



BARRETT
& ASSOCIATES, PLLC

3300 Bee Cave Road Suite 650 #189
Austin, Texas 78746

Phone: 512.600.3800 Fax: 512.330-0499

April 6, 2015

Office of Chief Clerk
ATTN: Docket Clerk
TCEQ, MC 105
PO Box 13087
Austin, Texas 78711-3087

Re: Docket No. 2015-0436-MWD; Timberwood Development Company, LP; WQ0015242001

Dear Chief Clerk:

Attached is an original and 7 copies of Timberwood Development Company, LP's Response to Hearing Requests.

Copies will be provided to all parties as described in the Certificate of Service on the Response. If you have any questions, please do not hesitate to contact me at 512-600-3800.

Very truly yours,

Andrew N. Barrett

TCEQ DOCKET NUMBER 2015-0436-MWD

APPLICATION BY TIMBERWOOD	X	BEFORE THE TEXAS
DEVELOPMENT COMPANY, LP	X	COMMISSION ON
FOR TPDES PERMIT NO.	X	ENVIRONMENTAL
WQ0015242001	X	QUALITY

**APPLICANT TIMBERWOOD DEVELOPMENT COMPANY, LP's RESPONSE TO
HEARING REQUESTS**

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

Timberwood Development Company, LP (Applicant or Timberwood) files this Response to the Texas Commission on Environmental Quality (TCEQ) requesting the TCEQ to deny the Hearing Requests. San Antonio Water System (SAWS) filed both comments and hearing requests. The only other hearing requester is Mr. Gregory Seth Prescott. Four landowners filed comments but did not request a public hearing. Timberwood will address the hearing requestors separately.

OVERVIEW

Timberwood seeks to have a small plant with a small discharge of highly treated effluent. This plant will serve a subdivision of approximately 65 homes on 13.77 acres. This particular project is filling a gap in a larger development. The area is all part of the Timberwood Park subdivision. The Timberwood Park subdivision is approximately 2,500 acres and approximately 3200-3300 homes. With the exception of the 65 homes that will receive sewer service from this plant, the homes have septic tanks. For whatever reason, SAWS' water engineers were able to find a way to lay water lines to serve all this development. One would think that SAWS could do the same with wastewater where there would be a greater economy of scale instead of asking 65 homeowners to pay the cost to connect.

SAWS has protested the application. Stripped to the essentials, SAWS' complaint is really two arguments: 1. Timberwood should connect to SAWS and, 2. SAWS is concerned

that the treated effluent will reach the Edwards Aquifer and adversely impact San Antonio's water source.

Timberwood, predictably, disagrees with SAWS and urges the TCEQ to deny SAWS' hearing requests. Timberwood would love to connect to SAWS and would do so if it were economically feasible. The distance to SAWS' closest connection is somewhere between 1.5 and 2 miles. No other system is available. The highest and best use for this land is smaller lot sizes and served from a wastewater treatment plant.

Concerning SAWS second point, it is difficult to imagine how a discharge as small as the one requested (15,600 gallons per day) combined with the stringent permit limits (5-5-2-1) and with the recharge zone the distance that it is approximately 1.6 miles, would have any impact on the Edwards Aquifer. SAWS has presented no information as to any impact.

I. Gregory Scott Prescott

Mr. Prescott submitted via email on July 14, 2014 to the TCEQ commenting on this application. Mr. Prescott's language requested a public hearing. However, he did not adequately define his justiciable interest as required by Section 5.115(e), *Water Code* and 30 TAC Section 55.201(c) and (d). For that reason, and others, the TCEQ should deny his request.

Mr. Prescott's request seemed to be more a request for information, although couched in the language of a request for a public hearing. Instead of explaining why he is affected or whether he actually had any concerns or issues with the proposed discharge, Mr. Prescott stated, "I would like to understand what is being requested and proposed behind my house, and I believe that any and all of the people that would be potentially affected have the right to know as well."

Timberwood concurs with Mr. Prescott that all people, whether potentially affected or not, have the right to know what Timberwood is proposing through this application. However, that statement does not meet 30 TAC Section 55.201(c) or (d)'s requirements. Mr. Prescott sheds no light on whether he is downstream of the proposed discharge. If his property is downstream, he does not describe how far downstream. Moreover, he makes no mention of what his concerns over water quality might be. In short, he did not provide a "...written statement explaining in plain language the requestor's location and distance relative to the proposed facility

or activity.” He also failed to explain why he believes that he will be adversely affected. Finally, he did not list any disputed issues of fact that were raised in the public comment period.

In short, in compliance with 30 TAC Section 55.209(e), Timberwood believes that Mr. Prescott is not an affected person. He has neither alleged nor proven any impact from Timberwood’s proposed facility. He has raised no issues; instead, he requests information. As he did not raise any issues of either fact or law, nor was this request based on any issues raised in public comment period, this hearing request should be denied.

II. SAWS

SAWS, being ably represented by skilled counsel, present a valiant effort to thwart this application. Timberwood would point out that despite the fine arguments, SAWS has not shown itself entitled to a contested case hearing.

SAWS IS NOT AN AFFECTED PERSON

SAWS has not proven itself to be an affected person. It has no justiciable interest in a legal right, duty, etc. in Timberwood’s application any different than that of the general public. The fact that the project is within San Antonio’s extraterritorial jurisdiction is not, in and of itself, dispositive that SAWS is an affected person. TCEQ rules require governmental entities, including local governments, to present some proof before being an affected person. Further, and perhaps more important, 30 TAC Section 55.203(b) is permissive and not mandatory (“Governmental entities... with authority under state law over issues raised by the application *may* be considered affected persons). SAWS’ pleadings do not show that either they or the City of San Antonio have jurisdiction or authority over wastewater permitting.

SAWS does superlative work in providing water and wastewater to the citizens of San Antonio. However, Timberwood believes, even if TCEQ decides SAWS has “authority under state law raised by the application” that the permissive nature of the 30 TAC Section 55.203(b) indicates that a local government’s affected status should be considered in light of all circumstances of the application. As will be discussed below, SAWS is not impacted by the proposed wastewater discharge.

SAWS presents four points on which they base their affected person claim. Timberwood will address these in the order they appear in SAWS’ hearing request:

1. SAWS: “Timberwood’s proposed treatment facility is located less than 2 miles from SAWS’ nearest sewer main, and SAWS is ready, willing and able to provide sewer service to the area proposed to be served by Timberwood.”

RESPONSE: A more correct statement would be “SAWS is ready, willing and able to accept Timberwood’s connector or force main after Timberwood pays for it.” SAWS is in no position to accept wastewater from this development. Timberwood, like most developers, would prefer to be able to connect to a competent user, like SAWS. However, SAWS has priced themselves out of consideration. A project of 65 homes cannot afford to lay pipe for almost two miles.

Timberwood presented estimated costs during the application process necessary to connect to SAWS’ nearest connection (about 8,500 feet). The Executive Director referred to these costs in the Response to Comment—approximately \$38,000.00 per lot to connect to SAWS and a cost of approximately \$11,000.00 to implement our own facility.

2. SAWS: “Timberwood’s proposed treatment facility and the area proposed to be served by the facility are located entirely within SAWS’ certificated sewer area, and SAWS has not consented to Timberwood providing retail sewer service inside SAWS’ certificated area.”

RESPONSE: This point, even if valid, concerns a separate regulatory program. Chapter 13, *Water Code*, determines the retail utility provider. Therefore, this issue is not relevant in determining whether SAWS is an affected person. As the TCEQ is aware, the Texas Legislature has made it easier over the past several sessions for landowners to remove their property from a utility’s CCN. The reason for such legislation could be based on situations such as this—a certificated provider is not in a cost effective position to provide service within its certificated area yet opposes a landowner who wishes to develop his property.

It should also be mentioned that there are over 80 lots in less than a mile radius of the proposed plant and over 2,800 homes in the Timberwood Park development. Each of these homes, along with the remaining 400+ lots are all on septic tank. One has to question why SAWS has such a large certificated area yet has not invested the capital to provide service nor seems interested in providing service to a large existing development. Even more puzzling is

SAWS' insistence that such a small system connect to their system. Perhaps SAWS is chasing minnows and missing sharks.

Another possibility is Timberwood could apply and obtain dual certification. A final point is that a CCN only authorizes (and requires) a certificate holder to provide retail utility service. A wastewater plant can provide service without that service being retail utility service. The service could be an incident of tenancy—that is, wastewater costs included as part of Homeowners Association Fees or made part of a Condominium.

Regardless of whether Timberwood eventually removes SAWS CCN or works around it, the type of service Timberwood will provide to the development is not relevant to determining whether SAWS is an affected party in a wastewater application. Certainly they would be an affected person in a CCN matter.

3. SAWS: Timberwood's proposed treatment facility will discharge treated effluent that will reach the Edward's Aquifer recharge zone and will enter that aquifer, which is SAWS' primary source of drinking water.

RESPONSE: Timberwood is somewhat amused at SAWS' concern. For some reason, the highly treated effluent that this permit requires, 5-5-2-1, is a greater worry to SAWS than the numerous septic tanks in the area. This does not even include the fact that the treated effluent from Timberwood's wastewater treatment plant is undoubtedly of higher quality than the non-point source runoff from the area. If SAWS were truly concerned about water quality, they would be able to extend sewer service to the area to relieve the area of 2,500+ septic tanks.

While claiming to be agitated by this high quality effluent, SAWS neglected to present any documentation of how the effluent would impair or impact water quality. Timberwood's engineers sealed the application stating the plant, if operated properly, would meet all TCEQ requirements, including maintaining water quality. The Executive Director's Statement of Basis/Technical Summary shows that a Tier I antidegradation review was performed and that the permit action will not impair existing water quality and that existing uses will be maintained.

SAWS also has not shown that an average flow of 15,600 gallons per day would even reach the Edwards Aquifer. A flow this low will likely evaporate or absorb into the soil before reaching any recharge features.

4. SAWS: Timberwood’s proposed treatment facility is located in San Antonio’s extraterritorial jurisdiction and subject to San Antonio’s Aquifer Protection Ordinance, which is administered by SAWS.

RESPONSE: As stated above, the fact that the proposed project is within San Antonio’s ETJ is not dispositive that SAWS or San Antonio is an affected person. San Antonio’s Aquifer Protection Ordinance does not help their argument. In fact, it is not relevant. The San Antonio Aquifer Protection Ordinance relates to development, construction and erosion and runoff.

The essence of the Aquifer Protection Ordinance seems to be that San Antonio requires a Letter of Certification to be approved by SAWS before development begins in the Edwards Aquifer Recharge Zone. Even though Timberwood’s project is not within the recharge zone, it is possible that SAWS will be able to review the development plan and storm water issues. That, however, is a review separate and apart from wastewater discharge.

DISPUTED ISSUES RAISED IN THE HEARING REQUEST

SAWS: Proposed treatment plant is not needed and granting it runs counter to regionalization policy.

RESPONSE: As previously discussed, the cost of tying into SAWS is prohibitive for 65 units. The fact that it is not economical to connect to SAWS makes the permit necessary. Contrary to SAWS assertion, the Executive Director addressed this issue in the Response to Comments. Similarly, Timberwood addressed this issue in the application.

SAWS: SAWS believes that additional monitoring and operation requirements are necessary.

RESPONSE: SAWS statements are fairly mysterious. The monitoring and operation requirements in the draft permit comply with all TCEQ standards. Timberwood did not request nor has the Executive Director offered to relax any requirements. There is nothing to indicate that SAWS’ desire for additional monitoring is merited.

SAWS: SAWS questions the adequacy of the nuisance odor prevention plan

RESPONSE: Timberwood, as required, submitted an odor control plan as a variance for the 150-foot buffer. SAWS claims that the nuisance odor prevention plan should be part of the permit application. They are putting the cart before horse. The nuisance odor plan is similar to

plant design—it occurs after permitting. Since it is a public document, SAWS has the ability to make their views known both to the Executive Director and to Timberwood. However, the nuisance odor prevention plan is not properly part of a contested case issue.

Timberwood would also point out that SAWS does not have standing to raise this issue. Their interest in nuisance odor prevention plans is no different than the general public. Being a political subdivision does not grant them preferred status on this issue.

SAWS: SAWS takes issue with the Executive Director’s statement that the proposed plant will not discharge pollutants into waters in the state and will not create additional pollutant loading in the Edwards Aquifer recharge zone.

RESPONSE: On this issue, on a very limited basis, Timberwood concurs with SAWS. Timberwood’s permit does contemplate a discharge of highly treated effluent into waters in the State. Timberwood also agrees with SAWS that in the Response to Comments, the Executive Director mistakenly responded that the proposed permit is a “no discharge” permit. After that, Timberwood’s concurrence with SAWS ends.

Everyone deserves a “mulligan”. The Executive Director merely had a word processing mix up in Response No. 10. The draft permit makes clear on its face a discharge is being allowed by TCEQ; the “Description of Facility” under Background on page 1 of the Response to Comment makes clear that the permit is a discharge.

Timberwood would point out that SAWS is incorrect in its hearing request citing 30 TAC Section 213.6. That prohibition applies to discharges in the Edwards Aquifer Recharge Zone. Timberwood’s proposed discharge is in the Contributing Zone approximately 1.6 miles from the Recharge Zone.

Timberwood would also clarify that no commenter, SAWS included, commented or raised the issue during the comment period that the proposed discharge would cause additional pollutant loading in the recharge zone in contravention of 30 TAC Section 291.6. Thus, if SAWS’ intention in its March 3, 2015 hearing request is to argue that 30 TAC Section 291.6 prohibits this application, Timberwood would show that such an issue was not raised in the comment period and cannot be used as a basis for a public hearing.

The closest SAWS statement that Timberwood can find is from SAWS' June 24, 2014 hearing request where SAWS, in arguing its Affected Person status, states that "...given the close proximity of the treatment plant to the Recharge Zone, there is a potential risk for wastewater to enter SAWS' water supply".

This issue is addressed in the Technical Summary discussed above. In that document, the Executive Director states that after conducting a Tier 1 antidegradation review, water quality be maintained. In other words, there is no degradation or additional pollutant loading into the receiving waters.

FINAL THOUGHTS

At the outset of this Response, Timberwood broke SAWS' issues into two matters—regionalization (need) and the discharge's potential impact on water quality in the Edwards Aquifer. Timberwood has addressed those issues and maintains that SAWS is not an affected person and that SAWS presented no issue for hearing and the permit is necessary for this development project.

Concerning SAWS' alleged concerns over monitoring, operational requirements and nuisance odor abatement plans, Timberwood would respond that those are not proper issues for a hearing. These are relatively simple matters; especially given the small discharge and high quality of effluent. If those are major concerns to SAWS, we could reach an agreement with them relatively quickly.

IF REFERRED TO SOAH, EXPECTED MAXIMUM DURATION SHOULD BE THREE MONTHS

Timberwood realizes that, at first blush, this might seem an ambitious request. However, given the relative low interest plus the amount of time that SAWS has had to examine the application and records, discovery should be relatively simple and quick. Further, there are no new or unique issues to be discussed at a contested case hearing. We would be remiss if not admitting that delay is the enemy of a developer—something opponents know too well and couch their concerns in water quality.

CONCLUSION

For the reasons discussed in the Response, Timberwood respectfully requests that the TCEQ not refer this matter to SOAH. If the TCEQ finds that necessary, Timberwood requests, respectfully of course, that the issues be limited to the whether water quality uses will be maintained and the issue of regionalization.

Respectfully submitted,

Andy Barrett & Associates, PLLC

By: 

Andrew N. Barrett

State Bar No. 01808900

3300 Bee Cave Road, Suite 650 #189

Austin, Texas 78746

512-600-3800

512-330-0499 FAX

ATTORNEY FOR APPLICANT

TIMBERWOOD DEVELOPMENT COMPANY, LP

CERTIFICATE OF SERVICE

*I hereby certify that I have served a true and correct copy of the foregoing
Timberwood Development Company, LP's Response to Hearing Request on the following by U.S.
mail or otherwise in accordance with 30 Texas Administrative Code 1.11 on this 6th day of April.*

FOR THE APPLICANT:

Jason R. Gale
Timberwood Development Corporation, LP
15315 San Pedro
San Antonio, TX 78232

Joe K. Wells, Jr., P.E.
WWD Engineering
9217 Highway 290 West, Suite 110
Austin, Texas 78736

PROTESTANTS/INTERESTED PERSONS:

See below

FOR THE EXECUTIVE DIRECTOR
via electronic mail:

Brian Christian, Director
Texas Commission on Environmental
Quality
Environmental Assistance Division
Public Education Program MC-108
P.O. Box 13087
Austin, Texas 78711-2087

Anthony Tatu, Staff Attorney
Texas Commission on Environmental
Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087

REQUESTER(S):

Joe Freeland
Mathews & Freeland LLP
8140 N Mopac Expy Ste 2-260
Austin, Texas 78759-8942

Keith Martin
San Antonio Water System
2800 US Highway 281 N
San Antonio, TX 78212-3106

FOR PUBLIC INTEREST COUNSEL
via electronic mail:

Vic McWherter, Attorney
Texas Commission on Environmental
Quality
Public Interest Counsel MC-103
P.O. Box 13087
Austin, Texas 78711-3087

**FOR ALTERNATIVE DISPUTE
RESOLUTION:**

Kyle Lucas
Texas Commission on Environmental
Quality
Alternative Dispute Resolution,
MC-222
P.O. Box 13097
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK
via electronic mail:

Bridget C. Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of Chief
Office of Chief Clerk MC-105
P.O. Box 13087
Austin, Texas 78711-3087

Gregory Seth Prescott
738 Best Way
San Antonio, TX 78260-5325

Commenters:

Donald Ewing
406 Sunny Pass
San Antonio, TX 78260-6442

Brooks & Stacy Neighbors
734 Best Way
San Antonio, TX 78260-5325

Jolynn & Shea Posey
903 Slumber Pass
San Antonio, TX 78260-5368

James & Rebecca A. Thompson
818 Best Way
San Antonio, TX 78260-5362



Andrew N. Barrett