

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

April 6, 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: **TIMBERWOOD DEVELOPMENT COMPANY, LP**
TCEQ DOCKET NO. 2015-0436-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 black ink, appearing to read "Rudy Calderon".

Rudy Calderon, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



TCEQ DOCKET NO. 2015-0436-MWD

**IN THE MATTER OF THE
APPLICATION OF
TIMBERWOOD DEVELOPMENT
COMPANY, LP FOR TPDES
PERMIT NO. WQ0015242001**

**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 shows the following.

I. Introduction

A. Background of Facility

Timberwood Development Company, LP (Applicant) has applied to the TCEQ for a new permit that will authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 15,600 gallons per day. The wastewater treatment facility will serve the Timberwood Villas II. The Timberwood Villas II Wastewater Treatment Facility will be a package plant operated in the conventional mode. Treatment units include bar screen, aeration basin, anoxic basin, clarifier, sludge digester, and a chlorine contact chamber. The facility has not been constructed. The proposed permit does not authorize the discharge of pollutants to water in the state.

The effluent limitations in the draft permit, based on a 30-day average, are 5 mg/l Carbonaceous Biochemical Oxygen Demand (5-day), 5 mg/l Total Suspended Solids, 2 mg/l Ammonia Nitrogen, 1 mg/l Phosphorus, 63 *E. coli* CFU or MPN per 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 and shall not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow.

The wastewater treatment facility will be located 740 feet north of the intersection of Slumber Pass and White Eagle Drive in Bexar County, Texas 78260. The treated effluent will be discharged to an unnamed tributary; thence to Mustang Creek; thence to Mud Creek; thence to Salado Creek in Segment No. 1910 of the San Antonio River Basin. The unclassified receiving water uses are minimal aquatic life for unnamed tributary; minimal aquatic life for Mustang Creek (intermittent); and limited aquatic life for Mustang Creek (intermittent with pools). The designated uses for Segment No. 1910 are high aquatic life use, public water supply, aquifer protection, and primary contact recreation.

B. Procedural Background

TCEQ received this application on April 7, 2014. On May 23, 2014, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in English on June 27, 2014 in *San Antonio Express News* and in Spanish on June 25, 2014 in *La Prensa*. The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published in English on September 30, 2014 in the *San Antonio Express News* and on October 1, 2014 in *La Prensa* in Spanish. The public comment period ended on October 31, 2014. On January 30, 2015, the ED filed his Response to Public Comment, and on February 3, 2015, the Chief Clerk mailed notice of the ED's final decision and Response to Comments. The deadline to request a contested case hearing was March 5, 2015.

TCEQ received timely comments and requests for a contested case hearing from San Antonio Water System (SAWS) and Gregory Seth Prescott.

II. Applicable Law

The ED declared this application administratively complete on May 23, 2014. Because 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 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 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. *Id.* 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).

A group or association may request a contested case hearing if:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

30 TAC § 55.205(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements. *Id.*

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

SAWS

According to the hearing request, SAWS is the water and sewer utility for the City of San Antonio charged with providing drinking water and wastewater services to customers within the San Antonio city limits and to customers within San Antonio's extraterritorial jurisdiction (ETJ). SAWS holds Certificate of Convenience and Necessity (CCN) NO 20285, issued by the TCEQ, to provide such services to the city and its ETJ. In its hearing request, SAWS raises the issues of regionalization, water quality, protection of the Edwards Aquifer, and odor.

In its hearing request, SAWS contends that by virtue of holding CCN No. 20285, it has the exclusive right to provide wastewater services in the area and it has not consented to Applicant providing wastewater services to the proposed service area. SAWS also states that the proposed facility would be located less than 2 miles from SAWS' nearest sewer main and that SAWS is willing and ready to provide wastewater services to the area proposed to be served by the Applicant. Additionally, SAWS correctly states that the proposed facility would be located in the Edwards Aquifer

Contributing Zone within 5 miles upstream of the recharge zone and that discharge from the proposed facility has the potential to infiltrate the Edwards Aquifer. SAWS states the Edwards Aquifer is its primary source of drinking water and, therefore, SAWS has a unique interest in the quality of the water in the aquifer. Finally, SAWS states since the proposed facility is located in San Antonio's ETJ, it is subject to San Antonio's Aquifer Protection Ordinance, which is administered by SAWS.

OPIC finds that SAWS is an affected person based on the factors set forth in 30 TAC §§ 55.203(b) and (c) and that a reasonable relationship exists between SAWS' concerns and the issuance of the proposed permit.

Gregory Seth Prescott

According to a map provided to OPIC by the ED, Mr. Prescott's property is adjacent to the proposed facility. While this fact would most likely assure Mr. Prescott affected person status, Mr. Prescott failed to raise any relevant or material issues in his hearing request that could be referred to SOAH. Therefore, OPIC has found that Mr. Prescott is not an affected person and should not be granted a contested case hearing. However, should another party be found to be an affected person and granted a contested case hearing, Mr. Prescott would have an opportunity at a preliminary hearing to cure this defect and seek party status at that time.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing requests:

- (1) Whether the proposed facility will violate TCEQ's regionalization policy?
- (2) Whether the proposed plant or discharge will adversely impact water quality?
- (3) Whether the proposed plant or discharge will cause nuisance odors?
- (4) Whether the proposed permit is protective of the Edwards Aquifer?

C. Issues Raised in the Comment Period

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

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

F. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 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 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”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

In its hearing request, SAWS raises the issues of regionalization, water quality, protection of the Edwards Aquifer, and odor.

Regionalization

State policy is to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to prevent pollution and maintain and enhance the quality of state water. *TWC § 26.081(a)*. This policy was implemented to stem the proliferation of small package plants such as the one proposed in the application. When considering the issuance of a permit to discharge waste, the TCEQ is required to consider need and the availability of existing or proposed regional waste collection, treatment, and disposal systems. *TWC § 26.082*. As the provider of wastewater services to the residents of San Antonio and to the residents within the cities ETJ, SAWS has a unique interest in the issue of regionalization. As stated before, the proposed facility will be located less than 2 miles from the nearest SAWS sewer main and completely within SAWS' CCN. The facility would also be located over the Edwards Aquifer Contributing Zone with its discharge potentially infiltrating the aquifer itself. Therefore, OPIC finds that the issue of regionalization is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH for a contested case hearing on this matter.

Water Quality

SAWS raised the issue of water quality in its hearing request. The TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307 and 309, as well as under specific rules related to wastewater systems found at 30 TAC Chapters 30 and 217. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit "maintain the quality of water in the state consistent with public health and enjoyment." *30 TAC § 307.1*. Therefore, OPIC concludes the issue of water quality raised by SAWS is relevant and material to the

Commission's decision regarding this application and is appropriate for referral to SOAH for a contested case hearing on this matter.

Odor

SAWS raised the issue of odor in its hearing request. Odor is specifically addressed by the TCEQ in 30 TAC §309.13 concerning the siting of wastewater treatment plants. Therefore, OPIC concludes the issue of odor raised by SAWS is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH for a contested case hearing on this matter.

Edwards Aquifer

SAWS raised the issue of the protection of the Edwards Aquifer in its hearing request. It is not in dispute that the proposed facility will be located within the Edwards Aquifer Contributing Zone and will be less than 5 miles upstream from the recharge zone. These factors make the proposed permit subject to the rules in 30 TAC Ch. 213. While the proposed permit would meet the requirements laid out in 30 TAC §213.6 for effluent treatment, out of an abundance of caution and concern for the preservation of the Edwards Aquifer, OPIC concludes the issue of the protection of the Edwards Aquifer raised by SAWS is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH for a contested case hearing on this matter.

G. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

- (1) Whether the proposed facility will violate TCEQ's regionalization policy?
- (2) Whether the proposed plant or discharge will adversely impact water quality?
- (3) Whether the proposed plant or discharge will cause nuisance odors?
- (4) Whether the proposed permit is protective of the Edwards Aquifer?

H. Maximum Expected Duration of Hearing

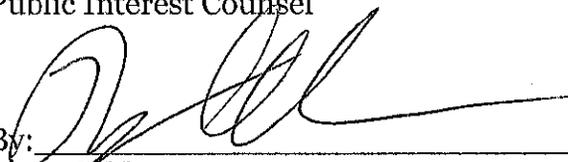
Commission Rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in 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.

IV. Conclusion

OPIC recommends denying the hearing request from Gregory Seth Prescott and granting the hearing request from the SAWS on the issues referenced in Section III.G above. OPIC further recommends a hearing duration of nine months.

Respectfully submitted,

Vic McWherter
Public Interest Counsel



By: _____
Rudy Calderon
Assistant Public Interest Counsel
State Bar No. 24047209
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-3144 Phone
(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2015 the original and seven true and correct copies of the Office of 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, electronic mail, or by deposit in the U.S. Mail.



Rudy Calderon

MAILING LIST
TIMBERWOOD DEVELOPMENT COMPANY, LP
TCEQ DOCKET NO. 2015-0436-MWD

FOR THE APPLICANT:

Jason R. Gale
Timberwood Development Company, LP
15315 San Pedro Avenue
San Antonio, Texas 78232-3719
Tel: (210) 494-5237
Fax: (210) 494-0913

Joe K. Wells, Jr., P.E.
WWD Engineering
9217 Highway 290 West, Suite 110
Austin, Texas 78736-7813
Tel: (512) 288-2111
Fax: (512) 617-1524

FOR THE EXECUTIVE DIRECTOR

Anthony Tatu, Staff Attorney
TCEQ Environmental Law Division
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606

Donald Camp, Technical Staff
TCEQ Water Permits Division, MC- 148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4681 Fax: 512/239-4430

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

FOR ALTERNATIVE DISPUTE
RESOLUTION

Kyle Lucas
TCEQ 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:

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

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

