

Bryan W. Shaw, Ph.D., P.E., *Chairman*
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

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: NEW BRAUNFELS UTILITIES
TCEQ DOCKET NO. 2013-2151-MWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script, reading "Isabel Segarra Treviño".

Isabel G. Segarra Treviño, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2013-2151-MWD

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION OF NEW	§	
BRAUNFELS UTILITIES FOR A	§	TEXAS COMMISSION ON
NEW TEXAS POLLUTANT	§	
DISCHARGE ELIMINATION	§	ENVIRONMENTAL QUALITY
SYSTEM (TPDES) PERMIT		
NO. WQ0010232004		

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUEST 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 Request for Hearing in the above-referenced matter and respectfully recommends denying the request for a contested case hearing filed by Irene Alberti.

I. INTRODUCTION

A. Background of Facility

New Braunfels Utilities of Guadalupe County (NBU or Applicant) has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0010232004, to authorize the discharge of treated domestic wastewater effluent at a daily average flow not to exceed 2.5 million gallons per day (MGD) in the Interim I phase, 4.9 MGD in the Interim II phase, 7.5 MGD in the Interim III phase, and 9.9 MGD in the Final phase. The Sam C. McKenzie, Jr. Water Reclamation Facility will treat the effluent before it is discharged using an activated sludge process operated in the complete mix mode with single-stage nitrification. Construction on the Sam C. McKenzie, Jr. Water Reclamation Facility has not commenced.

Proposed Interim Phase I will treat effluent with a lift station, two screening channels, an aerated grit chamber, two anoxic basins, two anaerobic basins, two aeration basins, two final clarifiers, two tertiary filters, two aerobic sludge digesters, a belt filter press, and an ultraviolet (UV) disinfection chamber. Proposed Interim II phase will add two anoxic basins, two anaerobic basins, two aeration basins, two final clarifiers, one tertiary filter, two aerobic sludge digesters, and one UV disinfection chamber. Proposed Interim III phase will add one aerated grit chamber, two anoxic basins, two anaerobic basins, one aeration basin, one final clarifier, one tertiary filter, two aerobic sludge digesters, one belt filter press, and one UV disinfection chamber. The proposed Final phase will add two anoxic basins, two anaerobic basins, one aeration basin, one final clarifier, one tertiary filter, and two aerobic sludge digesters.

Effluent limits, based on a thirty-day average, apply in all phases of the proposed permit. Carbonaceous biochemical oxygen five-day demand is 10 milligrams per liter (mg/L). Total suspended solids are limited to 15 mg/L. Ammonia nitrogen is limited to 3 mg/L. Dissolved oxygen demand is 4 mg/L. E. coli is limited to 126 colony forming units or most probable number of E. coli per 100 milliliters of effluent. Phosphorous is limited to 1 mg/L in Interim I and II phases, 0.75 mg/L in Interim III phase, and 0.5 mg/L in the Final phase. NBU must use a UV light system for disinfection.

The proposed wastewater treatment facility is to be located approximately four miles southeast of the City of New Braunfels, 0.7 mile southwest of the intersection of State Highway 46 and Elley Lane, and 0.6 mile downstream from the Lake Dunlap Dam on the Guadalupe River in Guadalupe County, Texas 78130. The treated effluent is to be discharged by pipeline at two locations, Outfall 001 and Outfall 002. The treated effluent is to be discharged at Outfall 001 to the Lake Dunlap Hydroelectric Plant Canal. Then, the effluent is to be discharged to the

Guadalupe River below the Comal River in Segment No. 1804 of the Guadalupe River Basin. Outfall 002 is to be used only when bypassing Lake Dunlap Hydroelectric Plant Canal to divert all upstream flow to the Guadalupe River. The treated effluent is to be discharged at Outfall 002 from the Lake Dunlap Hydroelectric Plant Canal to the Guadalupe River below the Comal River in Segment No. 1804 of the Guadalupe River Basin. Designated uses for Segment No. 1804 of the Guadalupe River are high aquatic life, public water supply, aquifer protection, and primary contact recreation.

B. Procedural Background

The TCEQ received NBU's application on September 12, 2011 and the TCEQ Executive Director (ED) declared the application administratively complete on October 21, 2011. The TCEQ prepared a Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) and published it in English on November 13, 2011 in the *New Braunfels Herald-Zeitung* newspaper, and, in Spanish on December 16, 2011 in the *La Voz de Guadalupe County* newspaper.

The ED's staff completed the technical review of NBU's application on April 27, 2012, and prepared a draft permit. The TCEQ prepared a Notice of Application and Preliminary Decision for Water Quality Permit (NAPD) and published it in English on May 8, 2013 in the *New Braunfels Herald-Zeitung* and the *Seguin Gazette* newspapers, and in Spanish on May 30, 2013 in the *La Voz de Guadalupe County* newspaper. The first public comment period ended on July 1, 2013. To correct a publication error with the English NORI, the TCEQ published a combined NORI and NAPD in English on September 8, 2013 in the *Seguin Gazette* newspaper. The second public comment period ended on October 8, 2013.

The Chief Clerk mailed the Executive Director's Decision and Response to Public Comment on October 16, 2013 and the deadline for filing requests for a contested case hearing was November 15, 2013.

The TCEQ Chief Clerk's office received a timely request for a contested case hearing from Irene Alberti on May 16, 2013. As discussed below, the OPIC recommends denying Ms. Alberti's hearing request because the OPIC cannot find that she has demonstrated she is an affected person and the request does not raise issues that are relevant and material to NBU's application.

II. APPLICABLE LAW

A person may request the TCEQ reconsider the ED's decision on an application or hold a contested case hearing on an 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). The requirements of House Bill 801 only apply to applications declared administratively complete on or after September 1, 1999. The TCEQ declared NBU's application administratively complete on September 12, 2011. Therefore, NBU's application is subject to the procedural requirements of House Bill 801.

The rules of the TCEQ require that a person seeking a hearing must substantially comply with the following: (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who filed the request, (2) identify the requestor's personal justiciable interest affected by the application, including a written statement describing the requestor's location or distance in relation to the proposed facility or activity, and, how or why the requestor believes he or she will be affected by the proposed facility or activity in a manner not common to members of the general public, (3) request a contested case hearing, (4) list all relevant and

material disputed issues of fact that were raised during the comment period and that are the basis of the hearing request, and (5) provide any other information specified in the public notice of the application. 30 TEX. ADMIN. CODE (TAC) § 55.201(d) (2012).

Only affected persons are granted contested case hearings. TWC § 5.556(c). 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) (2012). This justiciable interest does not include an interest common to the general public. *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).

The Commission shall grant an affected person’s timely filed contested case hearing request if the request: (1) 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, (2) is timely filed with the Chief Clerk, (3) is made pursuant to a right to hearing authorized by law, and (4) complies with the request for reconsideration and contested case hearing requirements. 30 TAC § 55.211(c) (2002).

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) (2001).

III. DISCUSSION

Ms. Alberti timely filed a request for a contested case hearing on May 6, 2013 for NBU's proposed TPDES Permit No. WQ0010232004.

A. Determination of Affected Person Status

Ms. Alberti lists her address as 111 Encino Blanco, San Antonio, Texas 78232, and states that NBU's proposed facility is twenty yards from approximately ten acres of land she owns along the Guadalupe River. Applicant lists Ms. Alberti as Tract 56 on the Adjacent Landowner List submitted with the application. Ms. Alberti's contested case hearing request expresses concerns about property value, future development of her property, and future use of her property.

For a hearing requestor to be an affected person, the request must be based on an interest that is protected under the law governing the permit application. The TCEQ administers the TPDES program to manage point source pollutant discharges into the navigable waters of Texas. TWC § 5.013(a) (2007). Ms. Alberti's interests – property value, future development, and future use of property – are not protected under the TPDES program. Ms. Alberti does not claim an interest protected by the law under which the application is made.

Nor can the OPIC find that there is a reasonable relationship between the interest claimed and the activity regulated. The interest claimed must not be “common to members of the general public.” 30 TAC § 55.203(a). Ms. Alberti does not claim that her property value, future development, and future use of her property will be uniquely affected by specific activities regulated under the proposed permit, nor does she specify what types of future development and futures uses will be limited by NBU’s proposed facility. Ms. Alberti’s concerns about future development and uses of property are speculative. Further, she does not claim that she will be prevented from continuing her current use of her land. Therefore, the OPIC cannot find that there is a reasonable relationship between the interests claimed by Ms. Alberti and specific environmental or health concerns regulated under NBU’s proposed permit.

Accordingly, the OPIC concludes that Ms. Alberti is not an affected person entitled to a contested case hearing.

B. Issues Raised in the Hearing Request

Ms. Alberti’s hearing request raises the following issues:

1. Whether the proposed facility will reduce property values.
2. Whether the proposed facility will affect future land development.
3. Whether the proposed facility will affect future land uses.

C. Issues Raised in the Comment Period

Ms. Alberti’s issues were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) & (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

There is no agreement between Ms. Alberti and the ED on the issues raised in the hearing request.

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.

F. Relevant and Material Issues

The hearing request does not raise issues relevant and material to the Commission's decision under the requirements of 30 TAC § 55.211(c)(2) because the issues raised cannot be addressed in a hearing on NBU's water quality permit.

G. Issues Recommended for Referral

The OPIC does not recommend any issues of fact be referred to the SOAH for a contested case hearing.

H. Maximum Expected Duration of Hearing

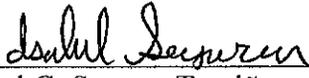
Commission Rule 30 TAC § 80.6(b)(5) (2001) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7) (2001), the 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

The OPIC concludes that the hearing request does not raise issues relevant or material to the Commission's decision under 30 TAC § 55.211(c)(2). For the reasons set forth above, we recommend denying Ms. Alberti's hearing request.

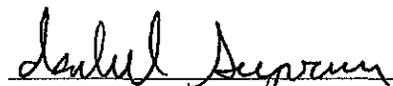
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2014 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing 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.



Isabel G. Segarra Treviño

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TCEQ DOCKET NO. 2013-2151-MWD**

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