

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

February 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: CITY OF TEMPLE
TCEQ DOCKET NO. 2014-1834-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 cursive script that reads "Aaron Tucker".

Aaron Tucker, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2014-1834-MWD

**IN THE MATTER OF
THE APPLICATION OF
CITY OF TEMPLE FOR
TPDES PERMIT NO.
WQ001047002**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

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

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

Applicant City of Temple has applied to the TCEQ to renew its existing Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ001047002 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 7.5 million gallons per day. The existing Doshier Farm wastewater treatment facility serves the Eastern and Northeastern sides of the City, as well as a large area outside of the City that is primarily agricultural use. The facility is located at 2515 East Avenue H, Temple on the west side of State Highway Loop 363, approximately one mile south of the intersection of State Highway 53 and State Highway Loop 363, in Bell County, Texas 76501.

If the draft permit is issued, the treated effluent will be discharged to an unnamed tributary; then to Little Elm Creek; then to Big Elm Creek; then to Little River in

Segment No. 1213 of the Brazos River Basin. The unclassified receiving water uses are minimal aquatic life use for the unnamed tributary and Little Elm Creek and high aquatic life use for Big Elm Creek. The designated uses for Segment No. 1213 are high aquatic life use, public water supply, and primary contact recreation.

The draft permit authorizes the discharge of treated domestic wastewater at a volume not to exceed an annual average flow of 7.5 million gallons per day (MGD). The effluent limitations of the draft permit, based on a 30-day average, are 10 mg/l five-day carbonaceous biochemical oxygen demand (CBOD₅), 15 mg/l Total Suspended Solid (TSS), 2 mg/l ammonia-nitrogen (NH₃-N), 0.0132 mg/l, Hexavalent Chromium, 126 *E. coli*, CFU or MPN/100 ml and 4.0 mg/l minimum dissolved oxygen (DO). The effluent shall contain a chlorine residual of at least 1.0 mg/l after a detention time of at least 20 minutes (based on peak flow) and shall be monitored daily by grab sample. The effluent shall be dechlorinated to less than 0.1 mg/l chlorine residual. The draft permit includes a TPDES pretreatment program substantial modification coordinated with the Stormwater & Pretreatment Team.

b. Procedural Background

The City submitted an application to renew its existing permit on November 6, 2013. On November 14, 2013, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt of Application and Intent (NORI) to Obtain a Water Quality Permit was issued by the ED on November 14, 2013 and published on November 26, 2013 in the *Temple Daily Telegram*. Following a technical review of the application, the ED prepared a draft permit. The ED issued the Notice of Application and Preliminary Decision (NAPD) for TPDES Permit for Municipal

Wastewater Renewal and Notice of Substantial Modification to the Pretreatment Program on August 14, 2014 and it was published on August 21, 2014 in the *Temple Daily Telegram*. The public comment period ended on September 15, 2014. On November 3, 2014, the ED filed his decision and Response to Public Comment, which the Office of the Chief Clerk mailed on November 5, 2014.

TCEQ received timely comments and requests for a contested case hearing from Linda Drozd, Frank L. Jez, Bill W. Smetana, Carol Smetana, Jimmy Spanhel, Franklin Tschoerner, Agnes Tschoerner, and a concerned citizen. OPIC recommends denying all the hearing requests submitted by requesters.

II. RIGHT TO A CONTESTED CASE HEARING

A. Right to a Contested Case Hearing

Texas Water Code § 26.028(d) states that the Commission may approve an application to renew a permit without a public hearing, under certain conditions.¹ 30 Texas Administrative Code § 55.201(i)(5) provides that no right to a hearing exists for certain water quality discharge permits. These authorizations include applications to renew or amend a permit if the applicant is not trying to:

- (A) increase significantly the quantity of waste to be discharged;
- (B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;
- (C) any required opportunity for public meeting has been given;
- (D) consultation and response to all timely received and significant public comment has been given; and
- (E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit.

¹ See also 30 TEX. ADMIN. CODE §§ 50.113(d)(4), 55.211(d)(4).

30 TEX. ADMIN. CODE § 55.201(i)(5).

OPIC finds that draft renewal permit satisfies all five elements of Section 55.201(i)(5). First, the draft permit would not increase the quantity of waste that could be discharged from the existing permit. Second, effluent limitations and monitoring requirements would remain the same or be more protective than the existing permit requirements. OPIC notes that the ED increased the stringency of effluent limitations for Ammonia Nitrogen and Hexavalent Chromium from the existing permit requirements. Additionally, *E. coli* bacteria limits were added to the draft permit in accordance with the recent amendments to Chapters 309 and 319 of Title 30 of the Texas Administrative Code. Third, the ED solicited requests for a public meeting, but did not receive a request from a local member of the legislature nor did he determine that there was substantial public interest in the proposed activity. Fourth, the ED has filed a response to comments that addresses all timely and significant public comment. Finally, the applicant's compliance history is "satisfactory." Therefore, OPIC finds that the Commission may approve the application without holding a contested case hearing on the proposed renewal. For these reasons, OPIC recommends that the hearing requests be denied. If the Commission disagrees, OPIC provides the following analysis of the requests.

III. ANALYSIS OF REQUESTS FOR CONTESTED CASE HEARINGS

a. APPLICABLE LAW

As 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 Texas Water Code Section 5.556, added by Act 1999, 76th Leg., ch. 1350 (commonly known as "House Bill 801"). A person may request that the Commission

reconsider the ED's decision or hold a contested case hearing. TEXAS WATER CODE § 5.556. 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 as defined by Section 5.115. 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.* Governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be

considered affected persons. 30 TEX. ADMIN. CODE § 55.203(b). 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).

b. Discussion

Linda Drozd, Frank L. Jez, Bill W. Smetana, Carol Smetana, Jimmy Spanhel, Franklin Tschoerner, Agnes Tschoerner, and a concerned citizen timely filed requests for a contested case hearing. All the requesters submitted an identical form letter, which they individually signed and dated.

Since the requesters themselves do not describe the location of their property with respect to the location of the facility or the route of the discharge, OPIC must rely on information provided by the ED and the Applicant. With the exception of Linda Drozd, all the requesters appear to reside within the watershed of the unnamed tributary approximately three to seven miles downstream of the proposed discharge route. In her request, Ms. Drozd lists her address as on Stag Road near the City of Holland. According to the map provided by the ED, this address is located near another segment of the Little River that is not downstream of the proposed discharge route. Since Ms. Drozd does not reside downstream of the proposed discharge route, OPIC finds that she is not an affected person.

Although all the other requesters reside within the watershed of the unnamed tributary downstream of the proposed discharge route, OPIC cannot support granting a hearing request based on proximity alone. Proximity to the facility may distinguish their interests from members of the general public,² but a justiciable interest itself must be stated³ and somehow related to a legal right, duty, privilege, power, or economic interest

² 30 TEX. ADMIN. CODE § 55.203(a) (stating that an interest common to members of the general public does not qualify as a personal justiciable interest).

³ 30 TEX. ADMIN. CODE § 55.201(d)(2) (requiring a contested case hearing request to substantially comply with the requirement that a request contain a written statement explaining, among other things, how any why the requestor believes she will be adversely affected by the proposed facility).

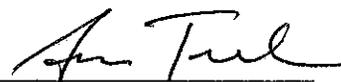
affected by the application.⁴ The form letter submitted by all the requester states that the application has raised questions and concerns among those who live or own property near or on the discharge route. The form letter raises two identifiable concerns. First, requesters are concerned that the facility will cease discharging treated water into the unnamed tributary and instead divert it to the Panda Electric Generating plant. Second, the requesters express concern about two “significant” waste water overflow events at the Doshier Farms wastewater treatment facility noticed in the *Temple Daily Telegram* in May and November of 2013. While the form letter raises these two concerns, none of the requesters ultimately state how they will be adversely affected by the proposed discharge, and, thereby, do not state an interest that may be affected by the application. For these reasons the form letter fails to comply with the basic requirements of a hearing request in 30 Texas Administrative Code § 55.201(d). Therefore, OPIC recommends that the Commission find that none of the requesters qualify as an “affected person.”

IV. CONCLUSION

For these reasons, OPIC respectfully recommends that the Commission deny all requests for a contested case hearing.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: 

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⁴ 30 TEX. ADMIN. CODE § 55.203(a).

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2015 the original and seven true and correct copies of the Office of the 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 or by deposit in the U.S. Mail.



Aaron B. Tucker

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TCEQ DOCKET NO. 2014-1834-MWD**

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