

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



*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

December 29, 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: WEST PARK MUNICIPAL UTILITY DISTRICT  
TCEQ DOCKET NO. 2014-1417-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 that reads "Vic McWherter".

Vic McWherter  
Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2014-1417-MWD**

**IN THE MATTER OF  
THE APPLICATION OF  
WEST PARK  
MUNICIPAL UTILITY  
DISTRICT FOR A  
MAJOR AMENDMENT  
OF TPDES PERMIT NO.  
WQ0012346001**

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**BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL  
QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO REQUEST  
FOR HEARING**

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 shows the following.

**I. INTRODUCTION**

**a. Background of Facility**

West Park Municipal Utility District ("West Park") has applied to the TCEQ for a major amendment to existing Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0012346001. The amendment would authorize an increase in the discharge of treated wastewater from a daily average flow not to exceed 0.5 million gallons per day to a daily average flow not to exceed 0.99 million gallons per day. West Park's facility is located at 19310 Katy Freeway in Houston. The facility currently operates in the Interim phase and consists of treatment units that include bar screens, two aeration basins, two re-aeration basins, two final clarifiers, two sludge digesters, and two

chlorine contact chambers. In the Final phase, treatment units will include bar screens, three aeration basins, two clarifiers, three sludge digesters and a chlorine contact basin.

Discharged treated effluent from West Park's facility flows through South Mayde Creek and Buffalo Bayou Above Tidal in Segment No.1014 of the San Jacinto River Basin. The designated uses for affected portions of South Mayde Creek include both limited and intermediate aquatic life use. The designated uses for Segment No. 1014 of the San Jacinto River Basin are limited aquatic life use and primary contact recreation. The Executive Director has performed antidegradation reviews of receiving waters and determined that effluent limitations in the proposed draft permit will maintain and protect existing instream uses. In both the Interim and the Final phases, the discharge limitations for each effluent characteristic, based on a 30-day average, are as follows: 7 mg/l Carbonaceous Biochemical Oxygen Demand (5-day); 15 mg/l Total Suspended Solids; 2 mg/l ammonia nitrogen; 63 CFU or MPN/100 ml *E. Coli* and 6.0 mg/l minimum dissolved oxygen.

**b. Procedural Background**

TCEQ received this application on November 5, 2013. On January 8, 2014, the Executive Director declared the application administratively complete. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published on January 19, 2014 in both the *Houston Chronicle* and *La Voz de Houston*. Following technical review of the application, the Executive Director issued a draft permit and preliminary decision that the application met applicable regulatory requirements. On April 20, 2014, the Notice of Application and Preliminary Decision was published in both the *Houston Chronicle* and *La Voz de Houston*. The public

comment period ended on May 20, 2014. The Executive Director issued his Decision and Response to Public Comment on August 20, 2014.

TCEQ received one timely request for a contested case hearing from Annette Baldwin. Ms. Baldwin electronically submitted her hearing request to the TCEQ Chief Clerk's Office on March 8, 2014. No additional hearing requests were received during the comment period or following the issuance of the Executive Director's Decision and Response to Comments.

As discussed below, OPIC recommends that the Commission deny Ms. Baldwin's hearing request because it fails to demonstrate that Ms. Baldwin is an affected person and fails to raise issues that are relevant and material to the Commission's decision on this water quality permit amendment.

## **II. APPLICABLE LAW**

The Commission may not grant a request for a contested case hearing unless the Commission determines that the request was filed by an affected person. TEXAS WATER CODE § 5.556(c). The Commission may not refer an issue to the State Office of Administrative Hearings for a hearing unless the Commission determines that the issue involves a disputed question of fact, was raised during the public comment period and is relevant and material to the decision on the application. TEXAS WATER CODE § 5.556(d).

A hearing request must substantially comply with the following: give the name, address, and daytime telephone number of the person who files the request; identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and

distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public; request a contested case hearing; and provide any other information specified in the public notice of application. 30 TEX. ADMIN. CODE § 55.201(d).

An “affected person” means a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. TEXAS WATER CODE § 5.115(a); 30 TEX. ADMIN. CODE § 55.203(a). An interest common to members of the general public does not qualify as a personal justiciable interest. *Id.* In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

- (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 TEX. ADMIN. CODE § 55.203(c).

The Commission shall grant an affected person’s timely filed hearing request if the request is made pursuant to a right to hearing authorized by law and 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 TEX. ADMIN. CODE § 55.211(c). 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 TEX. ADMIN. CODE § 55.209(e).

### III. DISCUSSION

#### a. Determination of Affected Person Status

Ms. Baldwin expresses concern that the Addicks Reservoir is at risk for catastrophic failure because too much water is already being directed into this body of water. She is concerned that the increase in the amount of wastewater to be discharged under this permit amendment will exacerbate this problem. She states that because of concerns about the overburdened reservoir, the Corps of Engineer is releasing more water from the reservoir into the Houston area than deemed appropriate. In light of these issues, Ms. Baldwin states that increasing the amount of water flowing into this watercourse will place areas of Houston in jeopardy.

Ms. Baldwin has not provided her location relative to the proposed discharge. Maps filed with the application do not show her as an owner of property adjacent to West Park's facility or along the discharge route. There is no available information showing Ms. Baldwin's location to support a contention that the permitted discharge would have more of an impact on her than other members of the general public. 30 TEX. ADMIN. CODE § 55.203(a); § 55.203(c)(4)(5). Moreover, Ms. Baldwin's stated concerns are

unrelated to water quality. Her concerns about overburdening the receiving waters and the reservoir appear to be more of a concern about flooding. Flooding is outside the Commission's jurisdiction to consider in the context of this water quality application. 30 TEX. ADMIN. CODE § 55.203(c)(1).

Therefore, based on the factors set forth in 30 TEX. ADMIN. CODE § 55.203, OPIC cannot find that Ms. Baldwin is an affected person. In the event the Commission disagrees and finds that Ms. Baldwin is an affected person, OPIC provides further analysis below concerning the issues raised in the request.

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

Ms. Baldwin asserts that the proposed permitted discharge would place Houston in jeopardy because too much water is already in the watercourse and affected reservoirs. She contends that too much water will be released into areas of Houston in order to avoid a bursting of the reservoirs. She states that the proposed discharge of wastewater should be diverted elsewhere to avoid these problems.

#### **c. Issues Raised During the Public Comment Period**

Ms. Baldwin's hearing request was filed during the comment period; therefore, the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TEX. ADMIN. CODE §§ 55.201(c), (d)(4), 55.211(c)(2)(A).

#### **d. Disputed Issues**

There is no agreement between the hearing requestor and the Executive Director on the issues raised in the hearing requests. In the Response to Comments, the Executive Director notes that the TCEQ does not have jurisdiction over flooding concerns nor

authority to require an alternative discharge route if the one proposed complies with applicable statutes and regulations.

**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 TEX. ADMIN. CODE § 55.211(c)(2)(A). The issues presented concerning flooding and alternative discharge routes are issues of fact.

**f. Relevant and Material Issues to the Decision on the Application**

The issues raised concerning potential flooding and possible alternative discharge routes are not relevant and material to the Commission's decision under the requirements of 30 TEX. ADMIN. CODE §§ 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 review motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are materials . . . 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 TEX. WATER CODE and 30 TEX. ADMIN. CODE Chapters 305, 307, and 309, as well as under specific rules related to wastewater systems found at 30 TEX. ADMIN. CODE Chapter 30 and 217. The Texas Surface Water Quality Standards in 30 TEX. ADMIN.

CODE Chapter 307 require that the proposed amended permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TEX. ADMIN. CODE § 307.1. However, there are no statutes or rules authorizing the TCEQ to regulate flooding or to require an alternative route if the proposed permitted discharge route complies with TCEQ’s regulations.

**g. Issues Recommended for Referral**

Because the hearing request raises no issue that is relevant and material to the Commission’s decision on this application, OPIC cannot recommend that any issue be referred to SOAH for a contested case hearing.

**h. Maximum Expected Duration for the Contested Case Hearing.**

Commission Rule 30 TEX. ADMIN. CODE § 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. As stated above, OPIC recommends denial of the hearing request based on its findings that Ms. Baldwin is not an affected person and that her hearing request raises no issues that are relevant and material to the Commission’s decision on the application.

However, if the Commission disagrees with these findings and refers this application to hearing, OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

#### IV. CONCLUSION

OPIC finds that Ms. Annette Baldwin is not an affected person based on the information provided in her hearing request. OPIC further finds that her request raises no issues that are relevant and material to the Commission's decision on this application. For these reasons, OPIC recommends that the Commission deny Ms. Baldwin's hearing request.

Respectfully submitted,

By: *Vic McWherter*  
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#### CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2014 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Request 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 or by deposit in the U.S. Mail.

*Vic McWherter*  
Vic McWherter

**MAILING LIST**  
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**TCEQ DOCKET NO. 2014-1417-MWD**

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