

TCEQ DOCKET NO. 2015-0840-MWD

APPLICATION BY § **BEFORE THE TEXAS COMMISSION**
NEW BRAUNFELS UTILITIES §
FOR AN AMENDMENT TO § **ON**
TPDES PERMIT NO. §
WQ0010232002 § **ENVIRONMENTAL QUALITY**

**NEW BRAUNFELS UTILITIES' RESPONSE
TO REQUESTS FOR CONTESTED CASE HEARING**

TO THE HONORABLE COMMISSIONERS:

New Braunfels Utilities (“NBU”), the applicant in this matter, files its Response to Requests for Contested Case Hearing in the above-referenced matter, and would respectfully show the following:

INTRODUCTION

NBU requests that the Texas Commission on Environmental Quality (the “Commission” or “TCEQ”) deny all hearing requests filed in this matter and approve NBU’s application for a Texas Pollutant Discharge Elimination System (“TPDES”) permit amendment to Permit No. WQ0010232002 (the “Amendment”).¹ None of the hearing requestors have demonstrated that the activities proposed by NBU as contemplated in the Amendment will adversely affect any of the requestors’ respective personal justiciable interests. Consequently, they are not affected persons. The Texas Water Code expressly prohibits the Commission from granting a request for a contested case hearing unless the Commission determines the request was filed by an affected person. Because the hearing requests do not adequately show that the requestors are

¹ NBU’s existing permit is numbered WQ0010232002 as identified by the Chief Clerk’s notice of the Commission’s consideration of the hearing requests in this matter dated July 15, 2015. The amended permit, if issued, would be numbered WQ0010232004.

affected persons, they must be denied. Accordingly, the TCEQ should grant the Amendment.

BACKGROUND AND PROCEDURAL HISTORY

NBU's permit application was filed on March 26, 2014, and the Executive Director declared the application administratively complete on April 22, 2014. The "Notice of Receipt of Application and Intent to Obtain Water Quality Permit Amendment," (the "NORI") was mailed by the Office of the Chief Clerk and was published by NBU in the *New Braunfels Herald-Zeitung* on May 11, 2014. The NORI was also published in Spanish by NBU in *La Voz de Guadalupe County* on May 26, 2014. The permit application was made available for inspection by the public at the NBU main office located at 263 Main Plaza, New Braunfels, Texas 78131-0289.

After completing his technical review of the permit application, the Executive Director issued an initial Draft Permit on December 18, 2014. The "Notice of Application and Preliminary Decision for TPDES Permit for Municipal Wastewater Major Amendment" (the "NAPD") was mailed by the Office of the Chief Clerk and was published by NBU in the *New Braunfels Herald-Zeitung* on January 11, 2015. The NAPD was also published in Spanish by NBU in *La Prensa De San Antonio* on January 7, 2015. The permit application was still available for inspection at the NBU main office located at 263 Main Plaza, New Braunfels, Texas 78131-0289.

The public comment period for the permit application ended on February 10, 2015. The Executive Director filed his Response to Public Comment on April 17, 2015. The opportunity to request a contested case hearing or request reconsideration of the Executive Director's decision on the permit application ended on May 20, 2015. Hearing

requests were filed by the following persons: Brad Bechtol, Harvey Heideman, Josephine Heideman, Skylar Koepp, and Scott Roots.

RESPONSE TO HEARING REQUESTS

The Commission determines whether to hold an evidentiary contested case hearing on a TPDES amendment application—like NBU’s—under Sections 5.115, 5.556, and 26.028 of the Texas Water Code, and Chapter 55, Subchapter F, of Title 30 of the Texas Administrative Code.² Section 5.556 of the Texas Water Code expressly precludes the Commission from granting a hearing request unless the Commission determines that the request was filed by an affected person as defined by Section 5.115 of the Texas Water Code.³

The Commission may act on a properly noticed TPDES application without holding a public hearing if no affected person has requested a public hearing.⁴ Before holding a contested case hearing, a threshold determination must be made as to whether a requestor is an affected person with standing to request such a hearing.⁵ The Commission may hold a contested case hearing on a TPDES amendment application only after determining, under Section 26.028(h) of the Texas Water Code, that at least one affected person has requested a hearing.

² See also Tex. Gov’t Code §§ 2001.002, .051, .058, .081-.088 (West 2008) (Administrative Procedure Act general provisions applicable to contested case hearings).

³ Tex. Water Code Ann. § 5.556(b) (West 2008) (“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.”)

⁴ *Id.* § 26.028(h).

⁵ *Texas Comm’n on Environmental Quality v. City of Waco*, 413 S.W.3d 409, 410 (Tex. 2013).

Section 5.115 requires the Commission to adopt rules specifying factors to be considered in determining whether a requestor is an affected person.⁶ Pursuant to that requirement, the Commission has adopted Rules 55.201 and 55.203.⁷ Rule 55.201 provides that only the following may request a contested case hearing on a TPDES amendment application:

- (1) the Commission itself;
- (2) the Executive Director;
- (3) the applicant; and
- (4) affected persons, when authorized by law.⁸

Affected persons are authorized by Section 26.028 of the Texas Water Code to request a hearing on a TDPEs amendment application.⁹ Rule 55.201 imposes numerous requirements a hearing requestor must meet for the Commission to consider the hearing request.

If the Commission determines that a hearing requestor is an affected person, the Commission is limited in the issues it may refer to a hearing. Under Section 5.556, the Commission may not refer an issue unless the Commission determines that the issue:

- (1) involves a disputed question of fact;
- (2) was raised during the comment period; and
- (3) is relevant and material to the decision on the application.¹⁰

As shown below, none of the hearing requestors in this matter has satisfied the applicable statutory and administrative requirements in a way that shows that they are

⁶ Tex. Water Code Ann. § 5.115(a) (West Supp. 2014).

⁷ 24 Tex. Reg. 9047.

⁸ 30 Tex. Admin. Code § 55.201(b); *see also id.* § 55.200 (stating applicability of Subchapter F to applications filed under Texas Water Code Chapter 26.)

⁹ Tex. Water Code § 26.028(c) (West Supp. 2014).

¹⁰ *Id.* § 5.556(d). Ann.

affected persons. While the requestors have identified a few relevant issues, the issues should not be referred to hearing because the Commission should not determine that an affected person has requested a hearing as required by law.

I. No requestor has stated how or why the activities proposed by NBU will affect any personal justiciable interest not common to the general public as required by TCEQ rules.

In order to demonstrate affectedness, a hearing request must substantially comply with the following requirements of Rule 55.201:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) 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 proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing; and
- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request.¹¹

Rule 55.203 provides the criteria the Commission uses to determine whether a requestor is an affected person. Under the rule, "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. An interest common to members of the general public does not qualify as a personal justiciable interest."¹² Only when the Commission

¹¹ *Id.* § 55.201(d).

¹² 30 Tex. Admin. Code § 55.203(a); *see also* Tex. Water Code § 5.115(a).

has determined that a hearing requestor has timely submitted a request that substantially complies with the requirements of Rule 55.201, and that the requestor has an interest related to the application, may the Commission hold a contested case hearing on a TPDES amendment application like the one submitted by NBU.¹³ The claimed interest must be personal to the hearing requestor (*i.e.*, not common to the general public) and must also be justiciable (*i.e.*, within the Commission's jurisdiction and redressable by a hearing). In other words, unless the hearing request shows how a person's personal justiciable interest will be affected by the Amendment, the Commission cannot determine that the person is affected, even if the person has some legal right or interest relevant to the Commission's jurisdiction. Stated even more simply, a claimed interest has to be *affected*, and the hearing requestor has to *state how and why* its interest is affected. Otherwise, a hearing is precluded, and the Amendment should be issued.

If a hearing requestor states how and why the requestor's personal justiciable interest is affected by the Application, the Commission shall consider all factors including—but not limited to—the following ones in determining whether the interest is actually affected:

- (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;

¹³ Tex. Water Code §§ 5.115, 5.556, 26.028(h); 30 Tex. Admin. Code §§ 55.201, 203.

- (4) likely impact of the regulated activity on the health and safety of the person, and 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.¹⁴

Of these and other possibly relevant factors, the requestors have only alleged impacts to the use of their property and of the impacted natural resource. They have not, however, shown that any reasonable relationship exists between those interests and the proposed discharge authorized in the Amendment.

All five hearing requests filed in this matter, and that are presently before the Commission, make substantively identical claims.¹⁵ Accordingly, NBU addresses the interests and issues claimed in all of the hearing requests together rather than addressing each hearing request individually. The requests essentially include two statements of how and why the requestors believe they will be affected:

- (1) anticipated increases in algal growth the requestors speculate will result from the Amendment will harm the requestors' recreational use and enjoyment of the river; and
- (2) odors from the proposed facility will adversely impact the requestors' ability to engage in outdoor recreational activities on the Guadalupe River and on their property.

The rest of the hearing requestors' claims are general claims of the requestors' perceived deficiencies in the NBU application and the Executive Director's draft permit, but

¹⁴ 30 Tex. Admin. Code § 55.203.

¹⁵ A thorough review of all hearing requests indicates that each is substantively identical to all others with the exception of the names, addresses, distances, and telephone numbers of the respective hearing requestors.

without any explanation of how or why the alleged deficiencies will impact any particular interest of the requestors—personal, justiciable, or otherwise. The hearing requests implicate a single additional interest: property values. But they do not explain how or why the requestors believe property values will be affected by the Amendment, as they must do under Rule 55.201.

The hearing requests claim that algal growth in the Guadalupe River currently impairs the requestors’ ability to recreate in the river. The requestors anticipate that the Amendment, if approved, will increase algal growth and “further harm our family’s recreational use and enjoyment of the river.” Even assuming such an effect to be true, the stated interest is common to members of the general public. The Guadalupe River below Canyon Dam is a popular watercourse for recreation. Like the requestors, presumably many members of the general public swim, fish, boat, canoe, wade, and otherwise recreate and enjoy the aesthetic value and wildlife of the Guadalupe River.

The hearing requests also claim that odors from the proposed facility will adversely impact the requestors’ ability to engage in outdoor recreational activities in the river and on their property. Though the requestors allege some connection between the proposed activity and their interests, they do not state how or why the activity will affect their personal interests. Recreational interests in the Guadalupe River are common to members of the general public. So, in order for this claim to demonstrate that the requestors are affected, there must be some impact on the requestors’ use of their property. However, the hearing requests provide no specific information about how odors from the proposed facility will adversely affect recreational activities on their

property beyond generally stating that their ability to engage in outdoor recreation will be adversely impacted.

II. The issues raised in the hearing requests should not be referred to hearing because each issue is irrelevant and immaterial or is not related to an interest that is personal and justiciable.

Section 5.115 of the Texas Water Code requires that, for the Commission to determine that a hearing requestor is affected, the requestor must have a justiciable interest. In other words, an imminent injury to the interest claimed by the requestor must likely be redressed by the Commission through a contested case hearing.¹⁶ A justiciable interest must also be fairly traceable to the proposed Amendment.¹⁷ Moreover, Section 5.556 of the Texas Water Code provides that the Commission may not refer an issue to hearing unless the Commission determines that the issue is relevant and material to the agency's decision on the Amendment. Even if a hearing requestor is an affected person, the request must raise a relevant and material issue in order for the Commission to refer the matter to a hearing.

The issues raised by the hearing requestors are as follows:

- (1) The discharges proposed by NBU in its application will adversely impact the requestor's recreational use of the Guadalupe River, including swimming, canoeing, fishing, wading, and boating, as well as the requestors' enjoyment of the aesthetic value of the Guadalupe River and its aquatic life; specifically, the requestors speculate that the Amendment, if

¹⁶ *City of Waco*, 413 S.W.3d at 417 (recognizing that the standard in Section 5.115 embodies the principles of constitutional standing).

¹⁷ *Id.*; see also 30 Tex. Admin. Code § 55.203(c) (listing, among other factors, that a hearing request must show that "a reasonable relationship exists between the interest claimed and the activity regulated").

- issued, would cause an increase in algal growth that will harm their recreational use and enjoyment of the Guadalupe River;
- (2) The activities proposed by NBU in its application will harm, in an unspecific and speculative manner, the requestors' respective property values;
 - (3) Odors, which the hearing requestors speculate will emanate from the facility proposed by NBU in its application, will adversely impact in an unspecific and speculative manner the requestors' ability to engage in outdoor activity;
 - (4) The requestors speculate that the Amendment, as proposed by the Executive Director, will cause degradation of water quality in the Guadalupe River, despite the Executive Director's conclusion, following a Tier 2 antidegradation review, that no degradation of water quality beyond a de minimis extent is expected as a result of the Amendment and that, therefore, there is no need for a determination of whether the lowering of water quality is necessary for important economic or social development as evidenced by the Executive Director's Fact Sheet and Preliminary Decision and Response to Public Comment;
 - (5) The requestors speculate that effluent limitations in the Executive Director's Amendment will not meet water quality standards during low flow periods and will result in reduced dissolved oxygen and violations of minimum dissolved oxygen levels;
 - (6) The requestors allege, without authority, that the proposed site of the new treatment facility is unsuitable due to its proximity to recreational activities in the Guadalupe River, the City of New Braunfels's drinking water intake system, and residential areas;
 - (7) The requestors speculate that light, noise, and sound pollution are a concern; and
 - (8) The requestors allege that NBU's compliance history does not justify the issuance of the Amendment.

Issue 1 is not justiciable. The Commission argued in a recent Texas Supreme Court case that, assuming whether a specific discharge contributes to algal growth in a surface water body “would be, at best, speculative.”¹⁸ Not only is the interest that the requestors claim will be affected by algal growth not personal because it is common to the general public, it is also not justiciable, because it is not traceable to the Amendment.¹⁹ Even if the Commission were to deny NBU’s application, it would not likely redress the complaint, because algae growth could result from any number of causes. As such, Issue 1 should not be referred to hearing.

Issue 2 is not within the Commission’s jurisdiction. As explained by the Executive Director in his Response to Public Comment, the Commission does not have jurisdiction to address or consider property values in its determination of whether or not to issue a TPDES permit.²⁰ Accordingly, even if the requestors had adequately explained how and why the Amendment will impact property values, the issue of property values is irrelevant to the Commission’s decision on the Amendment. Issue 2 should not be referred to hearing.

Issue 3 cannot be redressed. As such, it is not justiciable. While nuisance odors are regulated under Commission rules, applicable regulations are limited to a fixed buffer zone requirement. Wastewater treatment plant units may not be located closer than 150 feet to the nearest property line or, in the alternative, a permittee must secure legal restrictions in the form of a property interest—such as a restrictive easement or

¹⁸ *City of Waco*, 413 S.W.3d at 418.

¹⁹ *Id.* at 417-18.

²⁰ Decision of the Commission Regarding the Petition for Rulemaking Filed by State Representative Betty Brown, District 4, TCEQ Docket No. 2009-1142-RUL, August 31, 2009 (“The TCEQ does not have jurisdiction under the Texas Water Code to consider property values and the marketability of adjacent property,[sic] in its determination of whether to issue a permit or other authorization.”)

right-of-way—prohibiting residential structures within the part of the 150 foot buffer zone not owned by the permittee.²¹ The Amendment, if issued, will require NBU to comply with these regulations.²² There simply is nothing more the Commission can do under its own rules to redress complaints relating to odor, because there are no more stringent requirements the Commission could impose. Issue 3 should not be referred to hearing.

Issues 4 and 5 do not establish any personal interest of the hearing requestors. The Commission’s rules require the requestors to explain how and why the requestors believe anticipated possible degradation of water quality will affect the requestors’ personal interests in a way that is not common to members of the general public. The requestors, instead, generally speculate that the recreational interests they share with the general public will be affected by algal growth that could be caused by any number of factors. Potential degradation of water quality is a relevant issue to the Commission’s decision to grant the Amendment.²³ Absent some evidence as to how and why the alleged degradation might affect the requestors, however, there is no interest the Commission can consider that will be affected. Issues 4 and 5 should not be referred to hearing.

Similarly, Issue 6 does not establish any personal justiciable interest of the hearing requestors. The requestors express their belief that the proposed site for NBU’s new treatment facility is not suitable because the facility will be “closer to town” than the old one. While siting is relevant to the Commission’s decision on whether to grant the

²¹ 30 Tex. Admin. Code § 309.13(e).

²² Fact Sheet and Executive Director’s Preliminary Decision, at 7.

²³ 30 Tex. Admin. Code § 307.5(b)-(c).

Amendment,²⁴ the requestors have failed to establish any personal, justiciable interest that the Commission could redress through a contested case hearing. Accordingly, Issue 6 should not be referred to hearing.

Issue 7 cannot be redressed and does not establish any personal interest of the hearing requestors. It is, therefore, irrelevant and immaterial, and is not justiciable. No statute or administrative rule authorizes the TCEQ to consider “light, noise, and sound pollution” in its consideration of the Amendment. Such concerns are not among the relevant issues that can be redressed by the Commission through a contested case hearing. Issue 7 should not be referred to hearing.

Issue 8, while relevant to the Commission’s consideration of the Amendment, does not implicate any personal justiciable interest of any of the hearing requestors. The Executive Director and the Commission are required to consider NBU’s compliance history in determining whether to grant the Amendment.²⁵ Absent some personal justiciable interest of the requestors, however, issues related to NBU’s compliance history alone cannot be the basis for referring the Amendment to hearing. Because the hearing requestors have failed to show how or why any personal justiciable interest will be affected by the Amendment, Issue 8 should not be referred to hearing.

CONCLUSION

Because the hearing requestors have failed to demonstrate any personal justiciable interest that will be affected by the Commission’s granting of the Amendment, the Commission should find that none of the hearing requestors are

²⁴ *Id.* § 309.10(b).

²⁵ *Id.* § 60.3.

affected persons. Under the Texas Water Code, the Commission is precluded from granting any of the five hearing requests in this matter. NBU respectfully requests that the Commission deny all hearing requests, grant the NBU application, and issue TPDES Permit No. WQ0010232004 as proposed by the Executive Director. NBU further requests that the Commission grant NBU all other relief to which it is entitled by law.

Respectfully submitted,

LLOYD GOSSELINK
ROCHELLE & TOWNSEND, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5847 (Telephone)
(512) 472-0532 (Facsimile)

By: _____


JASON T. HILL
State Bar No. 24046075
JAMES T. ALDREDGE
State Bar No. 24058514

ATTORNEYS FOR APPLICANT
NEW BRAUNFELS UTILITIES

CERTIFICATE OF SERVICE

I certify that a true and correct copy of New Braunfels Utilities' Response to Requests for Contested Case Hearing was served on the following by U.S. Regular Mail, Certified Mail (return receipt requested), electronic mail, hand delivery and/or facsimile on this 27th day of July, 2015.

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

FOR THE EXECUTIVE DIRECTOR:

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

Sonia Bhuiya, Technical Staff
Texas Commission on Environmental
Quality
Water Quality Division, MC-148
P.O. Box 13087
Austin, Texas 78711-3087

FOR PUBLIC INTEREST COUNSEL:

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

FOR OFFICE OF PUBLIC ASSISTANCE:

Brian Christian, Director
Texas Commission on Environmental
Quality
Environmental Assistance Division, MC-
108
P.O. Box 13087
Austin, Texas 78711-3087

REQUESTORS:

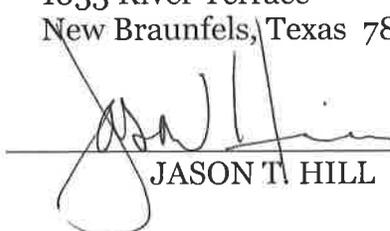
Brad Bechtol
1097 River Terrace
New Braunfels, Texas 78130

Harvey Heideman
896 Mary Preiss Drive
New Braunfels, Texas 78132

Josephine Heideman
896 Mary Preiss Drive
New Braunfels, Texas 78132

Skylar Koeppe
2891 Hunter Road
New Braunfels, Texas 78132

Scott Roots
1033 River Terrace
New Braunfels, Texas 78130



JASON T. HILL