

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *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

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: MAVERICK INVESTMENTS, L.L.C.
TCEQ DOCKET NO. 2015-0833-MWD**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request 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. 2015-0833-MWD

**IN THE MATTER OF
THE APPLICATION OF
3180 MAVERICK
INVESTMENTS, L.L.C.
FOR TPDES PERMIT
NO. WQ0015245001**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

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

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Request for Hearing in the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

A. Background of Facility

Applicant 3180 Maverick Investments, L.L.C. has applied to the TCEQ for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015245001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 15,000 gallons per day. The facility will be located at the southwest corner of the intersection of Farm-to-Market Road 3180 and South Farm-to-Market Road 565 in Chambers County, Texas 77523.

The effluent limitations in the draft permit are: 10 mg/l carbonaceous biochemical oxygen demand (5-day) and 15 mg/l total suspended solids based on the daily average flow; and 126 colony forming units or most probable number/100 ml of *E. coli* based on a single grab sample. Additionally, the pH shall be between 6.0 and 9.0 standard units,

and the effluent shall contain a chlorine residual of at least 1.0 mg/l after a detention time of at least 20 minutes.

If the draft permit is issued, the treated effluent will be discharged to a roadside ditch, then to an unnamed ditch; then to Cotton Bayou; then to Cotton Lake; then to an unnamed channel; then to High Tree Bayou; then to Red Bayou; then to the Trinity Bay in Segment No. 2422 of the Bays and Estuaries. The unclassified receiving water uses are minimal aquatic life use for the roadside ditch and limited aquatic life use for the unnamed ditch. The designated uses for Segment No. 2422 are high aquatic life use, oyster waters, and primary contact recreation.

B. Procedural Background

The TCEQ received 3180 Maverick Investments, L.L.C.'s application for a new TPDES permit on April 23, 2014 and declared it administratively complete on June 27, 2014. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on July 8, 2014, in *The Baytown Sun*. The ED completed the technical review of the application on October 02, 2014 and prepared a draft TPDES permit. The Combined NORI and Notice of Application and Preliminary Decision (NAPD) was published on January 9, 2015, in *The Baytown Sun*. The public comment period ended on February 9, 2015. The Office of Chief Clerk received timely comment letters from Dana Byal, Julie Dittrich, Patrick Dittrich, and George H. Neill, P.E. On April 14, 2015, the ED filed the Response to Comments. The Office of the Chief Clerk mailed the Response to Comments and Final Decision Letter on April 16, 2015.

The Commission received a timely request for a contested case hearing from Dana Byal on May 14, 2015. OPIC recommends that the Commission grant the hearing request submitted by Dana Byal.

II. APPLICABLE LAW

This application was administratively complete on June 27, 2014. 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").

Under the applicable statutory and regulatory requirements, 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” is “one 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).

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 TEX. ADMIN. CODE § 55.209(e).

III. DISCUSSION

A. Determination of Affected Person Status

One individual, Dana Byal, requests a contest case hearing on this application. Mrs. Byal submitted a timely hearing request on May 14, 2015. According to the hearing request, she resides at 4344 South Farm-to-Market Road 565, Baytown, TX, 77523 along the proposed discharge route in close proximity to proposed facility. In her request, Mrs. Byal states concerns protected by the law under which the application will be considered,¹ including floodplain considerations,² nuisance odors,³ and mosquitoes.⁴ Mrs. Byal's interests reasonably relate to the potential effects of sewage treatment and

¹ See 30 TAC § 55.203(c)(1).

² See 30 TAC § 309.13(a).

³ See 30 TAC § 309.13(e), (g).

⁴ See 30 TAC § 309.10(b).

wastewater discharge.⁵ In addition, nuisance odors and mosquitoes may affect Mrs. Byal's health as well as the use and enjoyment of her property.⁶ Finally, Mrs. Byal's property is in close proximity to the facility, which shows a reasonable relationship between the interests stated and the activity regulated.⁷

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing request:

- (1) Whether the proposed facility will cause wastewater to remain stagnant along the South Farm-to-Market Road 565 ditch and adversely impact the use and enjoyment of Mrs. Byal's property?
- (2) Whether the proposed facility will cause a public nuisance and interfere with Mrs. Byal's use and enjoyment of her property?
- (3) Whether the proposed facility meets the definition of a domestic wastewater system under Chapter 217 due to the commercial nature of the development?
- (4) Whether the proposed facility has complied with local requirements?

C. Issues Raised During the Public Comment Period

Issues must be raised during the comment period and must not have been withdrawn. 30 TEX. ADMIN. CODE §§ 55.201(c), (d)(4), 55.211(c)(2)(A). Issue No. 3 was not raised during the comment period.

D. Disputed Issues

There is no agreement between the hearing requests and the ED on the issues raised in the hearing requests.

⁵ See 30 TAC § 55.203(c)(3).

⁶ 30 TAC § 55.203(c)(4).

⁷ *Id.*

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 TEX. ADMIN. CODE § 55.211(c)(2)(A). All of the issues presented are issues of fact appropriate for referral to SOAH.

F. Relevant and Material Issues to the Decision on the Application

The hearing request raises issues relevant and material to the Commission's decision under the requirements of 30 TEX. ADMIN. CODE §§ 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 review motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are materials . . . 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.*

TCEQ is responsible for the protection of water quality under Chapter 26 of the TEX. WATER CODE and 30 TEX. ADMIN. CODE Chapters 305, 307, and 309, as well as under specific rules related to wastewater systems found at 30 TEX. ADMIN. CODE Chapters 309 and 217. Issue No. 1 relating to the location of the proposed facility and site conditions are relevant and material to the Commission's decision. TCEQ rules provide that “[a] wastewater treatment plant unit may not be located in the 100-year flood plain unless the plant unit is protected from inundation and damage that may occur the flood

event.” 30 TAC § 309.13(a). Issue No. 2 related to nuisance odors is relevant and material to the Commission’s decision. TCEQ rules provide that a wastewater treatment facility “abate and control a nuisance odor prior to construction.” 30 TAC § 309.13(e). Issue No. 3 regarding the commercial nature of the wastewater was not raised during the comment period and OPIC does not recommend its consideration. However, if the Commission considers this issue, OPIC finds it relevant and material. Finally, OPIC finds that Issue No. 4 related to compliance with local requirements is not relevant and material to the Commission’s decision. Commission rules do not require the TCEQ to obtain approval from the City of Baytown prior to issuance of a wastewater discharge permit.

G. Issues Recommended for Referral

OPIC recommends referring Issues No. 1 and 2 in § III. B to SOAH for a contested case hearing.

H. Maximum Expected Duration for the Contested Case Hearing.

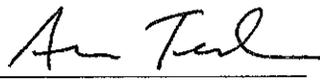
Commission Rule 30 TEX. ADMIN. CODE § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer 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 setting a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE § 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

For these reasons, OPIC respectfully recommends that the Commission grant Dana Byal's request for a contested case hearing.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: 
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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 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. 2015-0833-MWD

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