

TCEQ DOCKET NO. 2015-0664-MWD

APPLICATION BY JPHD, Inc., FOR § BEFORE THE
LAND APPLICATION PERMIT § TEXAS COMMISSION ON
WQ0015201001 § ENVIRONMENTAL QUALITY

REPLY OF HAMILTON POOL ROAD MATTERS TO RESPONSES TO
HEARING REQUESTS

I. SUMMARY

Hamilton Pool Road Matters (HPR Matters) agrees with the recommendations of the TCEQ Office of the Public Interest Counsel (OPIC) and Executive Director (ED) that the Commission grant HPR Matters' hearing request. With regard to HPR Matters' affected person status, these responses are well-reasoned in light of the applicable law, although HPR Matters differs with some recommendations of the ED regarding issues appropriate for referral.

On the other hand, HPR Matters' disagrees with JPHD, Inc.'s ("JPHD") position set forth in JPHD's response. JPHD has ignored important members of HPR Matters, has forwarded legal standards that are simply incorrect, and has asked the Commission to impose procedural hurdles that have no basis in the applicable law and are contrary to long-standing agency practice.

II. THE COMMISSION SHOULD GRANT HPR MATTERS' HEARING
REQUESTS

- A. Judy Hendricks, a member of HPR Matters, would be an affected person in her own right.

JPHD limits its analysis of HPR Matters' affected person status to a cursory

review of Bob Ayers' status as an affected person. While HPR Matters contends that Mr. Ayers is an affected person, it is worthwhile for the Commission to also consider the affected person status of Judy Hendricks.

Judy Hendricks would be an affected person in her own right, as confirmed by the Office of the Public Interest Counsel's Response. As set forth in HPR Matters' hearing request, Ms. Hendrick's owns property extending into the floodplain of Little Barton Creek, roughly 1200 feet downstream of the proposed treatment plant, and roughly the same distance downstream of the nearest drip field. Drip Fields 1, 2, 3, 4 and 5 are within the watershed of Little Barton Creek shortly upstream of her property. In its response, JPHD simply notes that Ms. Hendricks is not adjacent to the development, with no further analysis.

A consideration of the factors set forth at 30 TAC § 55.203(c) demonstrates that Ms. Hendricks would qualify as an affected person. HPR Matters' concerns expressed on her behalf relate to contaminants from upstream application fields adversely impacting her use and enjoyment of her property, as well as her use and enjoyment of Little Barton Creek. Such an interest in surface water quality is precisely of the type protected under Chapter 222 governing this application.¹

No distance limitation exists restricting the scope of persons who may be considered "affected" with regard to such an application, and, in fact, the proximity of Ms. Hendrick's residence and property shortly downstream of the plant and application fields distinguishes her interests from those of the general public. Certainly, concern for

¹ 30 TAC § 222.1.

the use and enjoyment of her property, as well as the use of Little Barton Creek, are reasonably related to JPHD's proposed application of contaminants to property shortly upstream of her property and the area of Little Barton Creek that she uses for recreational purposes. Should the permit be issued in a manner that does not sufficiently protect surface water quality, or in a manner that creates a significant risk of a spill from the wastewater treatment plant, her property and her use of Little Barton Creek is likely to be impacted due to its close proximity.

JPHD essentially asserts that HPR Matters has the burden to demonstrate that adverse impacts will occur as a result of the permitted activity. This mischaracterizes the burden applicable to HPR Matters. A hearing requester need only show that an adverse impact will *potentially* occur, which HPR Matters has done.

A similar analysis would demonstrate the affected person status of the Hansons, Mr. Morabbi, and Shield Ranch.² But, HPR Matters need only demonstrate that a single member would have standing, and given Ms. Hendrick's status as an affected person, such additional analysis is unnecessary.

B. An issue is disputed where there is disagreement.

JPHD asserts that certain issues are not disputed because HPR Matters did not present countervailing evidence on the question after issuance of the Executive Director's Response to Comments.

As for the timing issue, the Commission long ago rejected any argument that a hearing request must be filed after the issuance of the Executive Director's Response to

² In the time since submission of HPR Matters' Hearing Request, Jessica Tennant has sold her property.

Comments. Where a person has expressed disagreement with the issuance of a permit, and the Executive Director's Response to Comments merely reiterates the challenged recommendation of permit issuance, there is no basis to conclude that the disagreement no longer exists, or that the requester has abandoned their hearing request.

For an issue to be "disputed," there need only be disagreement between the parties. While protestants bear the responsibility of showing themselves affected persons (by showing a *potential* impact), and bear the duty of showing an issue to be disputed, the burden of proof on the merits of the permit remains upon the applicant throughout the proceeding. Consistent with the analysis provided by both the Executive Director and the Office of the Public Interest Counsel, disagreement as to whether the applicant has met this burden of proof on a particular issue renders the issue "disputed" for purposes of determining issues proper for referral to the State Office of Administrative Hearings (SOAH).

C. The issues raised by HPR Matters present questions of fact.

JPHD alleges that many of the issues raised by HPR Matters solely involve legal questions. On this question, HPR Matters concurs with the analysis of the Executive Director with regard to Issues 1 – 4, 6 – 20, and Issue No. 22 as designated by the Executive Director.

With regard to the protection of surface water quality, HPR Matters respectfully disagrees with the Executive Director's analysis set forth in association with Issue No. 23, as designated by the ED. Chapter 222 of the TCEQ rules governing this application provides that a purpose of the Chapter is to "maintain the quality of fresh water in the

state to the extent consistent with the public health and welfare and the operation of existing industries.”³ So, certainly the question of whether the permit conditions are sufficient to protect surface water quality is relevant to JPHD’s application. In this case, the authorized activities would include wastewater distribution lines that cross Little Barton Creek, and the location of drip fields in close proximity to surface water features.⁴ These circumstances raise questions as to whether the conditions of the permit are sufficient to prevent contaminants from *reaching* surface waters. Determination of that question involves numerous factual issues such as whether the authorized fields will absorb nutrients sufficiently to prevent their runoff into nearby streams, whether special conditions are needed to address the potential for a leak or spill where the distribution lines cross surface water features, whether the slopes within the drip fields will create an unacceptable risk of runoff, etc. Thus, the question of whether the proposed land irrigation activities are protective of surface water quality involves a disputed issue of fact appropriate for referral to SOAH.

Furthermore, the Executive Director has seemingly limited surface water quality issues to the impact of wastewater application in the drip irrigation fields. The concerns expressed in HPR Matters’ hearing requests go equally to whether the provisions of the permit regarding the distribution lines and the treatment facility itself will be protective of surface water quality. Thus, the referred issue should not be limited to only the impact of the drip irrigation fields. Accordingly, with respect to surface water, HPR Matters

³ 30 TAC § 222.1(1).

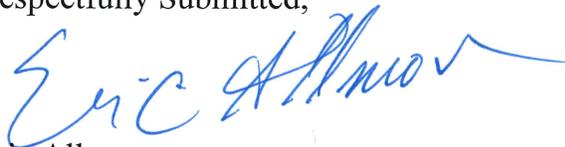
⁴ These are merely examples, and not an exhaustive list of the means by which the permitted activity will potentially impact surface water quality.

recommends that the Commission refer the following issue as raised in its hearing request: “Whether the draft permit is sufficiently protective of surface water.”⁵

III. PRAYER

For the reasons stated above, HPR Matters respectfully asks that the Commission grant HPR Matters’ hearing requests and refer the matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

Respectfully Submitted,



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⁵ This issue bears some resemblance to Issue No. 3 as recommended for referral by the Executive Director. HPR Matters, however, is unsure what the Executive Director means by “surface water sources” as opposed to “surface water,” and believes it should be clear that the hearing is not limited to only considering the impact of the irrigation fields themselves, since HPR Matters’ hearing request was not limited in such a fashion.

CERTIFICATE OF SERVICE

I, Eric Allmon, hereby certify that on June 22, 2015, the foregoing document was electronically filed with the Chief Clerk at the Texas Commission of Environmental Quality in accordance with TCEQ rules and the instructions as set forth by the Chief Clerk on the Commission's website, and that copies were served on all parties listed below via hand delivery, facsimile transmission, or by deposit in the United States Mail.


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