

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 3, 2014

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: WALTON TEXAS, L.P.
TCEQ DOCKET NO. 2013-2075-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,


Rudy Calderon, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



TCEQ DOCKET NO. 2013-2075-MWD

**IN THE MATTER OF THE
APPLICATION OF WALTON
TEXAS, L.P. FOR TPDES PERMIT
NO. WQ0015080001**

**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

Walton Texas, L.P. (Applicant) has applied to the TCEQ for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015080001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.06 million gallons per day (MGD) in the interim phase and 0.12 MGD in the final phase. The proposed facility will be located approximately 2,600 feet southeast of the intersection of State Highway 130 and State Highway 21 in Caldwell County, Texas 78644, and will serve a proposed mixed use subdivision called Cornerstone Development.

If the draft permit is issued, the facility will be a Membrane Bioreactor (MBR) activated sludge process plant operated in extended aeration mode. Treatment units include a lift station, anoxic basin, MBR basin, sludge digesters, Belt filter press, a UV disinfection basin, and fine screens. Sludge generated from the facility would be hauled

by a registered transporter and disposed of at a TCEQ permitted landfill, BFI Sunset Farms Landfill, Permit No. RN 1447 in Travis County, Texas.

The treated effluent will be discharged via pipe (3,400 linear feet) to Cedar Creek; thence to the Colorado River above La Grange in Segment No. 1434 of the Colorado River Basin. The Cedar Creek uses are limited aquatic life use. The designated uses for Segment No. 1434 are exceptional aquatic life use, public water supply and primary contact recreation. In accordance with 30 TEX. ADMIN. CODE (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. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses would not be impaired by this permit action. Additionally, the Tier 1 antidegradation review preliminarily determined that the stream reach assessed does not contain water bodies with exceptional, high, or intermediate aquatic life uses. Therefore, a Tier 2 antidegradation review was not performed.

The effluent limitation in the interim phase I of the draft permit, based on a 30-day average, are 5 mg/l Carbonaceous Biochemical Oxygen Demand (CBOD₅), 5 mg/l Total Suspended Solids (TSS), 2 mg/l Ammonia Nitrogen (NH₃-N), 1 mg/l Total Phosphorus, 4.0 mg/l minimum Dissolved Oxygen (DO), and 126 colony-forming units (CFU) or Most Probable Number (MPN) of E.coli per 100 milliliters (ml). The effluent limitations in the final phase of the draft permit, based on a 30-day average, are 5 mg/l CBOD₅, 5 mg/l TSS, 2 mg/l NH₃-N, 1 mg/l Total Phosphorus, 5.0 mg/l minimum DO, and 126 CFU or MPN of E.coli per 100ml.

B. Procedural Background

TCEQ received this application on February 18, 2013. On March 13, 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 March 21, 2013 in the *Lockhart Post-Register*. The ED completed the technical review of the application on April 30, 2013, and prepared a draft permit. The ED issued the Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) on June 20, 2013, and it was published on July 04, 2013 in the *Lockhart Post-Register*. The public comment period ended on August 5, 2013. On October 7, 2013, the ED filed his decision and Response to Public Comment, which the Office of Chief Clerk mailed on October 9, 2013. The deadline to request a contested case hearing was November 8, 2013.

TCEQ received timely comments and requests for a contested case hearing from Bill Flickinger of the law firm Willatt & Flickinger on behalf of Aus-Tex Parts and Service, Ltd. and Dempsey Buchanan LP, separately. Both requests for a contested case hearing were received on November 4, 2013. OPIC recommends granting the hearing requests submitted by Aus-Tex Parts and Service, Ltd. and Dempsey Buchanan LP.

II. Applicable Law

The ED declared this application administratively complete on March 13, 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

Aus-Tex Parts and Service, Ltd.

According to the hearing request, Aus-Tex Parts and Service, Ltd. owns and operates Mustang Plaza Wastewater Treatment Plant (Mustang Plaza WWTP) which is a wastewater treatment facility located within one mile of the facility. Mustang Plaza WWTP holds wastewater Certificate of Convenience and Necessity (CCN) No. 20953 and Water Quality Permit No. WQ0014104-001.

Aus-Tex Parts and Service, Ltd. is concerned the proposed facility may violate the TCEQ's regionalization policy. Aus-Tex Parts and Service, Ltd. states that Applicant failed to provide additional information requested by Aus-Tex Parts and Service, Ltd., so that Aus-Tex Parts and Service, Ltd. could determine whether or not Mustang Plaza WWTP could service the proposed Cornerstone Development.

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 processors of domestic wastewater, Aus-Tex Parts and Service, Ltd. has a unique interest in the issue of regionalization, and regionalization is an issue which is relevant to this application.

Therefore, OPIC finds that Aus-Tex Parts and Service, Ltd. is an affected person based on the factors set forth in 30 TAC § 55.203(c) and that a reasonable relationship exists between Aus-Tex Parts and Service, Ltd.'s interest in regionalization and the proposed facility. *30 TAC § 55.203(c)(3)*.

Dempsey Buchanan LP

According to the hearing request, Dempsey Buchanan LP owns property located 1,200 from the proposed facility with a discharge point less than one mile upstream from its property line. The receiving stream, Cedar Creek, runs through the property owned by Dempsey Buchanan LP. Dempsey Buchanan LP states that it is planning on developing its property for residential use.

Dempsey Buchanan LP raises concerns over the adverse impact the proposed facility may have on its property value as well as the health and safety impact the proposed facility may have on future occupants of the property. Additionally, Dempsey Buchanan LP raises nuisance odor concerns that could arise from the operation of the proposed facility. Dempsey Buchanan LP has also raised the issue of nuisance odors. Odor is specifically addressed by TCEQ regulations concerning the siting of domestic wastewater plants. 30 TAC § 309.13. Therefore, odor is an issue which falls within the TCEQ's jurisdiction and should be considered by the Commission when deliberating.

Therefore, OPIC finds that Dempsey Buchanan LP is an affected person based on the factors set forth in 30 TAC § 55.203(c) and that a reasonable relationship exists between Dempsey Buchanan LP's concerns about nuisance odors and the proposed facility. *Id.*

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 Dempsey Buchanan LP's property value will be adversely impacted by the proposed facility.
- (3) Whether the health and safety of future residents of a proposed residential development to be located on the property owned by Dempsey Buchanan LP will be adversely affected.
- (4) Whether the property owned by Dempsey Buchanan LP will be impacted by nuisance odors from the proposed facility.

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.*

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). Therefore, Issue No. 4 related to nuisance odors is relevant and material. TCEQ also adheres to a regionalization policy, as expressed in TWC §§ 26.003, 26.0282, and 26.081 and 30 TAC § 307.1. We conclude, therefore, that issue No. 1 related to regionalization is relevant and material.

OPIC finds that Issue No. 2 concerning property values and Issue No. 3 concerning effects on future residents are not relevant and material. With regards to the impact on Dempsey Buchanan LP's property value, the Texas Legislature establishes the jurisdiction of TCEQ, and the Texas Legislature has not given TCEQ the authority to consider property value. Therefore, this issue cannot be considered by the Commission when making its decision. While the issue of health effects and safety is within the TCEQ's jurisdiction, Dempsey Buchanan LP raises this issue, not on their behalf, but on

the behalf of future unknown residents of a residential community that does not yet exist. 30 TAC 55.203(a) requires that an interest be a personal one and since this issue is brought on behalf of future unnamed residents and not Dempsey Buchanan LP personally, this issue falls outside of the Commission's jurisdiction.

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 property owned by Dempsey Buchanan LP will be impacted by nuisance odors from the proposed facility.

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 granting the hearing requests from Aus-Tex Parts and Service, Ltd. and Dempsey Buchanan LP, on the issues referenced in Section III.G above. OPIC further recommends a hearing duration of nine months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2013 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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TCEQ DOCKET NO. 2013-2075-MWD**

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