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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

July 27, 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: NEW BRAUNFELS UTILITIES  
TCEQ DOCKET NO. 2015-0840-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 black ink that reads "Pranjal".

Pranjal M. Mehta, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



**TCEQ DOCKET NO. 2015-0840-MWD**

**IN THE MATTER  
OF THE APPLICATION OF  
NEW BRAUNFELS UTILITIES  
FOR TPDES PERMIT  
NO. WQ0015283001**

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**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE  
TO REQUEST 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 (TCEQ or the "Commission") files this Response to Request for Hearing in the above-referenced matter and respectfully submits the following.

**I. INTRODUCTION**

**A. Background of Facility**

On March 26, 2014, New Braunfels Utilities (NBU or Applicant) applied to the TCEQ for a Major Amendment to TPDES Permit, proposed permit no. WQ0015283001. The Major Amendment would authorize the relocation of the Gruene Road Water Reclamation and Wastewater Treatment Facility, the relocation of Outfall 001, and an increase in the volume of discharge of treated domestic wastewater from an annual average flow not to exceed 1.1 million gallons per day (MGD) to an annual average flow not to exceed 4.9 MGD. The proposed permit would include an Interim II phase (2.5 MGD) and Final phase (4.9 MGD). Currently the facility is operating in the Interim I phase (1.1 MGD).

The existing facility is located approximately 700 feet southwest of the crossing of Gruene Loop Road over the Guadalupe River, in Comal County, Texas 78131. The proposed facility's location would be on a 30 acre site located on the northeast corner of the intersection of

Highway 46 (Loop 337) and Gruene Road, approximately 1.8 miles northwest of Interstate Highway 35 on Highway 46 in Comal County, Texas 78130.

The proposed facility will be an activated sludge process plant operated in the complete mix mode. The proposed permit would authorize a registered transporter to haul sludge generated at the facility to a TCEQ permitted landfill, Mesquite Creek Landfill, Permit No. MSW-66B, in Comal and Guadalupe County, for disposal. The proposed permit would also authorize the disposal of sludge at a TCEQ authorized land application site or co-disposal landfill.

The discharge of treated domestic wastewater will enter directly into the Guadalupe River below Canyon Dam in Segment No. 1812 of the Guadalupe River Basin. The designated uses for Segment No. 1812 are exceptional aquatic life use, aquifer protection, public water supply, and primary contact recreation.

## **B. Procedural Background**

TCEQ received Applicant's application on March 26, 2014. On April 22, 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 Comal County, Texas in English on May 11, 2014 in the *New Braunfels Herald-Zeitung*, and in Spanish on May 26, 2014 in the *La Voz*. The Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published in Comal County, Texas in English on January 11, 2015 in the *New Braunfels Herald-Zeitung* and in Spanish on January 7, 2015 in the *La Prensa De San Antonio*. The public comment period ended on February 10, 2015. The Chief Clerk mailed the Executive Director's Decision and Response to Public Comment on April 20, 2015. The deadline for filing requests for a contested case hearing was May 20, 2015.

The Commission received timely requests for a contested case hearing from Brad Bechtol, Harvey Heideman, Josephine Heideman, Skylar Koepp and Scott Roots (Requesters). For the reasons stated herein, OPIC recommends that the Commission grant the hearing requests from Brad Bechtol, Harvey Heideman, Josephine Heideman and Scott Roots. Additionally, OPIC recommends that the Commission grant the hearing request from Skylar Koepp, though OPIC encourages Skylar Koepp to provide further information about his property interests as discussed further in Section III A.

## II. APPLICABLE LAW

This application was declared administratively complete on July 1, 2013. 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 TEXAS 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 TEX. ADMIN. CODE (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. 30 TAC § 55.203(b). 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).

Further, 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. 30 TAC § 55.205(b).

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**

On February 10, 2015, each Requester timely filed a separate request for a contested case hearing listing identical concerns. Each of these hearing requests expresses concerns about water quality, nuisance odor and property values being affected. These hearing requests state that the Requesters engage in recreational activities in, on, and adjacent to the Guadalupe River (River) on their property. These hearing requests further state that the Requesters and their family swim in the water and fish on the River at their property. These Requesters are concerned that the contaminants in the River from the upstream outfall would adversely impact use and enjoyment of their property, and would adversely impact use and enjoyment of the River. The Requesters are also concerned that the odors from the wastewater treatment plant would adversely impact their ability to engage in outdoor recreational activities in the River and on their property. They are further concerned that their property values would be harmed.

For a hearing requestor to be an affected person, the request must be based on an interest that is protected under the law governing the permit application. Water quality is protected by the

Texas Water Code. The TCEQ administers the TPDES program to manage point source pollutant discharges into the navigable waters of Texas. TWC § 5.013(a). Therefore, discharges of treated wastewater into water in the state from facilities regulated under the TPDES program are required to meet the requirements of the Texas Surface Water Quality Standards. (30 TAC Chapter 307). Therefore a reasonable relation exists between the water quality interest expressed in the hearing requests and the TCEQ's regulation of TPDES program.

Brad Bechtol

Brad Bechtol states that he owns and lives on riverfront property located at 1097 River Terrace, New Braunfels, Texas 78130 and his property is approximately 1,100 feet in distance downstream from the proposed discharge point of the proposed relocated wastewater facility. Applicant lists Mr. Bechtol's property as Tract 6 on the Affected Landowner's Map accompanying the application. The map prepared by the ED confirms that Mr. Bechtol's property is in close proximity to the discharge route and proposed facility. Because of his proximity to the proposed facility and discharge route, Mr. Bechtol's water quality interest is an interest which is not common to members of the general public. Accordingly, the OPIC concludes that Mr. Bechtol is an affected person entitled to a contested case hearing.

Harvey Heidman

Harvey Heidman states that he owns riverfront property located at 1321 River Terrace, New Braunfels, Texas 78130 and his property is approximately 100 feet in distance downstream from the proposed discharge point of the proposed relocated wastewater facility. Applicant lists Mr. Heidman's property as Tract 2 on the Affected Landowner's Map accompanying the application. The map prepared by the ED confirms that Mr. Heidman's property is in close proximity to the discharge route and proposed facility. Because of his proximity to the proposed

facility and discharge route, Mr. Heidman's water quality interest is an interest which is not common to members of the general public. Accordingly, the OPIC concludes that Mr. Heidman is an affected person entitled to a contested case hearing.

Josephine Heidman

Josephine Heidman states that she owns riverfront property located at 1321 River Terrace, New Braunfels, Texas 78130 and her property is approximately 100 feet in distance downstream from the proposed discharge point of the proposed relocated wastewater facility. Applicant lists Ms. Heidman's property as Tract 2 on the Affected Landowner's Map accompanying the application. The map prepared by the ED confirms that Ms. Heidman's property is in close proximity to the discharge route and proposed facility. Because of her proximity to the proposed facility and discharge route, Ms. Heidman's water quality interest is an interest which is not common to members of the general public. Accordingly, the OPIC concludes that Ms. Heidman is an affected person entitled to a contested case hearing.

Skylar Koepp

Skylar Koepp states that he owns the property identified as Tract 67 on the Affected Landowner's Map accompanying the application. Applicant lists "Noel Koepp Et Al" as the owner of Tract 67. The Latin phrase "et al" has the common meaning "and others." OPIC has no reason to doubt that Skylar Koepp is another member of the Koepp family with an interest in Tract 67. Assuming this to be the case -- and because of the proximity of Tract 67 to the facility and the discharge route and the water quality concerns expressed in the request -- OPIC finds Skylar Koepp to be an affected person. OPIC notes that the map prepared by the ED which locates Skylar Koepp 2.2 miles away from the facility appears to use Skylar Koepp's mailing address rather than Tract 67 -- the property actually identified in the request as forming the basis

for Skylar Koepp's affected person status. For clarification purposes, OPIC encourages Skylar Koepp to file and serve a timely reply further describing the ownership of Tract 67 and Skylar Koepp's interest in Tract 67. The process for filing and serving a reply are described in the Chief clerk's agenda setting letter dated July 15, 2015.

Scott Roots

Scott Roots states that he owns and lives on riverfront property located at 1033 River Terrace, New Braunfels, Texas 78130 and his property is approximately 1,500 feet in distance downstream from the proposed discharge point of the proposed relocated wastewater facility. Applicant lists Mr. Roots' property as Tract 10 on the Affected Landowner's Map accompanying the application. The map prepared by the ED confirms that Mr. Roots' property is in close proximity to the discharge route and proposed facility. Because of his proximity to the proposed facility and discharge route, Mr. Roots' water quality interest is an interest which is not common to members of the general public. Accordingly, the OPIC concludes that Mr. Roots is an affected person entitled to a contested case hearing.

**B. Issues raised in the hearing request**

1. Whether the proposed permit provisions are adequately protective of water quality.
2. Whether the proposed permit provisions are adequately protective of the Requesters' use and enjoyment of the receiving water.
3. Whether the proposed permitted activities will comply with applicable anti-degradation regulations.
4. Whether the site of the proposed relocated facility is unsuitable for a wastewater treatment plant.
5. Whether the permitted activities would result in nuisance odors.

6. Whether the Commission should deny this permit based on the applicant's compliance history.

7. Whether the proposed facility will harm property values.

**C. Which issues raised in the hearing request are disputed**

All of the issues raised in the hearing request are disputed.

**D. Whether the dispute involves questions of fact or of law**

The disputed issues involve questions of fact.

**E. Whether the issues were raised during the public comment period**

All of the issues were raised during the public comment period.

**F. Whether the hearing request is based on issues raised solely in a public comment which has been withdrawn**

The hearing requests are not based on issues raised solely in a public comment which has been withdrawn.

**G. Whether the issues are relevant and material to the decision on the application**

In order to refer an issue to the State Office of Administrative Hearings ("SOAH"), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. See 30 TAC §§ 55.201(d)(4), 55.209(e)(6) and 55.211(c)(2)(A).

Relevant and material issues are those governed by the substantive law under which this permit is to be issued. See *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248-251 (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.")

The Commission is responsible for the protection of water quality under the TWC Chapter 26 and 30 TAC Chapters 307 and 309, as well as under specific rules related to the wastewater systems found at 30 TAC Chapter 217. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require that the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. Therefore, issues Nos. 1 and 2 related to water quality and use and enjoyment of the Guadalupe River are relevant and material.

Issue no. 3 concerns the anti-degradation standards of the Texas Surface Water Quality Standards in 30 TAC Chapter 307. Requesters question whether the Tier 2 Antidegradation Review conducted by the ED was correct in finding that existing uses of the receiving water will be maintained and protected. The TCEQ’s Tier 2 antidegradation standards are detailed in 30 TAC § 307.5(b)(2). Therefore issue no. 3 is relevant and material.

Issue no. 4 concerns suitability of the site for the proposed relocated facility for a wastewater treatment plant. One of the stated purposes in the TCEQ rules on Domestic Wastewater Effluent Limitations and Plant Siting (30 TAC Chapter 309) is selection of a site that minimizes the possible contamination of ground and surface waters. 30 TAC § 309.10 (b). TCEQ’s siting requirements under 30 TAC § 309.13(a)-(d) were developed to protect surface and groundwater. Therefore, issue No. 4 is relevant and material.

Issue No. 5 questions whether permitted activities would result in nuisance odors. The Commission rules require domestic wastewater treatment facilities to meet buffer zone requirements for the abatement and control of nuisance odors pursuant to 30 TAC § 309.13(e) prior to construction of the new wastewater facility. Therefore issue no. 5 is relevant and material.

Issue no. 6 concerns whether the applicant's compliance history justifies issuance of the modified permit. 30 TAC Chapter 60 requires that the Commission rate the compliance history of every owner and operator of a facility that is regulated under any of the state's applicable environmental laws and create a compliance history report. According to TWC §26.0281, the Commission is required to review the compliance history of every Applicant and facility when an application for a discharge permit is received. Therefore the issue no. 6 is relevant and material.

Issue no. 7 concerns impact to the property values. The Commission does not have jurisdiction to review the effect, if any, the location of the wastewater treatment facility might have on the property values and marketability of nearby property. Therefore, issue No. 7 concerning the adverse effect on the Requesters' property values is not relevant and material.

#### **H. Issues for Referral**

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

1. Whether the proposed permit provisions are adequately protective of water quality.
2. Whether the proposed permit provisions are adequately protective of the Requesters' use and enjoyment of the receiving water.
3. Whether the proposed permitted activities will comply with applicable anti-degradation regulations.
4. Whether the site of the proposed relocated facility is unsuitable for a wastewater treatment plant.
5. Whether the permitted activities would result in nuisance odors.
6. Whether the Commission should deny this permit based on the applicant's compliance history.

#### IV. MAXIMUM EXPECTED DURATION OF HEARING

Commission Rule 30 TAC § 55.115(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.

#### V. CONCLUSION

OPIC recommends granting the request of Skylar Koepp but also encourages Skylar Koepp to submit a timely reply clarifying Skylar Koepp's ownership interest in Tract 67 identified in the Adjacent Landowner's map filed with the application. Additionally, OPIC recommends granting the hearing requests from Brad Bechtol, Harvey Heideman, Josephine Heideman, and Scott Roots. Furthermore, OPIC recommends referring this application to the State Office of Administrative Hearings for a nine-month hearing on the issues listed in Section III. H above.

Respectfully submitted,

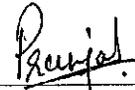
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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2015 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing was 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.



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Pranjal M. Mehta



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TCEQ DOCKET NO. 2015-0840-MWD**

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