Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Zak Covar, Commissioner
Richard A. Hyde, P.E., *Executive Director*

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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 15, 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: CITY OF ASHERTON
TCEQ DOCKET NO. 2014-0898-MWD

Dear Ms. Bohac:

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

Sincerely,

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2014-0898-MWD

IN THE MATTER OF THE APPLICATION OF CITY OF ASHERTON FOR PERMIT NO. WQ0013746001	§ § § § § §	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO HEARING REQUESTS

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Response to Hearing Requests in the above-referenced matter.

I. INTRODUCTION

A. Background of Facility

The City of Asherton ("Asherton" or the "Applicant") has applied to the TCEQ for a major amendment to Permit No. WQ0013746001. The amended permit would authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 180,000 gallons per day to a daily average flow not to exceed 200,000 gallons per day. The existing wastewater treatment facility serves the City of Asherton's service areas. The proposed wastewater treatment facility has not been

constructed, but will be at the site of the existing wastewater treatment facility which is located at 504 End Street, Asheron in Dimmit County, Texas 78827.

The effluent limitations in the proposed permit, based on a 30-day average are:

Phase	Biochemical Oxygen Demand (5-day) (BOD)	Total Suspended Solids (TSS)	Total Dissolved Solids (TDS)	Dissolved Oxygen (DO)
Interim	30 (mg/L)	90 (mg/L)	Report (mg/L)	4.0 (mg/L)
Final	20 (mg/L)	20 (mg/L)	Report (mg/L)	2.0 (mg/L)

Additionally, in the Interim phase the total residence time in the wastewater treatment system must be 21 days, based on a daily average flow of 0.18 million gallons per day (MGD). In the Final phase the effluent must contain a chlorine residual of at least 1.0 mg/L and may not exceed a chlorine residual of 4.0 mg/L after a detention time of at least 20 minutes. In both phases of the proposed permit the effluent may not exceed 126 colony forming units or most probable number of E. coli per 100 ml.

The treated effluent will be discharged to an unnamed tributary, then to El Moro Creek, then to Soldier Slough, then to Nueces River Above Holland Dam in Segment No. 2105 of the Nueces River Basin. The unclassified receiving water uses are minimal aquatic life use for the unnamed tributary and El Moro Creek. The designated uses for Segment 2105 are primary contact recreation, public water supply, and high aquatic life use.

B. Procedural Background

TCEQ received the permit application on April 5, 2013 and declared it administratively complete on May 17, 2013. The Notice of Receipt of Application and

Intent to Obtain a Water Quality Permit (NORI) was published on June 19, 2013 in the *Carrizo Springs Javelin*. The technical review was completed on December 5, 2013 and the Notice of Application and Preliminary Decision (NAPD) was published on February 19, 2014 in the *Carrizo Springs Javelin*. The public comment period ended on March 21, 2014. The Executive Director's ("ED") Response to Comments ("RTC") was mailed on May 22, 2014, and the time period for filing hearing requests ended on June 23, 2014.

TCEQ received timely hearing requests from Larry Votaw and Jackie Lynn Russell. As discussed below, OPIC recommends granting each of the hearing requests and referring the matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

II. APPLICABLE LAW

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 5.556 added by Acts 1999, 76th Leg., ch 1350 (commonly known as "House Bill 801"). Under 30 Texas Administrative Code ("TAC") § 55.201(d), a hearing request must substantially comply with the following:

(1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;

(2) 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;

(3) request a contested case hearing;

(4) list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to

hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and

(5) provide any other information specified in the public notice of application.

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:

(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, safety, and 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.

This standard does not require the requester to show that they will ultimately prevail on the merits, only that they "show that they will potentially suffer harm or have a justiciable interest that will be affected." *United Copper Industries v. Grissom*, 17 S.W.3d 797, 803 (Tex. App.—Austin 2000, pet. dism'd) (citing *Heat Energy Advanced Tech., Inc. v. West Dallas Coalition for Envtl. Justice*, 962 S.W.2d 288, 289 (Tex. App.—Austin 1998, pet. denied)).

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, 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;

(7) a maximum expected duration for the contested case hearing.

B. Determination of Affected Person Status

Larry Votaw and Jackie Lynn Russell, through their attorney Patrick J. Kelly, submitted hearing requests on August 8, 2013, and January 27, 2014. Both submittals were timely filed before June 23, 2014.

The hearing requests state that Mr. Votaw owns land adjacent to and surrounding Asherton's domestic wastewater treatment facility, while Mrs. Russell owns property on Mr. Votaw's east boundary. The map provided by the executive director's staff confirms the location of Mr. Votaw's property directly adjacent to and surrounding the facility, while Mrs. Russell's property is shown to lie slightly over a mile downstream from the facility in the direction of the discharge route.

The request states that Asherton and the executive director have mistakenly identified a tributary through which discharge from the facility will reach El Moro Creek. In fact, there is no channel or depression that conveys the waste. Rather, the discharge flows in sheets over the requestors' property— unconfined—until gravity and a gentle slope in the land eventually lead the waste to the creek. The requestors indicate in their request that this discharge is affecting ranching operations and making roadways

impassible. Furthermore, the requestors are concerned that contaminants in the effluent may pose a risk to human health, the water quality of water wells located on their property, and the health of deer raised on their property for human consumption. The request additionally raises concerns regarding property values and interference with an oil and gas lease with Eagle Ford Minerals.

Finally, the requestors assert that the City of Asherton has breached agreements with Mr. Votaw concerning decommissioning of the existing treatment facility and replacement with a new facility, as well as a separate agreement wherein Asherton would purchase acreage from Mr. Votaw and install a pivot irrigation system.

Based on the location of the property in relation to the project and the issues raised in their hearing request, Mr. Votaw and Mrs. Russell have shown personal justiciable interests related to legal rights, duties, privileges, powers, or economic interests affected by the application.[1] The requestors express concern about potential degradation of their private property, water supplies, personal health, and potential effects on economic interests and uses of their property, including ranching activities. The effluent proposed in the permit amendment will run through the requestors' property, and, because the discharge may not be confined to a defined tributary as indicated in the application, OPIC finds that a reasonable relationship exists between the interests claimed and the activity regulated.[2] Therefore, OPIC recommends that the Commission find that Mr. Votaw and Mrs. Russell are affected persons.

C. Issues Raised in the Hearing Requests

The following issues have been raised in the hearing requests:

1. Whether the proposed discharge route is a watercourse containing defined boundaries capable of conveying discharge to El Moro Creek.
2. Whether the proposed discharge of wastewater will impact ranching operations.
3. Whether the proposed discharge of wastewater will negatively impact human health.

[1] *See* 30 Tex. Admin. Code ("TAC") §55.203(a); *see also* 30 TAC §55.203(b)(3).
[2] *See* 30 TAC §55.203(b)(3)

4. Whether the proposed discharge of wastewater will negatively impact the health of deer raised for human consumption.
5. Whether the proposed discharge of wastewater will negatively impact groundwater.
6. Whether the proposed permit would decrease property values.
7. Whether the proposed permit would interfere with an oil and gas lease.
8. Whether the proposed permit should be granted due to the existence of private agreements between the City of Asherton and Mr. Votaw.

D. Issues raised in Comment Period

All of the issues in the hearing requests were raised during the public comment period.

E. Disputed Issues

There is no agreement on the issues raised in the hearing requests and, therefore, these issues are disputed.

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. The issue of private agreements between the City of Asherton and Mr. Votaw is an issue of law that is not appropriate for referral in a contested case hearing. All of the remaining issues are issues of fact; however, as discussed below, not all of the issues raised are relevant and material to the Commission's decision.

G. Relevant and Material Issues

In order to refer an issue to 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] Relevant and material issues are those governed by the substantive law under which this permit is to be issued.[4]

---

[3] 30 TAC30 TAC §§ 55.201(d)(4), 55.209(e)(6) and 55.211(c)(2)(A).

[4] *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.")*

Preliminarily, OPIC notes that this permit would not authorize any taking of private property or any trespass against private property rights. Under 30 TAC § 305.122(c), "[a] permit issued within the scope of this subchapter does not convey any property right of any sort, nor any exclusive privilege, and does not become a vested right in the permittee."

OPIC further notes that the State has the right to authorize use of watercourses for a public purpose without seeking permission from any riparian landowners."[5] Courts have reasoned that "[t]he bed and banks of a watercourse are burdened with the flow of water through that watercourse regardless of who holds actual title."[6] Discharging treated wastewater into state watercourses is allowed under Texas law.[7] The waters in watercourses are the property of the State and are held in trust for the public.[8] Yet, before the State may burden a watercourse, the preliminary determination of whether a watercourse even exists must be made.[9] When determining whether a watercourse exists, the particular facts of a case must be examined.[10]

The test for whether or not the discharge route at issue here is a watercourse is found in substantive case law. *Hoefs v. Short*, decided by Supreme Court of Texas in 1925, establishes this test.[11] A watercourse will have "(1) a defined bank and beds, (2) a current of water, and (3) a permanent source of supply."[12] In defining a permanent source of supply, this "merely means that the stream must be such that similar conditions will produce a flow of water, and these conditions recur with some degree of regularity, so that they establish and maintain a running stream for considerable periods of time."[13] Whether a watercourse exists can only be determined by examining the facts of a

---

[5] *Domel v. City of Georgetown*, 6 S.W.3d 349, 358 (Tex. App.—Austin 1999).
[6] *Id.*
[7] *Id.* at 360 (citing *See Abbott v. City of Kaufman*, 717 S.W.2d 927, 929 (Tex. App.—Tyler 1986, writ dism'd)).
[8] *Id.* at 353. Moreover, "[t]he Constitution of Texas, Art. 16, § 59a . . . designates rivers and streams as natural resources, declares that such belong to the State, and expressly invests the Legislature with the preservation and conservation of such resources." *Goldsmith & Powell v. State*, 159 S.W.2d 534, 535 (Tex. Civ. App.—Dallas 1942).
[9] *Domel*, 6 S.W.3d at 353.
[10] *Id.* at 354.
[11] 273 S.W. 785, 788 (Tex. 1925).
[12] *Domel*, 6 S.W.3d at 353 (summarizing *Hoefs v. Short*).
[13] *Hoefs*, 273 S.W. at 788.

particular case. Therefore, the issues raised by the requestors concerning whether the proposed discharge route is actually a watercourse are factual issues appropriate for referral to SOAH.

The requestors' concerns about the functionality and suitability of the proposed discharge route are relevant and material under the Commission's Chapter 309 rules. The requests state that the effluent "is flowing across flat land...not confined to any tributary whatsoever." The purposes of 30 TAC Chapter 309, Subchapter B, Domestic Wastewater Effluent Limitation and Plant Siting requirements, include goals "to prohibit issuance of a permit for a facility to be located in an area determined to be unsuitable or inappropriate, unless the design, construction, and operational features of the facility will mitigate the unsuitable site characteristics." 30 TAC §309.10(b). The requestors' concerns raise relevant questions concerning whether the inadequacies of the proposed discharge route render the proposed facility "unsuitable or inappropriate"[14] for the area.

Similarly, the issue of impact on groundwater is relevant and material to the Commission's decision on this permit. 30 TAC §309.12 provides that "the commission may not issue a permit for a new facility or for the substantial change of an existing facility unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface water and groundwater."

Furthermore, the requestors' economic interests, including ranching,[15] as well as human health and the health of the deer raised for human consumption,[16]are within the Commission's jurisdiction and are relevant and material to the Commission's decision on this application under Chapter 26 of the Texas Water Code and the Texas Surface Water Quality Standards found the in the Commission's Chapter 307 rules.

Conversely, OPIC finds that the requestors' remaining concerns over property values and interference with an oil and gas lease fall outside of the scope of TCEQ jurisdiction to maintain and protect water quality of the state, as implicitly authorized by the Texas Water Code Chapter 26.

---

[14] *See* 30 TAC § 309.10(b).
[15] 30 TAC § 55.201(d)
[16] See Water Code §26.003.

H. Issues for Referral

OPIC recommends that the Commission refer the following disputed issues of fact to the State Office of Administrative Hearings for a contested case hearing:

1. Whether the proposed discharge route is a watercourse containing defined boundaries capable of conveying discharge to El Moro Creek.
2. Whether the proposed discharge of wastewater will negatively impact ranching operations.
3. Whether the proposed discharge of wastewater will negatively impact human health and the health of deer raised for human consumption.
4. Whether the proposed discharge of wastewater will negatively impact groundwater.

IV. MAXIMUM EXPECTED DURATION OF HEARING

Commission Rule 30 TAC § 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 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.

V. CONCLUSION

For the reasons stated above, OPIC recommends granting the hearing requests of Larry Votaw and Jackie Lynn Russell and referring this application to the State Office of Administrative Hearings for a contested hearing of no longer than nine months on the issues listed above.

Respectfully submitted,

Vic McWherter
Acting Public Interest Counsel

By: _____
Eli Martinez
State Bar No. 24056591
Office of Public Interest Counsel
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
Phone (512) 239-6363
Fax(512) 239-6377

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2014 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Hearing Requests 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

MAILING LIST
CITY OF ASHERTON
TCEQ DOCKET NO. 2014-0898-MWD

FOR THE APPLICANT:
The Honorable Alithvia Martinez
City of Asherton
P.O. Box 450
Asherton, Texas 78827

Robert H. Thonhoff, Jr., P.E.
Stephen M. Bell, P.E.
Thonhoff Consulting Engineers, Inc.
1301 S. Capital of Texas Hwy., Ste. A236
West Lake Hills, Texas 78746
Tel: 512/328-6736 Fax: 512/328-6848

FOR THE EXECUTIVE DIRECTOR
Kathy Humphreys, Staff Attorney
TCEQ Environmental Law Division
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606

Phillip Urbany, R.S., Technical Staff
TCEQ Water Quality Division, MC 148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4542 Fax: 512/239-4430

Brian Christian, Director
TCEQ Small Business and
Environmental Assistance Division
Public Education Program, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678

FOR ALTERNATIVE DISPUTE RESOLUTION
Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4010 Fax: 512/239-4015

FOR THE CHIEF CLERK:
Bridget Bohac
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311

REQUESTERS:
Patrick J. Kelly
Langley & Banack, Inc.
P.O. Box 218
Carrizo Springs, Texas 78834

Patrick J. Kelly
Langley & Banack, Inc.
401 Quarry Street
Eagle Pass, Texas 78852

Larry Votaw
P.O. Box 486
Carrizo Springs, Texas 78834