

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 3, 2013

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: HAYS COUNTY UTILITY DISTRICT NO. 5
TCEQ DOCKET NO. 2013-0820-MWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2013-0820-MWD

**IN THE MATTER
OF THE APPLICATION OF
HAYS COUNTY UTILITY
DISTRICT No. 5
FOR TPDES PERMIT
NO. WQ0014358001**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

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

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 (the Commission or TCEQ) files this Response to Hearing Request in the
above-referenced matter and respectfully shows the following.

I. INTRODUCTION

A. Background of Facility

Hays County Municipal Utility District No. 5 (Applicant) has applied to the TCEQ for a
renewal with changes of Permit No. WQ0014358001, which authorizes the disposal of treated
domestic wastewater at a daily average flow not to exceed 300,000 gallons per day via public
access subsurface drip irrigation system with a minimum area of 68.87 acres. Applicant has
requested the addition of 150,000 gallons per day Interim phase. The wastewater treatment
facility serves Hay County MUD No. 5.

The Highpointe Subdivision Wastewater Treatment Facility consists of an activated
sludge process plant using the extended aeration mode. Treatment units in the Interim I and
Interim II phases include a lift station, bar screen, aeration basin, final clarifier, aerobic sludge
digester, and a chlorine contact chamber. Treatment units in the final phase will include an
additional aeration basin, final clarifier, aerobic sludge digester, and chlorine contact chamber

with the same capacities as the Interim II phase facilities. The facility includes an effluent holding tank, each with a capacity of 333,000 gallons for storage of treated effluent before irrigation. An additional 333,000 gallon effluent holding tank will be added in the final phase, for a total capacity of 666,000 gallons. The facility is in operation.

Sludge generated from the treatment facility is hauled by a registered transporter to the City of Manor Wilbarger Creek Wastewater Treatment Facility to be digested, dewatered and then disposed of with the bulk of the sludge from the plant accepting the sludge. The draft permit also authorizes the disposal of sludge at a TCEQ authorized land application site or co-disposal landfill.

The wastewater treatment facility and disposal site are located approximately 2.3 miles south of U.S. Highway 290 and approximately 6,500 feet east of Sawyer Ranch Road. The disposal sites are located throughout the Highpointe Subdivision. The entrance to the subdivision is located on the east side of Sawyer Ranch Road, approximately 1.7 miles along Sawyer Ranch Road, south of the intersection of U.S. Highway 290 and Sawyer Ranch Road. Sawyer Ranch Road is located 8.2 miles west of the intersection of U.S. Highway 290 and Texas Highway 71 (the "Y" in Oak Hill), and 5.5 miles east of Dripping Springs in Hays County, Texas 78737.

The wastewater treatment facility and disposal site are located in the drainage basin of Onion Creek in Segment No. 1427 of the Colorado River Basin. No discharge of pollutants into water in the State is authorized by this permit.

B. Procedural Background

TCEQ received this application on February 21, 2012. On March 7, 2012, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt of Application and Intent to Obtain Permit (NORI) was published on April 5, 2012 in the *Austin*

American-Statesman and in *jahora si!*. The Notice of Application and Preliminary Decision (NAPD) was published on July 19, 2012 in the *Austin American-Statesman* and in *jahora si!*. The public comment period ended on August 20, 2012.

An incomplete copy of the ED's decision and Response to Comments was mailed on March 18, 2013 and set the deadline for the request of a contested case hearing or reconsideration 30 days later. On March 28, 2013, a complete copy of the ED's decision and Response to Comments was mailed to the Applicant and Protestants/Interested Persons, Save Our Springs Alliance Inc. (SOS). This extended the deadline for the request of a contested case hearing or reconsideration to April 28, 2013. TCEQ received timely comments, requests for a public meeting, and requests for a contested case hearing from SOS on August 16, 2012 and April 26, 2013.

As discussed below, OPIC finds that there is no right to a contested case hearing on this application and recommends that the hearing request be denied.

II. REQUIREMENTS OF APPLICABLE LAW

This application was declared administratively complete on March 7, 2012. 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 TEX. ADMIN. CODE (TAC) § 55.201(d).

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.” This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include, but are not limited to:

- 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.

The Commission has also set forth specific criteria for judging whether a group or organization should be considered an “affected person.” 30 TAC § 55.205(a) states that a group or association may request a 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.

The ED of TCEQ, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements.¹

Accordingly, pursuant to 30 TAC § 55.209(e), 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 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 a maximum expected duration for the contested case hearing.

III. DISCUSSION

A. Right to a Contested Case Hearing

TWC § 26.028(d) and 30 TAC § 55.201(i)(5) provides that there is no right to a contested case hearing for certain applications for permit renewals or amendments if the applicant is not seeking to:

- a) increase significantly the quantity of waste to be discharged;
- b) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;
- c) any required opportunity for public meeting has been given;
- d) consultation and response to all timely received and significant public comment has been given; and
- e) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit;

OPIC finds that the renewal application does not authorize the applicant to significantly increase the quantity of water to be discharged because the existing permit includes an identical final phase discharge limit of 300,000 gallons of wastewater per day, and the minimum disposal area of 68.87 acres in the final phase is identical as between the current permit and the renewal

¹ 30 TAC § 55.205(b).
Office of Public Interest Counsel's Response to Hearing Request
Hays County MUD No. 5
TCEQ Permit No. WQ0014358001

application. The changes to the permit concern the way in which the facility is phased to authorize facility operations at interim levels until the facility is operational at full capacity. OPIC does not interpret these changes as authorizing increased discharges compared to the existing permit. The renewal application would not change the effluent limitations and monitoring requirements contained in the existing permit; opportunity for a public meeting was given; the ED has filed a response to comments that addresses all timely and significant public comment; and the applicant's compliance history over the last five years is listed as "average." OPIC therefore finds no right to a hearing exists on the proposed renewal. If the Commission should find otherwise, OPIC offers the following hearing request analysis.

B. Affected Person Analysis

The Office of the Chief Clerk received a timely filed hearing request from Bill Bunch of behalf of SOS. Mr. Bunch stated that SOS is dedicated to the preservation of the Edwards Aquifer, its springs and contributing streams, and to the natural and cultural heritage of the Hill Country region and its water watersheds, with a special emphasis on Barton Springs.

A group or organization is required by 30 TAC § 55.205(a)(1) to identify one or more members who would otherwise have standing to request a hearing in their own right. Kathy Turney is identified as a member of SOS who lives less than one-half mile downstream of the wastewater plant and has an interest in the protection of water quality, public health, drinking water, and the recreational, ecological and aesthetic enjoyment of surface and groundwater downstream of the facility. Given her proximity to the facility, OPIC finds that a reasonable relationship exists between Ms. Turney's interests and operation of the facility. Furthermore, operation of the facility could potentially impact Ms. Turney's health, safety, and use of property

or natural resources. For these reasons, OPIC finds that Ms. Turney is an affected person under 30 TAC § 55.203(a) and has standing to request a hearing.

30 TAC § 55.205(a)(2) requires a showing that the interests a group or association seeks to protect are germane to the organization's purpose. SOS's stated purpose is the protection of water quality, human health and the environment, wildlife, and recreation, which is germane to the interests raised in the hearing request. OPIC finds that SOS's hearing request therefore complies with the requirement of 30 TAC § 55.205(a)(2).

Lastly, SOS's hearing request complies with 30 TAC § 55.205(a)(3) because neither the claim asserted nor the relief requested requires the participation of Ms. Turney or any other individual member. SOS is therefore an affected person under 30 TAC § 55.205(a) and may request a hearing.

C. Issues Raised

SOS raises the issues of protection of water quality, human health and the environment, wildlife, use and enjoyment of property, and recreation.

D. Issues Raised in Comment Period

Each of the issues raised by SOS in the hearing request was raised in the comment period and has not been withdrawn. 30 TAC § 55.201(c), (d)(4) and 30 TAC § 55.211(c)(2)(A).

E. Disputed Issues

There is no agreement between Applicant, ED, and SOS on the issues presented above.

F. 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(b)(3)(A), (B). The issues raised by SOS concerning the protection of water quality,

human health and the environment, wildlife, use and enjoyment of property, and recreation are issues of fact.

G. Relevant and Material Issues

The hearing request raises 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). Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.² To refer an issue to the State Office of Administrative Hearings (SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.³ The issues raised by SOS concerning protection of water quality, human health and the environment, wildlife, and recreation are all issues relevant and material to the commission's decision on the proposed permit.⁴

H. Issues for Referral

If the Commission finds that a right to a hearing exists and that SOS qualifies as an affected person, OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

- 1) Does the Applicant's renewal permit adequately protect surface and ground water quality, including the quality of drinking water?
- 2) Will the renewal of the Applicant's permit negatively impact human health?
- 3) Will the renewal of the Applicant's permit negatively impact the environment, including terrestrial and aquatic wildlife?
- 4) Will the renewal of the Applicant's permit negatively impact use and enjoyment of the requestor's property?
- 5) Will the renewal of the Applicant's permit negatively impact requestor's recreational interests?

² See 30 TAC §55.209(e)(6)

³ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(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.")

⁴ Water Code sections 26.027(a) and 26.003. See also 30 TAC §§309.13(a)-(d), 30 TAC §309.10(b), & 30 TAC Chapter 213, Subchapter B.

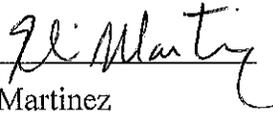
IV. Maximum Expected Duration of Hearing

Commission Rule 30 TEX. ADMIN. CODE § 55.115(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 TEX. ADMIN. CODE § 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.

V. CONCLUSION

OPIC finds that the Commission may approve the application without holding a contested case hearing and recommends that the Commission deny the hearing request. Should the Commission choose to hold a contested case hearing, OPIC recommends that SOS and Kathy Turney be found affected. OPIC also would recommend referring the above issues SOAH for a contested case hearing.

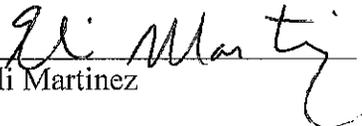
Respectfully submitted,
Blas J. Coy, Jr.
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2013, the original and seven true and correct copies of the Office of the Public Counsel's Response to Hearing Request 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.


Eli Martinez

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TCEQ DOCKET NO. 2013-0820-MWD

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