

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 12, 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: ABRAXAS CORPORATION
TCEQ DOCKET NO. 2013-2229-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. 2013-2229-MWD

**IN THE MATTER OF THE
APPLICATION OF ABRAXAS
CORPORATION FOR TPDES
PERMIT NO. WQ0015010001**

**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

Abraxas Corporation (Applicant) has applied to the TCEQ for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015010001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day (GPD). The Applicant is applying for a new permit because they allowed their existing permit to expire before they submitted a renewal application. The previous permit (TCEQ Permit No. WQ0011086001) expired on December 1, 2009. The proposed facility will be located at 3301 Cattlebaron Road, approximately 0.9 mile north of the intersection of Cattlebaron and White Settlement Roads in Parker County, Texas.

The treated effluent will be discharged to a man-made pond; then to an unnamed drainage ditch; then to an unnamed tributary; then to Haywire Lake #2; then to an unnamed tributary; then to an unnamed impoundment; then to Haywire Lake #1;

then to an unnamed tributary; then to Silver Creek; then to Lake Worth in Segment No. 0807 of the Trinity River Basin. The unclassified receiving water uses are limited aquatic life use for the man-made pond, no significant aquatic life use for the unnamed drainage ditch and unnamed tributary and high aquatic life use for Haywire Lake #1, Haywire Lake #2 and the unnamed impoundment. The designated uses for Segment No. 0807 are high aquatic life use, public water supply and contact recreation.

B. Procedural Background

TCEQ received this application on June 28, 2011. On August 17, 2011, 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 October 7, 2011, in The Community News. The Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published on October 12, 2012, in The Community News. The original public comment period ended on November 12, 2012. However, it was determined that the Applicant did not publish the NORI in the newspaper of largest circulation in the county where the facility is located as required by 30 TEX. ADMIN. CODE (TAC) § 39.405(f)(1). Therefore, the Applicant re-published a combined NORI/NAPD on August 22, 2013, in The Weatherford Telegram and the comment period ended on September 23, 2013. On November 21, 2013, the ED filed his Response to Public Comment, and on November 25, 2013, the ED mailed notice of his final decision. The deadline to request a contested case hearing was December 27, 2013.

TCEQ received timely comments and requests for a contested case hearing from Cheryl L. Coon of the law firm Shannon, Gracey, Ratliff & Miller, LLP on behalf of

Haywire Ranch (Haywire Ranch) and Stephen C. Dickman of the law firm Kelly Hart on behalf of the City of Fort Worth (City of Fort Worth or city).

II. Applicable Law

The ED declared this application administratively complete on August 27, 2011. 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

Haywire Ranch

According to the hearing request, Haywire Ranch owns property adjacent to the plant located at 3301 Cattlebaron Road. However, Haywire Ranch failed to specify an address in its hearing request that would allow OPIC to identify where the property is located, as required by 30 TAC § 55.201(d). Haywire Ranch is not contained on the list of adjacent property owners furnished to OPIC by the ED, therefore OPIC cannot determine if Haywire Ranch is an affected person or not. Should Haywire Ranch wish to cure this defect in its hearing request, it must do so by filing a reply by January 26, 2015. Should Haywire Ranch cure its hearing request defect, Haywire Ranch has raised the issue of Applicant's ability to operate its plant in compliance with its permit as an issue they would like referred to SOAH for a contested case hearing.

Due to its noncompliance with 30 TAC § 55.201(d), OPIC recommends Haywire Ranch not be granted affected person status at this time.

City of Fort Worth

According to the hearing request, the City of Fort Worth is a municipality whose extra-territorial jurisdiction (ETJ) covers the area where the plant is located and the area the plant services. In its hearing request, the City of Fort Worth raises issues related to regionalization, whether the outfall of the facility is less than 5 miles from Lake Worth, and whether the Applicant is capable of operating the plant in compliance with its permit.

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, the City of Fort Worth has a unique interest in the issue of regionalization and the proliferation of small package plants, like the one at issue here, in its ETJ. As stated before, the plant and its service area lie within the cities ETJ. As such, the city has brought up the likelihood of annexing this area in the future. This being the case, the city states that any annexation in the future would be followed by the construction of lift stations to connect the newly annexed area to the city's wastewater disposal system. The city asserts that the feasibility of connecting to an existing system, in accordance with the TCEQ's regionalization policy and in light of the plant being located in the city's ETJ, was not considered by the Applicant and needs to be referred to SOAH for a contested case hearing.

As stated in the hearing request, Lake Worth is a source of drinking water for the City of Fort Worth. As the entity that provides drinking water to its residents, the City of Fort Worth has a unique interest in the issue of water quality, and water quality is an issue which is relevant to this application. According to the July 17, 2012, Interoffice Memorandum clarifying the distance of the outfall to Lake Worth, the ED has determined that the outfall is 5.4 miles from the normal pool elevation of Lake Worth and is therefore not subject to the effluent limits prescribed in 30 TAC § 311.63. However, the city correctly states in its hearing request that this is the third determination issued by the ED and that on June 4, 2012, the ED had stated the outfall was 4.7 miles from the normal pool elevation of Lake Worth which would make it subject to the effluent limits contained in 30 TAC § 311.63. The City of Fort Worth therefore seeks a clarification of the distance between the outfall and Lake Worth at a contested case hearing.

Finally, the City of Fort Worth doubts the ability of the Applicant to operate the plant in compliance with its permit. The city cites Applicant's poor compliance history in its hearing request as a basis for this belief. The city is concerned that the quality of effluent which will eventually make its way to Lake Worth will affect the water quality in the lake which provides drinking water to the city. Texas Health and Safety Code Section 121.003(a) provides that a municipality may enforce any law that is reasonably necessary to protect public health. In addition, TWC Subchapter E details the statutory authority a local government has over water quality issues. Therefore, the City of Fort Worth requests this issue be referred to SOAH for a contested case hearing.

OPIC finds that the City of Fort Worth 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 Fort Worth's concerns and the issuance of the proposed permit.

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 distance between the outfall of the facility and Lake Worth is less than 5 stream miles.
- (3) 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. 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. We conclude, therefore, that issue No. 1 related to regionalization and Issue No. 3 related to compliance history and proper operation of the facility are relevant and material.

Pursuant to 30 TAC § 309.3, discharges within five miles of the conservation pool level of a reservoir that may be a source for public drinking water supply shall achieve, at a minimum, enhanced secondary treatment as defined in 30 TAC § 309.4. We

conclude, therefore, that issue No. 2 related to the clarification of the distance between the outfall and Lake Worth is 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 distance between the outfall of the facility and Lake Worth is less than 5 stream miles.
- (3) Whether Applicant's has the ability, based on its compliance history, to operate its plant in compliance with its permit.

H. Maximum Expected Duration of Hearing

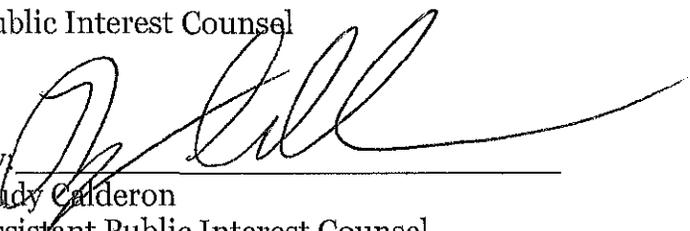
Commission Rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year 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 Haywire Ranch and granting the hearing request from the City of Fort Worth, on the issues referenced in Section III.G above. OPIC further recommends a hearing duration of nine months.

Respectfully submitted,

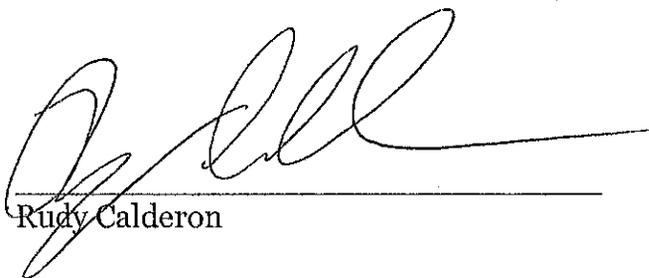
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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 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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