

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*

August 30, 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: NEW WAY LAND DEVELOPMENT LLC  
TCEQ DOCKET NO. 2013-1036-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 cursive script that reads "Amy Swanholm".

Amy Swanholm, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



**TCEQ DOCKET NO. 2013-1036-MWD**

<b>IN THE MATTER</b>	<b>§</b>	<b>BEFORE THE</b>
<b>OF THE APPLICATION OF</b>	<b>§</b>	
<b>NEW WAY LAND</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>DEVELOPMENT, LLC, FOR</b>	<b>§</b>	
<b>TPDES PERMIT</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>
<b>NO. WQ0015058001</b>		

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

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.

There were no material issues of fact raised during the comment period. Although the hearing requests of the City of Cotulla and John & Mildred Allen comply with all other requirement for administrative standing, OPIC cannot recommend the Commission refer this matter to the State Office of Administrative Hearings because the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A) have not been met.

**I. INTRODUCTION**

**A. Background of Facility**

New Way Land Development, LLC. (New Way or Applicant) applied to the TCEQ for new TPDES Permit No. WQ0015058001 to authorize the discharge of treated domestic wastewater effluent at a daily average flow not to exceed 200,000 gallons per day. The New Way Land Development Wastewater Treatment Facility would be an activated sludge process plant operated in the complete mix mode. Treatment units

would include a bar screen, aeration basin, final clarifier, sludge digester, and chlorine contact chamber. The facility has not been constructed. Sludge generated by the treatment facility would be hauled by a registered transporter and disposed of at a TCEQ-permitted land application site or co-disposal landfill. The effluent limits in the draft permit, based on a thirty-day average, are ten milligrams per liter (mg/L) carbonaceous biochemical oxygen demand (five-day), 15 mg/L total suspended solids, 3 mg/L ammonia nitrogen, and 4 mg/L minimum dissolved oxygen. The effluent shall contain a chlorine residual of at least 1 mg/L and shall not exceed a chlorine residual of 4 mg/L after a detention time of at least twenty minutes based on peak flow. The effluent limit for *E. coli* is 126 colony-forming units or most probable number of bacteria per 100 milliliters of effluent.

The wastewater treatment facility would be located at the intersection of Interstate Highway 35 and Ranch Road 3408 in La Salle County, Texas 78014. The treated effluent would be discharged to an unnamed tributary, then to Nueces River above Holland Dam in Segment No. 2105 of the Nueces River Basin. The unclassified receiving water use is no significant aquatic life use for the unnamed tributary. The designated uses for Segment No. 2105 are primary contact recreation, public water supply, and high aquatic life use.

## **B. Procedural Background**

TCEQ received this application on August 27, 2012. On November 26, 2012, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on February 14, 2013 in the *Frio-Nueces Current*. The ED completed the technical review

of the application on February 26, 2013, and prepared a draft permit. The ED issued the Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) on March 7, 2013, in the *Frio-Nueces Current*. The public comment period ended on April 8, 2013. On April 30, 2013, the ED filed its decision and Response to Comments, which the Chief Clerk's office mailed on May 3, 2013. The deadline to request reconsideration of the ED's decision or a contested case hearing was June 3, 2013.

TCEQ received timely comments and requests for a contested case hearing from the City of Cotulla and John & Mildred Allen on January 30, 2012, May 30, 2013, and June 3, 2013. For the reasons stated below, OPIC recommends denying the hearing requests.

## **II. APPLICABLE LAW**

This application was declared administratively complete on November 26, 2012. Because the application was declared administratively complete after September 1, 1999, a person may request reconsideration of the application or a contested case hearing 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).

### **A. Requests for Contested Case Hearing**

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. 30 TAC § 55.203(b). 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. 30 TAC § 55.205(b).

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**

The TCEQ received a joint hearing request from the City of Cotulla, Mr. John W. Allen and Ms. Mildred Allen.

Mr. John W. Allen and Ms. Mildred Allen (the Allens) own and reside on over 16 acres of land, located immediately adjacent to the proposed facility and discharge point. They are concerned that the proposed facility will negatively impact their use and enjoyment of their property through the discharge of pollutants, noxious odors, and air pollution. They also believe that the proposed facility constitutes a private nuisance, and is unnecessary and redundant.

Based on the location of the Allens' property and the issues raised in their hearing request, they have shown a personal justicable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. However as discussed in Section III.C., there were no issues of fact raised during the comment period so OPIC cannot recommend granting their request for a hearing.

The City of Cotulla (the City) states that the proposed facility would be located within the city's extra-territorial jurisdiction (ETJ) and notes that the City has exclusive statutory authority over this area per Texas Loc. Govt. Code Ann. § 42.021. The City is concerned because it has a CCN to operate a wastewater treatment facility in the area, and the proposed facility would be redundant, is contrary to the TCEQ's regionalization policy. Further, the City states that it has the capacity and legal authority to provide sewer service to the housing development to be served by New Way's proposed facility.

Based on the issues raised by the city, the location of the proposed facility within the City's ETJ, as well as the City's authority to provide wastewater service under CCN # 20991, OPIC finds the City has shown a personal justicable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. However as discussed in Section III.C., there were no issues of fact raised during the comment period so OPIC cannot recommend granting the City's request for a hearing.

For these reasons, OPIC concludes the City of Cotulla, Mr. John W. Allen and Ms. Mildred Allen would be affected persons entitled to a contested case hearing, but cannot recommend a contested case hearing because there were no material issues of fact raised during the comment period.

## **B. Issues Raised in the Hearing Request**

The following issues have been raised in the hearing requests:

1. Whether the proposed facility will impact the surrounding landowners' use and enjoyment of their property including through the discharge of pollutants, noxious odors, and air pollution.
2. Whether the proposed facility constitutes a private nuisance.
3. Whether the proposed facility is necessary.
4. Whether the proposed facility would be redundant.
5. Whether the proposed facility complies with TCEQ standards for regionalization.
6. Whether the draft permit may be granted if the applicant does not hold a CCN in the area.
7. Whether the City's existing facility can provide wastewater treatment instead.

## **C. Issues Raised in the Comment Period**

One comment, from the City, was submitted during the comment period. In this comment, the City stated its general opposition to the proposed facility and requests a contested case hearing. No factual issues were raised in this comment. The joint hearing request from the City and the Allens was submitted after the comment period ended. Although this hearing request meets all other requirements for administrative standing, there were no issues of fact submitted during the comment period for the joint

hearing requestors to base their hearing request upon. Therefore the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A) have not been met and OPIC cannot recommend the Commission refer this matter to SOAH.

#### **D. Disputed Issues**

There is no agreement between the hearing requestors 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 raised in the hearing request are issues of fact and would be appropriate for referral to SOAH, had there been factual issues submitted during the comment period.

#### **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, 248–251 (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”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

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. Furthermore, the proposed permit must comply with 30 TAC §§ 305.122(c), 307.1 and 309.10, which prohibit injury to private property and invasion of property rights and require minimization of exposure to nuisance conditions. In addition, Applicant is required to control and abate nuisance odor under 30 TAC §§ 307.4(b)(1) and 309.13(e).

OPIC recommends that all the issues raised by the hearing requestors, with the exception of the Allens’ concern with air quality, are relevant and material. This application is for a water quality permit, issues relating to air quality would be outside the scope of this authorization.

#### **G. Issues Recommended for Referral**

OPIC cannot recommend any issues be referred to SOAH for a hearing, because there were no issues of fact raised during the comment period. However, should the Commission refer this matter to SOAH, OPIC would recommend that the following issues be referred for a contested case hearing:

1. Whether the proposed facility will impact the surrounding landowners’ use and enjoyment of their property including through the discharge of pollutants and noxious odors.

2. Whether the proposed facility constitutes a private nuisance.
3. Whether the proposed facility is unnecessary or redundant.
4. Whether the proposed facility complies with TCEQ standards for regionalization.
5. Whether the draft permit may be granted if the applicant does not hold a CCN in the area.
6. Whether the City's existing facility can provide wastewater treatment.

#### **H. Maximum Expected Duration of Hearing**

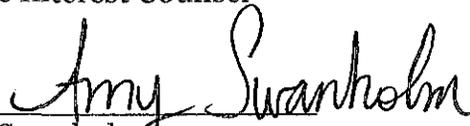
Commission Rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year 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 requests from the City of Cotulla, Mr. John W. Allen, and Ms. Mildred Allen. There were no material issues of fact submitted during the comment period, and therefore the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A) have not been met.

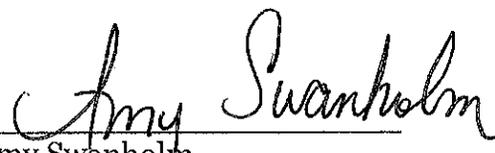
Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2013, the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing and Requests for Reconsideration was 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.

  
\_\_\_\_\_  
Amy Swanholm



**MAILING LIST**  
**NEW WAY LAND DEVELOPMENT, LLC**  
**TCEQ DOCKET NO. 2013-1036-MWD**

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