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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 6, 2015

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: CITY OF LIBERTY HILL
TCEQ DOCKET NO. 2014-1720-MWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Rudy Calderon".

Rudy Calderon, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2014-1720-MWD

**IN THE MATTER OF THE
APPLICATION OF THE CITY OF
LIBERTY HILL FOR TPDES
PERMIT NO. WQ0014477001**

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
REQUESTS FOR HEARING**

To the Honorable Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in the above-referenced matter and respectfully shows the following.

I. Introduction

A. Background of Facility

Liberty Hill has applied to the TCEQ for a major amendment and renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014477001 to authorize an increase in the discharge of treated domestic wastewater effluent from an annual average flow not to exceed 1.2 million gallons per day (MGD) to an annual average flow not to exceed 4.0 MGD. The Liberty Hill Regional Wastewater Treatment Facility is an activated sludge process plant operated in the extended aeration mode. Treatment units in the Interim I phase include a bar screen, post-equalization basin, aerobic sludge digester, ultraviolet disinfection system, step aeration system, chemical addition for phosphorus removal, effluent rotating disc filters, and sequencing batch reactors. The sizes of the Interim II and Final phase sequencing batch reactors and digester units would be identical to their sizes in the Interim I phase. The filters and ultraviolet disinfection system are already sized for the Final phase. The facility is

currently operating in the Interim I phase. The Interim II and Final phase facilities have not been constructed.

Effluent limits in all phases of the proposed permit, based on a thirty-day average, are 5 milligrams per liter (mg/L) carbonaceous biochemical oxygen demand (five-day), 5 mg/L total suspended solids, 2 mg/L ammonia nitrogen, 16.6 mg/L nitrate-nitrogen, report total nitrogen, 126 colony-forming units or most probable number of *E. coli* per 100 milliliters, and 5 mg/L minimum dissolved oxygen. The total phosphorus limit, based on a thirty-day average, is 0.5 mg/L in the Interim I and II phases and 0.15 mg/L in the Final phase. The permittee shall use an ultraviolet disinfection system for disinfection purposes.

The wastewater treatment facility (facility) is located approximately 5,000 feet north of the South Fork San Gabriel River and 2,000 feet east of U.S. Highway 183 in Williamson County, Texas 78641. The treated effluent is discharged to the South Fork San Gabriel River in Segment No. 1250 of the Brazos River Basin. The designated uses for Segment No. 1250 are high aquatic life use, public water supply, aquifer protection, and primary contact recreation.

B. Procedural Background

TCEQ received this application on February 11, 2013. On March 21, 2013, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published on April 3, 2013. The Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published on May 15, 2014. Due to issues with the first NORI and NAPD, a combined NORI/NAPD/Notice of Public Meeting was published on July 6, 2014, in *The Williamson County Sun*. On October 2, 2014, the ED

filed his Response to Public Comment, and on October 7, 2014, the ED mailed notice of his final decision. The deadline to request a contested case hearing was November 6, 2014.

TCEQ received timely comments and requests for a contested case hearing from Paige H. Saenz of the law firm Knight & Partners on behalf of the City of Leander (Leander), Audrey Swearingen, and Sharon and Terry Cassidy on behalf of themselves and the Save the South San Gabriel group.

II. Applicable Law

The ED declared this application administratively complete on March 21, 2013. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. WATER CODE (TWC) § 5.556).

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 the application.

30 TAC § 55.201(d).

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.” *30 TAC § 55.203(a)*. This justiciable interest does not include an interest common to the general public. *Id.* Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. *Id.* Relevant factors considered in determining whether a person is affected 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.

30 TAC § 55.203(c).

A group or association may request a contested case hearing if:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization’s purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

30 TAC § 55.205(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements. *Id.*

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, 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 of 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.

30 TAC § 55.209(e).

III. Discussion

A. Determination of Affected Person Status

City of Leander

According to the hearing request, the City of Leander (Leander) is a municipality whose extra-territorial jurisdiction (ETJ) ends approximately 1 mile from where the facility is located and the area the plant services. Leander also states that the facility is located approximately 3 miles from Leander's closest wastewater treatment plant. Leander explains in its hearing request that it is currently working with a developer to obtain a TPDES permit for a new wastewater treatment plant that would service some of the same areas north of the South San Gabriel that Liberty Hill anticipates servicing once the expansion of its facility is complete and that some of that service area lies within Leander's ETJ. Leander contends that the proposed expansion will be collecting inflow from within Leander's ETJ and that this loss of inflow and potential customers

will adversely affect its ability to provide wastewater services within its ETJ. Leander will also be filing CCN applications for water and sewer for areas north of the South San Gabriel. OPIC has determined that Leander's concerns relate to the state's regionalization policy concerning the proliferation of wastewater treatment facilities.

State policy is to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to prevent pollution and maintain and enhance the quality of state water. *TWC § 26.081(a)*. When considering the issuance of a permit to discharge waste, the TCEQ is required to consider need and the availability of existing or proposed regional waste collection, treatment, and disposal systems. *TWC § 26.082*. As the provider of wastewater services to its residents within its city limits and ETJ, Leander has a unique interest in the issue of regionalization. As stated before, the plant is approximately 1 mile from Leander's ETJ boundary and its service area could draw customers and inflow from Leander's ETJ which would affect Leander's future plans for servicing its ETJ.

OPIC finds that the City of Leander is an affected person based on the factors set forth in 30 TAC §§ 55.203(b) and (c) and that a reasonable relationship exists between the City of Leander's concerns and the issuance of the proposed major permit amendment.

Sharon Cassady, Terry Cassady, Save the South San Gabriel

In their hearing request, Sharon and Terry Cassady, on behalf of themselves and the Save the South San Gabriel group, have brought up issues relating to algae growth and environmental impacts to the South San Gabriel, the loss of use and recreation due to the increased effluent flow into the South San Gabriel, and Liberty Hill's ability to

properly operate the expanded facility due to its compliance history and an enforcement action which led to an Agreed Order being signed in April 2013.

According to the hearing request and the map provided by the ED, the Cassady property lies on the South San Gabriel River approximately one half mile downstream from the outfall. Due to their proximity to the outfall and the location of their property on the river, the Cassadys' concerns about algae growth and loss of use and enjoyment of the river differ from those of the general public and are sufficient to find them affected persons. Additionally, their concerns about Liberty Hill's compliance history and ability to operate the facility provide further grounds for granting their hearing request.

As stated in their hearing request, the Cassadys are members of the Save the South San Gabriel group and have requested a hearing on their behalf as well. 30 TAC § 55.205(a) lays out the factors for determining whether a group or association can be granted party status. OPIC has determined that the Save the South San Gabriel River group, through Sharon and Terry Cassady, have met the criteria for being designated as affected persons.

OPIC, therefore, has determined that Sharon and Terry Cassady, and the Save the South San Gabriel group, qualify as affected persons under TCEQ rule.

Audrey Swearingen

In the hearing request submitted by Audrey Swearingen, she raises issues related to algae growth and environmental impact of increased effluent flow, loss of use and enjoyment of the river, and Liberty Hill's ability to properly operate the facility based on their compliance history. According to the map provided by the ED, Ms. Swearingen's property is located more than a mile away from the facility and is not located on the

South San Gabriel itself, but is separated from the river by a street and property which backs up to the river.

Given the intervening distance between the facility, the outfall, the river, and the requestor, OPIC finds that Ms. Swearingen's interests cannot be distinguished from interests common to the general public. Therefore, OPIC finds that Audrey Swearingen does not qualify as an affected person under TCEQ rule.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing requests:

- (1) Whether the proposed facility will violate TCEQ's regionalization policy.
- (2) Whether the use and enjoyment of the South San Gabriel will be adversely affected by the issuance of the permit amendment.
- (3) Whether the proposed increase in effluent will lead to algae growth and further environmental impacts.
- (4) Whether Applicant has the ability, based on its compliance history, to operate its plant in compliance with its permit.

C. Issues Raised in the Comment Period

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. *30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A)*.

D. Disputed Issues

There is no agreement between the hearing requesters and the ED on the issues raised in the hearing requests.

E. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable

requirements. 30 TAC § 55.211(c)(2)(A). All of the issues presented are issues of fact appropriate for referral to SOAH.

F. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–51 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material . . . it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

Texas encourages regionalization under the provisions of TWC § 26.081. Therefore, OPIC concludes Issue no. 1 to be relevant and material. Furthermore, TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307 and 309, as well as under specific rules related to wastewater systems found at 30 TAC Chapters 30 and 217. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. Therefore, OPIC concludes that Issues nos. 2, 3, and 4 related to loss of use and enjoyment of the river, increased algae growth, and Liberty Hill's ability to properly operate the facility based on its compliance history are also relevant and material.

G. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

- (1) Whether the proposed facility will violate TCEQ's regionalization policy.
- (2) Whether the use and enjoyment of the South San Gabriel will be adversely affected by the issuance of the permit amendment.
- (3) Whether the proposed increase in effluent will lead to algae growth and further environmental impacts.
- (4) Whether Applicant has the ability, based on its compliance history, to operate its plant in compliance with its permit.

H. Maximum Expected Duration of Hearing

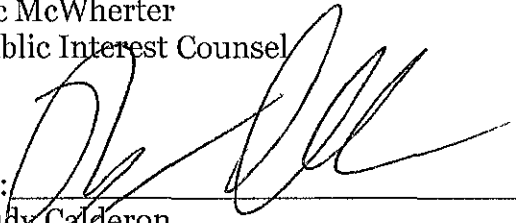
Commission Rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. Conclusion

OPIC recommends denying the hearing request from Audrey Swearingen and granting the hearing request from the City of Leander, Sharon and Terry Cassady, and the Save the South San Gabriel group, on the issues referenced in Section III.G above. OPIC further recommends a hearing duration of nine months.

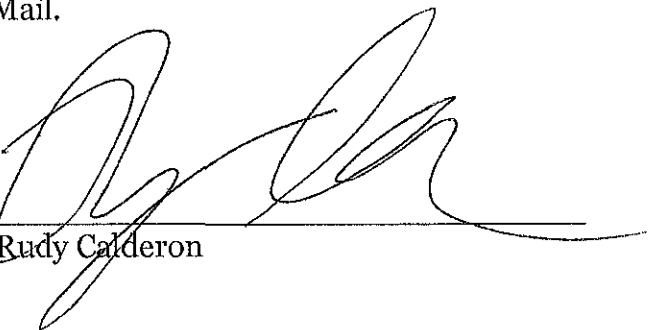
Respectfully submitted,

Vic McWherter
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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2015 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing 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, electronic mail, or by deposit in the U.S. Mail.



Rudy Calderon

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CITY OF LIBERTY HILL
TCEQ DOCKET NO. 2014-1720-MWD**

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