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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 9, 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: NORTH TEXAS MUNICIPAL WATER DISTRICT
TCEQ DOCKET NO. 2014-1662-IWD**

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 cursive script that reads "Aaron Tucker".

Aaron Tucker, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2014-1662-IWD

**IN THE MATTER
OF THE APPLICATION OF
NORTH TEXAS MUNICIPAL
WATER DISTRICT FOR TPDES
PERMIT
NO. WQ0004996000**

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**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 submits the following.

I. INTRODUCTION

A. Background of Facility

North Texas Municipal Water District ("Applicant"), P.O. Box 2408, Wylie, Texas 75098, applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) permit to authorize the discharge of brine residuals (concentrate) from the proposed Leonard Water Treatment Plant (proposed facility) at a daily average flow not to exceed 9.3 million gallons per day (MGD) via Outfall 001. The location of the proposed facility will be 700 feet north of the intersection of County Road 4965 and State Highway 78, west of the City of Leonard in Fannin County, Texas 75452. The discharge route is from the proposed facility via pipe to an unnamed tributary of the Red River, then to the Red River below Lake Texoma in Segment 0202 of the Red River Basin. The designated uses for Segment No. 0202 are contact recreation public water supply, and high aquatic life use. Domestic wastewater will be routed either to the City of

Leonard Publicly Owned Treatment Works or to an on-site sewage facility. All other waste generated at the plant, which may include clarifier blowdown, filter backwash, and backwash from maintenance and pretreatment membranes, is expected to be trucked to a permitted landfill or be disposed of in accordance with 30 TAC Chapter 312, Subchapter F.

B. Procedural Background

The TCEQ received the new TPDES application on June 11, 2012, and declared it Administratively Complete on July 18, 2012. The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) on August 7, 2012, in the *Fannin County Leader*. The ED completed the technical review of the application on November 26, 2013, and prepared a draft permit, which if approved, would establish the conditions under which the facility must operate. The Applicant published the Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) on February 11, 2014, in the *Fannin County Leader*. The Applicant published the Notice of Public Meeting on June 4, 2014 in the *Fannin County Leader*. On July 17, 2014, at the Fannin County Multipurpose Complex in Bonham, Texas, the TCEQ held a Public Meeting. The comment period for this application closed at the end of the public meeting. The ED filed his Response to Comments on September 25, 2014. The Chief Clerk's office mailed the Executive Director's Decision and Response to Comments on September 29, 2014. The deadline to request a contested case hearing was October 29, 2014. TCEQ received timely comments and requests for a contested case hearing from Jack Bradshaw, Julia Trigg Crawford, Duane Gibbs, Mayfield McCraw, Brenda and Curtis L. Schulz, and Harold Dean Witcher, Jr.

For the reasons discussed below, OPIC recommends denial of these requests because OPIC cannot determine that requesters are affected persons. Though OPIC cannot conclude that the requesters are affected persons, OPIC acknowledges that this permit may raise public interest

concerns given the large volume of wastewater authorized for discharge and the concerns about water salinity in the area of the discharge route. Under Texas Water Code §5.556(f), the Commission has the authority to hold a hearing if it determines that the public interest warrants doing so.

II. APPLICABLE LAW

A. Hearing Request

This application was declared administratively complete on July 18, 2012. Because the application was declared administratively complete after September 1, 1999 and before September 1, 2015, 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 TEX. ADMIN. CODE (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. 30 TAC § 55.203(b). 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 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

As discussed below, OPIC cannot find the requesters are affected persons because of intervening distances between the requesters' properties and either the proposed discharge point or the discharge route.

Jack Bradshaw

According to the hearing request, Jack Bradshaw has a family farm in Oklahoma on the Red River downstream from the proposed discharge point and irrigates his crops with water from the Red River. He is concerned that the wastewater may be hazardous to his crops. Mr. Bradshaw states concerns about water quality and salinity; however, because the ED's map shows a distance of many miles between his property and the discharge point, OPIC cannot find that Mr. Bradshaw has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public.

Julia Trigg Crawford

According to the hearing request, Julia Trigg Crawford possesses state water rights permit No. 3924 which entitles her to draw water from Bois d'Arc Creek and/or backwater from the Red River. According to the map prepared by the Executive Director, she is located near the border of Fannin and Lamar Counties downstream from the proposed discharge point at the confluence of the Red River and Bois d'Arc Creek. She is concerned that the proposed discharge will further increase the salinity of the Red River and diminish the quality of the water she uses under her water right. Her request states concerns about water quality and salinity; however, because the ED's map shows a distance of many miles between her property and the discharge point, OPIC cannot find that Ms. Crawford has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public.

Duane Gibbs

According to the hearing request, Duane Gibbs owns 2440 acres on the Red River. According to the map prepared by the Executive Director, he is located in Fannin County downstream from the proposed discharge point. He is concerned that the proposed discharge of desalination concentrate will be damaging to farmers who rely on groundwater and irrigated water downstream of the proposed discharge point. His request states concerns about water quality and salinity; however, because the ED's map shows a distance of many miles between his property and the discharge point, OPIC cannot find that Mr. Gibbs has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public.

Mayfield McCraw

According to the hearing request, Mayfield McCraw owns approximately 2,000 acres on the Red River, including an 800 acre commercial sod farm. The property is located in Fannin County several miles downstream from the proposed discharge point. Mr. McCraw irrigates his property using water from the Red River. He is concerned that the proposed discharge will further increase the salinity of the Red River and damage his equipment and machinery. According to the hearing request, he already spends \$50,000 a year on gypsum to mitigate the high-salinity problem and recondition the soil. Finally, Mr. McCraw is concerned that volumetric limits in the permit are not sufficiently protective of the Red River. While Mr. McCraw states concerns about water quality, because the ED's map shows a distance of many miles between his property and the discharge point, OPIC cannot find that Mr. McCraw has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public.

Brenda and Curtis L. Schulz

According to the hearing request, Brenda and Curtis L. Schulz live downstream of the proposed discharge point in Oklahoma. Their ranch borders the Red River and they pump water out of the river for irrigation under permits from the Oklahoma Water Resources Board. In addition to

using the river for irrigation, they fish and raise beef cattle. They are concerned about the impact of the proposed discharge on the Red River's water quality and its effect on their wells, crops, and livestock. Their request states concerns about water quality; however, because the ED's map shows a distance of many miles between their property and the discharge point, OPIC cannot find that Brenda and Curtis L Schulz have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public.

Harold Dean Witcher, Jr.

According to the hearing request, Harold Dean Witcher, Jr. resides in Fannin County and is employed by a large retailer of agricultural chemicals, seeds, and fertilizers. According to the map prepared by the Executive Director, his property is not located downstream of the proposed discharge point. He states that he has numerous customers who irrigate their crops with water from the Red River. He is concerned that the proposed discharge will increase the salinity of the river, which will hurt his agricultural customers who rely on irrigated water, and thereby impact his own livelihood. Finally, Mr. Witcher is concerned that volumetric limits in the permit are not sufficiently protective of the Red River. Because his property is not downstream of the proposed discharge route and his concerns about the impact on his economic interests are not supported with more detailed information, OPIC cannot find that Harold Dean Witcher, Jr. has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest not common to that of the general public.

Though OPIC cannot conclude that the requesters are affected persons, OPIC acknowledges that this permit may raise public interest concerns given the large volume of wastewater authorized for discharge and the concerns about water salinity in the area of the discharge route. Under Texas Water Code §5.556(f), the Commission has the authority to hold a hearing if it determines that the public interest warrants doing so. In the event the Commission determines that the requesters are

affected persons or otherwise decides to hold a hearing in the public interest, OPIC offers the following analysis of the issues raised in the hearing requests.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing requests:

1. Whether the proposed discharge will adversely affect water quality in the Red River?
2. Whether the proposed discharge will adversely affected the salinity in the Red River?
3. Whether the proposed discharge will adversely affect crops and livestock on Protestant's property?
4. Whether the volumetric limits in the proposed draft permit are protective of the environment?

C. Issues Raised During the Public Comment Period

Issues must be raised during the comment period and must not have been withdrawn. 30 TEX. ADMIN. CODE §§ 55.201(c), (d)(4), 55.211(c)(2)(A). All issues were raised during the comment period.

D. Disputed Issues

There is no agreement between the hearing requests 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 TEX. ADMIN. CODE § 55.211(c)(2)(A). All of the issues presented are issues of fact appropriate for referral to SOAH.

F. Relevant and Material Issues to the Decision on the Application

The hearing requests raise issues 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. All of the issues raised by the Requesters concern the impact of the proposed discharge relate on water quality in the Red River and its effect on their property, crops, and livestock. As noted in the Executive Director's Response to Comments at page 5, Chapter 307 of the Commission's rules provides that the surface waters of Texas cannot be made toxic to aquatic or terrestrial organisms or cause endangerment to human health. Additionally, one of the charges of 30 TAC § 307.1 is to “maintain the quality of water in the state consistent with public health and enjoyment.” Therefore, the water quality concerns raised by the Protestants are addressed by the substantive law that governs this application and these issues are relevant and material to the Commission's decision.

G. Issues Recommended for Referral

In the event the Commission determines to refer this matter for hearing, OPIC would recommend referring all the issues in Section III, Subsection B to SOAH for a contested case

hearing.

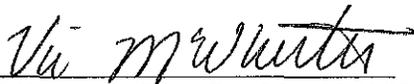
H. Maximum Expected Duration for the Contested Case Hearing.

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. To assist the Commission in setting a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE § 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

For the reasons stated above, OPIC recommends denying the hearing requests of Jack Bradshaw, Julia Trigg Crawford, Duane Gibbs, Mayfield McCraw, Brenda and Curtis L. Schulz and Harold Dean Witcher, Jr. because OPIC cannot find that the requesters are affected persons. In the event the Commission disagrees and finds that any of the requesters are affected persons, or otherwise determines the public interest warrants convening a hearing, OPIC would recommend a hearing of no longer than nine months on the issues listed in Section III, Subsection B above.

Respectfully submitted,
Vic McWherter
Public Interest Counsel

By: 
Vic McWherter, State Bar No. 00785565
Aaron B. Tucker
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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2015 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.



Vic McWherter

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TCEQ DOCKET NO. 2014-1662-IWD

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