director's (ED) Tier 1 antidegradation review preliminarily determined that existing water quality uses will not be impaired by this permit action. The review also concluded that numerical and narrative criteria adequate to protect existing uses would be maintained. The Tier 2 review preliminarily determined that no significant degradation of water quality is expected in Peach Creek. The Tier 2 review also determined that existing uses will be maintained and protected, although the ED's preliminary determination could be reexamined and modified if new information is received.

B. Procedural Background

TCEQ received this application on September 15, 2008. On November 24, 2008 the ED declared the application administratively complete. The Notice of Receipt and Intent to Obtain Water Quality Permit (NORI) was published in the *East Montgomery County Observer* on December 10, 2008, in Montgomery County. The NORI was also published in Spanish in *La Prensa de Houston* December 11-17, 2008, in Montgomery County. The ED declared the application technically complete on February 5, 2009 and the Notice of Application and Preliminary Decision (NAPD) was published in the *East Montgomery County Observer* on February 18, 2009, in Montgomery County. The NAPD was also published in Spanish in *La Prensa de Houston* February 19-25, 2009, in Montgomery County. The public comment period ended on March 23, 2009 and the deadline to request a contested case hearing was June 12, 2009.

On September 9, 2009, the Commission granted the hearing requests filed by Adriana Casenave, Gino Garza, Tamara Garza, and Gloria Giarruso. The Commission also referred three issues to the State Office of Administrative Hearings (SOAH):

1. Will the proposed discharge impact Peach Creek's ability to meet TCEQ water quality standards;
2. Whether the proposed discharge would contribute to excess bacteria in Peach Creek and Lake Houston; and

3. Will the proposed discharge impact the hearing requestors' use of Peach Creek for recreational purposes.

At the preliminary hearing on November 16, 2009, Tamara Garza and Adriana Casenave were named parties and allowed to participate in the contested case hearing. The hearing on the merits was held from March 31, 2010, to April 1, 2010.

II. WILL THE PROPOSED DISCHARGE IMPACT PEACH CREEK'S ABILITY TO MEET WATER QUALITY STANDARDS?

OPIC can not find that the Applicant has met its burden of proof on the first issue. The applicant, as the moving party, has the burden of proof to show by a preponderance of the evidence that the proposed discharge will not impact Peach Creek's ability to meet water quality standards.¹ The Applicant has failed to meet its burden because it did not provide any evidence of the proposed discharge's impact on Peach Creek's ability to meet water quality standards. Furthermore, the Protestant showed through cross-examination that the ED's technical review, although completed in compliance with TCEQ rules and procedure, may not have been sufficient to protect water quality in Peach Creek.

The Applicant presented two witnesses, the Mayor of Patton Village, Pamela Munoz, and George Lazaro, a professional civil engineer. Although Ms. Munoz was familiar with the history of the city's application, she provided no testimony regarding whether the proposed discharge would impact Peach Creek's ability to meet water quality standards. Mr. Lazaro did provide testimony on this issue, but OPIC finds his testimony unpersuasive. Although he has experience developing these types of projects for other cities,² he could not answer several basic questions related to water quality. His conclusory opinion is unconvincing because he did nothing other than review the modeling performed by TCEQ,³ which cross examination revealed he did not understand.

¹ "The burden of proof is on the moving party by a preponderance of the evidence." 30 Texas Administrative Code (TAC) § 80.17(a).

² Applicant Exhibit (App. Ex.) 4, at 2.

³ Transcript (T.) at 44-45.

Mr. Lazaro's testimony demonstrates limited experience or knowledge of water quality issues. For example, when asked whether he was familiar with the term photosynthesis, he stated that he was not a biologist.⁴ He was aware that dissolved oxygen (DO) helps aquatic life, but did not know how the presence of DO in water benefits plants.⁵ He had no information on the current DO levels of Peach Creek.⁶ And while he was aware that Peach Creek was classified by the ED as having high aquatic life, but was unable to testify as to whether there were fish in Peach Creek.⁷

Mr. Lazano stated that, in regards to several specific topics, he could offer no independent analysis. He offered no analysis on whether aquatic recreation would be impacted by the discharge.⁸ He offered no finding on whether "de minimus" degradation would occur, in relation to DO.⁹ Mr. Lazaro did not determine whether or not Peach Creek exceeded TCEQ water quality rules relating to fishable/swimmable standards.¹⁰ He performed no analysis of acute toxicity associated with the proposed discharge.¹¹ The only basis he could offer for his opinion was the Qual-tex modeling performed by the TCEQ and the memos created by TCEQ staff.¹²

Furthermore, he stated that he had no independent basis for his testimony that the proposed discharge would meet water quality standards, other than the modeling done by TCEQ.¹³ But, when asked if he was familiar with how the Qual-tex model works, he

⁴ T. at 51-52.

⁵ T. at 52.

⁶ T. at 54.

⁷ T. at 49.

⁸ T. at 39.

⁹ T. at 41.

¹⁰ T. at 42.

¹¹ T. at 44.

¹² T. at 39, 42, 44.

¹³ T. at 44-45.

stated that he had never performed one and so was not familiar with it.¹⁴ Furthermore, Mr. Lazaro could not answer questions about the specifics of how the Qual-tex model takes into account parameters such as stream flow, aquatic life, re-aeration rates, stream width, stream depth, and dissolved oxygen.¹⁵

OPIC recommends that the ALJ give no weight to Mr. Lazaro's testimony, considering that he conducted no independent analysis himself. In addition, he did not sufficiently understand TCEQ's modeling and memos enough to offer an informed opinion on whether the ED's data and evaluation was sound.

The ED witness, Michael Redda reviewed the studies conducted by other TCEQ technical staff and created the draft permit.¹⁶ In formulating his opinion on whether the proposed discharge would meet the TSWQS, for the most part he only considered the technical reports and three pages of memos created by the TCEQ technical staff.¹⁷

Mark Rudolph performed DO modeling for the ED. Although the modeling was performed in compliance with TCEQ procedure, he had no actual data from the site to base his modeling on.¹⁸ Neither did he know the actual width and depth of the receiving stream or the actual dissolved oxygen starting point.¹⁹ In addition, he agreed that upstream wastewater discharges can cause oxygen to be taken out of the stream. But he did not include upstream discharges in his modeling. He was also not aware of whether there were any upstream discharges with excessively high bacteria levels.²⁰

The Applicant presented no persuasive evidence the proposed discharge will impact on Peach Creek's ability to meet water quality standards. Further, Protestant has shown through cross-examination that the ED's technical review, although completed in compliance with TCEQ rules and procedure, may not have been sufficient to protect

¹⁴ T at 29.

¹⁵ T. at 31-33.

¹⁶ T. at 143.

¹⁷ T. at 148-149.

¹⁸ T. at 203.

¹⁹ T. at 205-206.

²⁰ T. at 204.

water quality in Peach Creek. Therefore, the record does not support issuance of this permit because the applicant has not met its burden of proof.

III. WHETHER THE PROPOSED DISCHARGE WOULD CONTRIBUTE TO EXCESS BACTERIA IN PEACH CREEK AND LAKE HOUSTON.

The Applicant has not met its burden to show that the proposed discharge would be protective in preventing excess bacteria in Peach Creek and Lake Houston. The Applicant asserts that the discharge would not contribute to excess bacteria, but during the hearing provided insufficient evidence to back up this assertion. In addition, although the ED examined the discharge's impact on bacteria levels in Peach Creek, it did not evaluate the discharge's impact on bacteria levels in Lake Houston. The Applicant also presented no evidence on the discharge's impact on bacteria levels in the lake. Furthermore, the Protestant presented evidence that the discharge may contribute to elevated bacteria levels in the receiving waters. Therefore, OPIC must conclude that the Applicant has not met its burden of proof on this issue.

George Lazaro, on behalf of the Applicant, stated a belief that the proposed discharge will not contribute to excess bacteria in Peach Creek or Lake Houston.²¹ In support of this, he states that the bacteria level in the draft permit is the same as that prescribed by 30 TAC § 307.7(b)(1)(A)(i), and water quality standards criteria for Peach Creek Segment 1101 and Lake Houston Segment 1002 of the San Jacinto River Basin, in Appendix A of Chapter 307.²² Mr. Lazano appears to confuse TCEQ water quality criteria with effluent limits for a specific permit issued by the TCEQ, an easy and understandable mistake to make.

Water quality criteria is guided by 30 TAC § 307.7, which sets out site-specific uses and criteria to accompany those uses. TCEQ designates that certain waterways have certain uses, such as aquatic life or recreation. Once a waterway has been assigned one of these uses, TCEQ, must ensure the waterway is clean enough to accommodate these

²¹ App. Ex 4 at 6 and 12.

²² *Id.* at 12.

uses. Texas waters where people recreate must not have elevated bacteria levels.²³ Elevated bacteria levels in freshwater are measured through an indicator bacteria, E.coli. If a freshwater waterway that is used for contact recreation has, on average, E.coli levels less than 126 colonies per 100 mg/L, TCEQ considers the waterway in compliance with the TSWQS rules governing recreational use and safe for recreation. The E.coli threshold of 126 colonies per 100 mg/L applies to the level of bacteria appropriate for the waterway as a whole, and contrary to Mr Lazaro, is not necessarily indicative of the appropriate bacteria level for a specific discharge into the waterway.

Further, Peach Creek is on the list of impaired Texas waterways, commonly referred to as the 303(d) list. It is on this list because of elevated levels of bacteria. If the E.coli effluent limit of the proposed discharge is the same as the maximum level of E.coli allowed to be present in the receiving waters the discharge could still contribute to excess bacteria in Peach Creek and Lake Houston. In addition, when asked basic questions about bacteria and its impact upon waterways, Mr. Lazaro could offer little expertise. He was unaware of current E.coli levels in Lake Houston.²⁴ He also stated that he made no independent assessment of excess bacteria in relation to Lake Houston or Peach Creek.²⁵ He acknowledges that bacteria can accumulate in the sediment of waterways, but has done no independent assessment of whether that will happen to Peach Creek or Lake Houston.²⁶

George Lazaro also states that the proposed facility would eliminate several hundred septic systems from the basin, and this should have a positive impact on water quality in the area.²⁷ He acknowledges, though, that this opinion is based primarily upon a report he did not create²⁸ and his observations of ponding above septic systems in the

²³ See 30 TAC § 307.7(b)(1).

²⁴ T at 55.

²⁵ T at 56-57.

²⁶ T at 58.

²⁷ App. Ex 4 at 12.

²⁸ T at 20.

area. He took no water samples to determine whether septic systems in the area were actually malfunctioning.²⁹

Although the ED properly conducted its technical and administrative review of the application, it did not fully evaluate the discharge's impact upon bacteria levels in the receiving waters. The ED witness who wrote the technical review stated in testimony that he did not look at bacteria levels in Lake Houston.³⁰ Michael Redda, in creating the draft permit, reviewed memos created by other TCEQ teams.³¹ Bacteria impairment was discussed in the Executive Director's Technical Summary.³² This memo states that the river segment of Peach Creek where the Applicant proposes to discharge is on the 303(d) list, or the state's inventory of impaired and threatened waters.³³ It also states that the facility, when operated properly, should not add to the bacterial impairment of this segment. But the memo does not evaluate bacteria levels in Lake Houston.³⁴ In fact, Mr Redda states that none of the memoranda he relied on considered bacteria levels in Lake Houston.³⁵ Michael Redda further testified that the TCEQ did not consider bacteria levels in Lake Houston at all.³⁶ For this particular permit, he said, TCEQ does not have any numbers on bacteria levels for Lake Houston.³⁷ Mark Rudolph, who conducted DO modeling for the ED, had no opinion on this referred issue.³⁸

Because the Commission has specifically referred the issue of the proposed discharge's impact upon bacteria levels in Lake Houston, the Applicant has the burden to

²⁹ T at 73-74.

³⁰ T at 145-147.

³¹ T at 141.

³² Executive Director's Exhibit (ED Ex.) 4, at 2.

³³ ED Ex. 4.

³⁴ T at 145-146.

³⁵ T at 147.

³⁶ T at 146.

³⁷ *Id.*

³⁸ T at 208.

present evidence on this issue. It relied on the ED's evaluation of the application and creation of the draft permit for many other issues raised by the Protestants. But it cannot completely rely on the ED for information on this referred issue, because the ED did not evaluate the discharge's impact upon Lake Houston. And because it did not present any evidence of its own on this issue, the Applicant has not met its burden of proof.

Furthermore, the Protestants have raised questions about whether the effluent limits in the draft permit would impact bacteria levels in the receiving waters. Mary Ellen Whitworth, an expert testifying for the Protestants, stated that the effluent will be treated with chlorine, to kill pathogens³⁹ for which E.coli is used as an indicator. The effluent will also contain a chlorine residual, in order to prevent regrowth of bacteria in the facility pipes and out into the receiving stream.⁴⁰ But she also testified that the National Science Foundation indicates that when wastewater effluent contains nitrogen and phosphorous, as this proposed effluent would, E.coli and other pathogens will grow.⁴¹ She also testified that because the proposed discharge will contain nitrogen and phosphorous, the discharge will potentially exacerbate the bacteria levels in Peach Creek and Lake Houston.⁴² The Applicant offered no evidence to the contrary. In fact, Mr. Lazaro actually acknowledged that if nitrogen and phosphorous are introduced into a waterway where bacteria has accumulated in the sediment, this could contribute to excess bacteria in the waterway.⁴³ Michael Redda, testifying for the ED, also stated that he did not consider the possible regrowth of bacteria, when creating the draft permit.⁴⁴

OPIC concludes that the Applicant has not met its burden of proof on the issue regarding the impact on excess bacteria in Lake Houston. The Applicant has presented no evidence on this issue, instead relying on the ED's evaluation. The ED completed its administrative and technical review of the application in accordance with the rules, but

³⁹ T at 105.

⁴⁰ T at 105.

⁴¹ T at 112.

⁴² T at 125.

⁴³ T. at 58-60.

⁴⁴ T. at 155.

did not examine whether the proposed discharge will impact bacteria levels in Lake Houston. Furthermore, the Protestants presented evidence indicating that the presence of nitrogen and phosphorous in the effluent could cause regrowth of bacteria in Peach Creek and Lake Houston, once the residual chlorine in the effluent disperses. Therefore, OPIC must find that the Applicant has not met its burden of proof.

IV. WILL THE PROPOSED DISCHARGE IMPACT THE HEARING REQUESTORS' USE OF PEACH CREEK FOR RECREATIONAL PURPOSES?

OPIC concludes that the Applicant has not met its burden of proof on this issue. As discussed previously, the draft permit contains a bacteria limit intended to ensure the proposed discharge does not impact the recreational capacity of the receiving waters, although OPIC questions whether the effluent will indeed ensure the receiving waters will be safe to recreate, considering that Peach Creek already contains elevated levels of bacteria. The ED witness, Michael Redda, testified that he did not model for bacteria, and that he also did not consider the potential regrowth of bacteria.⁴⁵ Mary Ellen Whitworth and George Lazaro acknowledged that the presence of nitrogen and phosphorous in a discharge can cause bacterial regrowth in receiving waters. Mary Ellen Whitworth and George Lazaro also agreed that wastewater discharges could lead to bacteria deposits in sediments downstream of the discharge.⁴⁶ Furthermore, Mr. Lazaro, testifying on behalf of the Applicant, did not know whether local residents swim or fish in Peach Creek.⁴⁷ He based his opinion primarily on the Qual-tex model, even though he could provide no details about the working of this modeling.⁴⁸

The Protestant has presented evidence indicating that the proposed discharge could cause bacterial regrowth in Peach Creek, leading to further elevated bacteria levels

⁴⁵ T. at 154-155.

⁴⁶ T. at 58-60 and 125.

⁴⁷ T. at 35.

⁴⁸ T. at 34.

in Peach Creek. The Applicant's witness has agreed that this is a possibility, but offered no evidence to indicate this would not happen with this discharge. Although Michael Redda did not believe it would happen with this proposed discharge, he generally appeared to agree with the underlying facts with which both the Protestants and Applicant's witnesses based their opinions on.⁴⁹ Therefore, OPIC concludes that the Applicant has not met its burden regarding potential impacts to the hearing requestors' use of Peach Creek for recreational purposes.

V. PUBLIC POLICY CONCERNS

OPIC acknowledges that the Applicant has raised concerns regarding pollution from failing septic systems that the proposed facility would replace. While replacing failing septic systems with a wastewater treatment plant is good public policy, in a contested case hearing, a proposal for decision must be based on an evidentiary record. Unfortunately, the Applicant has not met its burden of proof on all referred issues, and therefore, OPIC cannot recommend the ALJ approve this permit.

In addition, the record does not contain sufficient evidence for OPIC to determine whether the proposed discharge would be more protective than the current septic systems that would be replaced by the proposed facility. The Applicant presented no evidence on how many septic systems were failing or what sort of environmental harm was arising from failing or poorly operating systems.

The Mayor of Patton Village stated that the City has applied for a wastewater discharge permit in order to eliminate the use of septic systems.⁵⁰ Historically, she states, Patton Village has relied upon septic systems to treat waste.⁵¹ Currently, she continues, those septic systems are failing or poorly operating.⁵² The City has also been selected to receive a \$4.1 million dollar loan and grant from the United States Department of

⁴⁹ T. at 154-157.

⁵⁰ App Ex. 1 at 3.

⁵¹ *Id.*

⁵² *Id.*

Agriculture-Rural Development. She stated that 735 citizens in Patton Village have requested and paid money for wastewater service from the City.⁵³

Mr. Lazaro believes the water quality in Peach Creek would improve once homes connect to the proposed facility and failing or poorly operating systems are disconnected.⁵⁴ He claims that these failing septic systems are currently contributing to elevated bacteria levels and impacting the dissolved oxygen levels in Peach Creek.⁵⁵ He also stated that runoff from septic tanks can be a source of source of bacteria, nitrogen, and phosphate for waterways.⁵⁶

But, he conducted no field analysis and collected no samples to determine whether septic waste was entering Peach Creek.⁵⁷ He relied on a preliminary engineering report not entered into the record, but did not create that report himself. Nor could he offer any proof to support his opinion besides his review of this report.⁵⁸ He stated that the large amount of rainfall in the area contributes to failing septic systems,⁵⁹ but did not know the average rainfall per year in Montgomery County. He also could not elaborate on what exactly he meant by "large amounts of rainfall" in the area.⁶⁰

OPIC understands the purpose served by a general public policy favoring centralized wastewater treatment over the use of numerous individual septic systems. In this case, however, the record does not clearly demonstrate that septic systems are causing impairment of the receiving water. Furthermore, the applicant failed to meet its burden of proof on all referred issues.

⁵³ *Id.*

⁵⁴ App. Ex. 4 at 12.

⁵⁵ *Id.*

⁵⁶ T at 72-73.

⁵⁷ T at 19.

⁵⁸ *Id.*

⁵⁹ App. Ex. 4 at 11.

⁶⁰ T at 24.

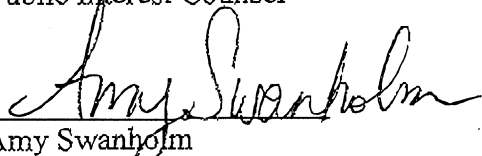
III. CONCLUSION

OPIC recommends the ALJ find that the Applicant has not met its burden of proof on all referred issues and, therefore, that the proposed permit be denied.

Respectfully submitted,

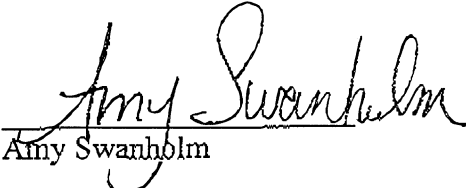
Blas J. Coy, Jr.
Public Interest Counsel

By:


Amy Swanholm
Assistant Public Interest Counsel
State Bar No. 24056400
(512)239-6823 PHONE
(512)239-6377 FAX

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2010 the original of the Office of the Public Interest Counsel's Closing Arguments were filed with the SOAH 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
CITY OF PATTON VILLAGE
SOAH DOCKET NO. 582-10-0353
TCEQ DOCKET NO. 2009-0913-MWD

The Honorable Rebecca S. Smith
Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
512/475-4993 FAX: 512/475-4994

Emily Rogers
Bickerstaff Heath Delgado Acosta, L.L.P.
3711 S. Mopac Expressway, Bldg. One, Ste. 300
Austin, Texas 78746
Tel: 512/472-8021
Fax: 512/320-5638
Representing: City of Patton Village

Alicia Lee, 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

Mac Duson
Blackburn & Carter, P.C.
4709 Austin Street
Houston, Texas 77004
Tel: 713/524-1012
Fax: 713/524-5165
Representing: Adriana Casenave

Tamara Garza
PO Box 476
New Caney, Texas 77357

Docket Clerk
Texas Commission on Environmental Quality
Office of Chief Clerk MC 105
P.O. Box 13087
Austin, TX 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311