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*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

July 13, 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: 3 B&J WASTEWATER COMPANY, INC.  
TCEQ DOCKET NO. 2015-0565-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. 2015-0565-MWD**

**IN THE MATTER OF THE  
APPLICATION OF 3 B&J  
WASTEWATER CO., FOR TPDES  
PERMIT NO. WQ0014911002**

**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**

3 B&J Wastewater Co. (Applicant) has applied to the TCEQ for proposed new TPDES Permit No. WQ0014911002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 950,000 gallons per day at the 3 B&J Wastewater Treatment Plant No. 1 (proposed facility). Previously, the Applicant applied for and the TCEQ granted TPDES Permit No. WQ0014911001, however, before the proposed facility was constructed, the Applicant allowed Permit No. WQ0014911001 to expire on December 1, 2013.

The proposed facility will be an activated sludge process plant operated in the extended aeration mode. Treatment units in Interim I phase will include a bar screen, grit chamber, aeration basin, final clarifier, tertiary filter, aerobic digester, and a chlorine contact chamber. After construction in connection with Interim II phase, the proposed facility will be an activated sludge process plant operated in the complete mix

mode. Treatment units will include a bar screen, grit chamber, aeration basin, final clarifier, tertiary filter, aerobic digester, and a chlorine contact chamber. After construction in connection in the Final phase, the proposed facility will be a parallel complete mix facility with the same treatment units as in the Interim II phase. The proposed permit authorizes a registered transporter to transport the sludge generated at the proposed facility to the City of Austin Walnut Creek Wastewater Treatment Facility, (permit No. WQ0010543011) for digestion, dewatering, and disposal with the sludge already at the Walnut Creek plant. In addition, the proposed permit authorizes the disposal of sludge at a TCEQ authorized land application site or co-disposal landfill.

The wastewater treatment facility (facility) will be located approximately 0.45 miles northwest of the intersection of C.R. 248 and Westridge Lane in Williamson County, Texas 78622. The discharge of treated effluent will first enter an unnamed tributary; then to the North Fork San Gabriel River in Segment No. 1251 of the Brazos River Basin. The unclassified receiving water use is limited aquatic life use for the unnamed tributary. The designated uses for Segment No. 1251 are high aquatic life use, public water supply, aquifer protection, and primary contact recreation.

## **B. Procedural Background**

TCEQ received this application on May 9, 2014. On August 14, 2014, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published on September 7, 2014, in English in the *Williamson County Sun*, and in Spanish on September 11, 2014 in *iahora si!*. The ED completed the technical review of the application on September 15, 2014. The Applicant published the Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) in Williamson

County, Texas on November 23, 2014, in English in the Williamson County Sun and on November 27, 2014 in Spanish in *iahora si!*. The public comment period closed on December 29, 2014. On March 4, 2015, the ED filed his Response to Public Comment, and on March 9, 2015, the ED mailed notice of his final decision. The deadline to request a contested case hearing was April 8, 2015.

TCEQ received timely comments and requests for a contested case hearing from The City of Georgetown (Georgetown) and J.D. Head from the law firm of Fritz, Byrne, Head & Harrison, PLLC, on behalf of Vic McNallie.

## **II. Applicable Law**

The ED declared this application administratively complete on August 14, 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)*.

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**

##### City of Georgetown

According to the hearing request, Georgetown is a municipality that provides wastewater services to the area that will be served by the proposed facility. Part of the area to be served by the proposed facility lies within Georgetown's extra-territorial jurisdiction (ETJ) with the remaining proposed service area lying adjacent to Georgetown's ETJ, but within Georgetown's wastewater service area. Georgetown owns and operates five existing wastewater treatment plants and holds a permit for an additional plant that has not yet been built. Georgetown states in its hearing request that the proposed facility will be located approximately 7,500 feet from a proposed major interceptor that, once completed, could be used to transport wastewater from the proposed service area to Georgetown's nearest wastewater treatment facility, which is 25,000 feet from the proposed facility. 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)*. 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 area proposed to be serviced by the new facility, Georgetown has a unique interest in the issue of regionalization. Additionally, in its hearing request, Georgetown points to an agreement titled “Agreement Regarding Sewer Service Areas and Customers by and between Lower Colorado River Authority, Brazos River Authority, City of Georgetown, City of Liberty Hill, and Chisholm Trail Special Utility District” dated February 1, 2005. This agreement reflects the local authorities’ attempts to follow the state’s regionalization policy. The agreement states that Georgetown will be the wastewater service provider for the area to be served by the proposed facility. While not binding on the TCEQ, the agreement does support Georgetown’s assertion that they should be the wastewater service provider for the area.

Additionally, in its hearing request, Georgetown requests that if the permit is issued, that it require the facility have the same processes as Georgetown’s facilities are required to have, namely the use of a belt press and sludge housing. To this point, the TCEQ does not have authority to mandate the manner of treatment. Instead, the TCEQ may only evaluate the proposed wastewater treatment technology and the effects of the treated wastewater on the receiving stream.

OPIC finds that the City of Georgetown 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 the City of Georgetown’s concerns about regionalization and the issuance of this new TPDES permit.

## Vic McNallie

According to the hearing request, Mr. McNallie owns property adjacent to the tract of land where the proposed facility will be located. The discharge route will run through a tract that is adjacent to Mr. McNallie's property. In his hearing request, Mr. McNallie raised issues related to odor nuisance, possible flooding of his property, water quality, regionalization, facility operations, TCEQ permitting authority, and application deficiencies.

As to odor, the proximity of Mr. McNallie to the proposed facility could subject Mr. McNallie to an odor nuisance condition. This condition could either be caused by the treatment of the wastewater itself or by the sludge handling operations that will take place at the facility. Therefore, Mr. McNallie could be affected in a way that is not common to the general public.

OPIC, therefore, has determined that the City of Georgetown and Vic McNallie qualify as affected persons under TCEQ rule.

### **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 facility will affect water quality in the discharge route and in Lake Georgetown.
- (3) Whether the proposed facility will be the cause of nuisance odors.
- (4) Whether the TCEQ has permitting authority in this case.
- (5) Whether the Applicant will be able to meet the effluent limits contained in the permit.
- (6) Whether effluent will encroach on adjacent property to the discharge route during flooding conditions.
- (7) Whether the application for the proposed permit is deficient due to the lack of an operator being included along with the owner as an applicant for the permit.

### **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.*

Texas encourages regionalization under the provisions of TWC § 26.081.

Therefore, OPIC concludes Issue no. 1 to be relevant and material. Furthermore, 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 Issue no. 2 to be relevant and material. Odor is specifically addressed by TCEQ regulations concerning the siting of domestic wastewater plants. *30 TAC § 309.13*. Therefore, OPIC concludes Issue no. 3 to be relevant and material.

As to the issue of the authority of the TCEQ to issue the proposed permit, Mr. McNallie asserts that both the Texas Special District Local Laws Code (TSDLLC) §§ 8221.105-8221.107 and the “Agreement Regarding Sewer Service Areas and Customers by and between Lower Colorado River Authority, Brazos River Authority, City of Georgetown, City of Liberty Hill, and Chisholm Trail Special Utility District” serve to remove authority from the TCEQ to permit the proposed facility. OPIC finds that the sections of the TSDLLC quoted by Mr. McNallie only serve to provide the Brazos River Authority (BRA) with oversight in addition to what the TCEQ possesses and does not replace the TCEQ as the permitting authority. Applicant may still need to obtain BRA approval, but TCEQ approval is still necessary. As discussed earlier, the “Agreement Regarding Sewer Service Areas and Customers by and between Lower Colorado River Authority, Brazos River Authority, City of Georgetown, City of Liberty Hill, and Chisholm Trail Special Utility District” is not binding on the TCEQ. Therefore, OPIC concludes Issue no. 4 is not relevant and material. Mr. McNallie also raises concerns that the Applicant will not be able to meet its permit limits, but provides no support as to why he feels that way. The permit limits proposed in the draft permit are not unique

and have been issued in previous permits. With no reasoning as to why he believes the permit limits will not be met, OPIC concludes that Issue no. 5 is not relevant and material. Mr. McNallie's concerns about his proximity to the discharge route and possible effluent encroaching onto his property during a flooding condition is beyond the TCEQ's jurisdiction and cannot be considered. OPIC concludes that Issue no. 6 is not relevant and material. Finally, Mr. McNallie claims that the application is deficient because the owner and operator did not both submit an application for a new permit. He cites 30 TAC § 305.43(a) as requiring that both the owner and operator submit a permit application. However, the requirement that both the owner and operator submit an application is only applicable upon a finding of a special circumstance by the Executive Director, otherwise only the owner is required to apply. There was no such special condition in this case. Therefore, OPIC concludes that that Issue no. 7 is not relevant and material.

OPIC therefore concludes that Issues nos. 1, 2, and 3 related to regionalization, nuisance odor, and water quality are relevant and material.

#### **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 facility will affect water quality in the discharge route and in Lake Georgetown.
- (3) Whether the proposed facility will be the cause of nuisance odors.

#### **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 granting the hearing request from the City of Georgetown and Vic McNallie 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

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## CERTIFICATE OF SERVICE

I hereby certify that on July 13, 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**  
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**TCEQ DOCKET NO. 2015-0565-MWD**

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