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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 17, 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: TRIO RESIDENTIAL DEVELOPERS, INC.  
TCEQ DOCKET NO. 2015-0841-MWD**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Reconsideration and Requests for a Contested Case Hearing in the above-entitled matter.

Sincerely,

  
Eli Martinez, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2015-0841-MWD**

<b>IN THE MATTER OF THE</b>	<b>§</b>	<b>BEFORE THE</b>
<b>APPLICATION BY TRIO</b>	<b>§</b>	
<b>RESIDENTIAL DEVELOPERS, INC.</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>FOR WATER QUALITY PERMIT</b>	<b>§</b>	
<b>NO. WQ0015219001</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO REQUESTS FOR RECONSIDERATION AND REQUESTS FOR A  
CONTESTED CASE HEARING**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Response to Requests for Reconsideration and Requests for a Contested Case Hearing in the above-referenced matter.

**I. INTRODUCTION**

**A. Background of Facility**

Trio Residential Developers, Inc. (Trio or Applicant) has applied for a permit to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 140,000 gallons per day (gpd) via surface irrigation of 40.5 acres of public access land. This permit would not authorize a discharge of pollutants into water in the state. The effluent limitations for the proposed permit, based on a 30-day average, are 10 mg/l biochemical oxygen demand (BOD5), 15 mg/l total suspended solids (TSS), and the pH shall not be less than 6.0 standard units or greater than 9.0 standard units. The effluent would contain a chlorine residual of at least 1.0 mg/l after a detention time of at least 20 minutes based on peak flow.

The draft permit authorizes the disposal of treated domestic wastewater effluent at an interim phase daily average flow not to exceed 70,000 gpd and a final phase daily average flow not to exceed 140,000 gpd. The facility would include one storage pond with a total surface area of 1.5 acres and total storage capacity of 8.6 acre-feet for storage of treated effluent prior to irrigation. Application rates to the irrigated land would not exceed 3.9 acre-feet per year per acre irrigated. The Applicant would be required to maintain Old World Bluestem grass (warm season) and Ryegrass (cool season) on the disposal site. The proposed wastewater treatment facility and disposal site would be located in the drainage basin of the Upper Cibolo Creek in Segment No. 1908 of the San Antonio River Basin. The proposed wastewater treatment facility and disposal site would be located along the north right-of-way of Ammann Road at its intersection with Rolling Acres Trail in Kendall County, Texas.

**B. Procedural Background**

The application was received on January 29, 2014, and declared administratively complete on March 14, 2014. The Notice of Receipt of Application and Intent to Obtain Permit (NORI) was published on April 4, 2014 in *The Boerne Star* in Kendall County, Texas. The Executive Director completed the technical review of the application on June 16, 2014 and prepared a draft permit. The Notice of Application and Preliminary Decision (NAPD) was published on August 11, 2014 in *The Boerne Star* in Kendall County, Texas. A Notice of Public Meeting was published on September 19, 2014 in *The Boerne Star*, and the public meeting was held on October 30, 2014 at the Hampton Inn & Suites, 34935 Interstate 10 West in Boerne, Texas.

It was determined that the place where the application and the draft permit were made available for viewing (the Fairs Oaks Ranch City Hall, 7286 Dietz Elkhorn Road, Fair Oaks Ranch, Texas) during the original NORI/NAPD period was in Bexar county, and not Kendall county where the facility is proposed to be located. Therefore, Trio published a combined NORI/NAPD on December 19, 2014 in *The Boerne Star*. The application and draft permit were made available for viewing at the Kendall County Courthouse located at 201 E. San Antonio Avenue, Boerne, Texas. The comment period for this application ended on January 20, 2015.

The Executive Director originally filed a decision and Response to Comments on April 24, 2015. An amended response was filed to correct the list of commenters on page one and fix a typographical error in the procedural background on April 30, 2015. The Revised Executive Director's Decision Letter was mailed on May 1, 2015, extending the deadline for requests for reconsideration or contested case hearing thirty calendar days to June 1, 2015. The Commission received timely requests for reconsideration from James Cannizzo and Annalisa Pace and timely requests for a contested case hearing from Steve Hartpence, Dee Anna & Gary Manitzas, Mary & James McConnell, Cheryl & Harry Schilling, and Frank Trapasso. Since this application was administratively complete after September 1, 1999, it is subject to the procedural requirements of House Bill 801 (76th Legislature, 1999).

## **II. REQUESTS FOR RECONSIDERATION**

### **A. Requirements of Applicable Law**

The application was declared administratively complete after September 1, 1999 and is subject to the requirements of Texas Water Code Chapter 5, Subchapter M, Environmental Permitting Procedures, §§5.551 to 5.556, added by Acts 1999, 76<sup>th</sup> Leg., ch 1350 (commonly

known as "House Bill 801"). House Bill 801 created the request for reconsideration as a procedural mechanism which allows the Commission to review and reconsider the Executive Director's decision on an application without a contested case hearing. Following the Executive Director's technical review and issuance of the Executive Director's decision and response to comments, a person may file a request for reconsideration or a request for contested case hearing, or both. TEXAS WATER CODE §5.556; 30 TEXAS ADMINISTRATIVE CODE ("TAC") §55.201(e).

Any person may file a request for reconsideration of the executive director's decision. 30 TAC 55.201(e). The request for reconsideration must state the reasons why the Executive Director's decision should be reconsidered. 30 TAC 55.201(e). Responses to requests for reconsideration should address the issues raised in the request. 30 TAC §55.209(f).

#### **B. Discussion**

The Commission received timely requests for reconsideration from James Cannizzo, on behalf of the United States Army, and Annalisa Pace, on behalf of the Greater Edwards Aquifer Alliance (GEAA). These requests for reconsideration contend that the Executive Director erred in not determining that the proposed plant is undersized based on appropriate average annual flow, and not requiring a karst feature survey to be submitted and analyzed for potential contamination transmission into groundwater—including the Edward's Aquifer. GEAA's request also argues that the draft permit has the potential to contaminate surface water due to runoff during heavy rain events and describes a plant that cannot properly handle nutrient loads.

While OPIC is sympathetic to the issues raised in the requests for reconsideration and concludes that these concerns should be referred to SOAH for a contested case hearing based on the hearing requests submitted by others, we cannot conclude that the permit should be denied without further developing the record and allowing a full and fair hearing after consideration of all relevant facts and legal requirements. OPIC therefore recommends that the Commission deny each of the requests for reconsideration.

### **III. REQUESTS FOR CONTESTED CASE HEARING**

#### **A. Requirements of Applicable Law**

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code § 5.556 added by Acts 1999, 76<sup>th</sup> Leg., ch 1350 (commonly known as "House Bill 801"). 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 application. 30 TEXAS ADMINISTRATIVE CODE (TAC) § 55.201(d). Under 30 TAC § 55.203(a), 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." This justiciable interest does not include an interest common to the general public. 30 TAC §

55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors 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.

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).

The Commission has also set forth specific criteria for judging whether a group or organization should be considered an "affected person." 30 TAC § 55.205(a) states that a group or association may request a 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.

Any group or association which meets all of these criteria shall be considered an "affected person."

Accordingly, pursuant to 30 TAC § 55.209(e), 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 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.

### **B. Determination of Affected Person Status**

The Office of the Chief Clerk received timely filed requests for a contested case hearing on the issuance of Applicant's permit from Steve Hartpence, Dee Anna & Gary Manitzas, Mary & James McConnel, Cheryl & Harry Schilling, and Frank Trapasso. Each of the above requests included relevant contact information and raised disputed issues outlining why the requestor would be adversely affected by the proposed activity in a manner not common to members of the general public.

#### I. Steve Hartpence

Steve Hartpence submitted a hearing request raising concerns related to potential contamination of groundwater and surface water, as well as potential willful neglect of permit obligations by the permittee based on a history of deceptive and coercive acts.

The proximity of Mr. Hartpence's property to the proposed land application area is confirmed on a map produced by the Commission's Geographic Information System (GIS) team, which indicates that Mr. Hartpence's property is located .75 miles from the site. There is, therefore, a reasonable relationship between the interests stated in Mr. Hartpence's request and the activity regulated.<sup>1</sup> The expressed concerns related to contamination of ground and surface

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<sup>1</sup> 30 TAC § 55.203(c)(3).

water are protected by the law under which the application will be considered.<sup>2</sup> OPIC therefore recommends to the Commission that Mr. Hartpence be found an affected person.

## II. Dee Anna and Gary Manitzas

Requestors Dee Anna and Gary Manitzas submitted a hearing request raising concerns related to potential contamination of groundwater and surface water resources. Although OPIC agrees that these concerns are interests protected by the law under which the application will be considered, the map produced by the GIS team indicates that the Manitzas' property is located 2.5 miles from the proposed land application area. Due to the long distance between the application site and the Manitzas' property, OPIC cannot conclude that a reasonable relationship exists between the interests stated and the activity regulated.<sup>3</sup> OPIC therefore recommends to the Commission that the Manitzas not be determined affected persons, and that their request for a hearing be denied.

## III. Mary & James McConnell

Mary & James McConnell submitted a hearing request raising concerns related to potential contamination of groundwater and surface water resources, depletion of water resources, nuisance issues related to noise and odor, and defects in the application and notice process—including misstatements related to the location of the property, the distance of the proposed plant site from the City of Fair Oaks Ranch wastewater treatment plant, characterization of the land on which disposal will take place, and posting of the complete application in the county in where the property will be located.

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<sup>2</sup> 30 TAC § 55.203(c)(1).

<sup>3</sup> 30 TAC § 55.203(c)(3).

The proximity of Mary & James McConnell's property to the proposed land application area is confirmed on a map produced by the Commission's Geographic Information System (GIS) team, which indicates that their property lies 1.14 miles from the site. There is, therefore, a reasonable relationship between the interests raised in the request and the activity regulated.<sup>4</sup> The expressed concerns related to contamination of ground and surface water, odor, and notice are protected by the law under which the application will be considered.<sup>5</sup> OPIC therefore recommends to the Commission that Mary & James McConnell be found affected persons.

#### IV. Cheryl & Harry Schilling

Cheryl & Harry Schilling submitted a hearing request raising concerns related to potential contamination of groundwater and surface water resources, depletion of water resources, nuisance issues related to noise and odor, and defects in the application and notice process—including misstatements related to the location of the property, the distance of the proposed plant site from the City of Fair Oaks Ranch wastewater treatment plant, characterization of the land on which disposal will take place, and posting of the complete application in the county in where the property will be located.

The proximity of Mr. and Mrs. Schilling's property to the proposed land application area is confirmed on a map produced by the Commission's Geographic Information System (GIS) team, which indicates that their property lies 1.34 miles from the site. There is, therefore, a reasonable relationship between the interests raised in the request and the activity regulated.<sup>6</sup> The expressed concerns related to contamination of ground and surface water, odor, and notice

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<sup>4</sup> 30 TAC § 55.203(c)(3).

<sup>5</sup> 30 TAC § 55.203(c)(1).

<sup>6</sup> 30 TAC § 55.203(c)(3).

are protected by the law under which the application will be considered.<sup>7</sup> OPIC therefore recommends to the Commission that Mary & James McConnell be found affected persons.

#### V. Frank Trapasso

Frank Trapasso submitted a hearing request raising concerns related to potential contamination of groundwater and surface water resources, as well as potential nuisance issues related to odor.

The proximity of Mr. Trapasso's property to the proposed land application area is confirmed on a map produced by the Commission's Geographic Information System (GIS) team, which indicates that his property lies 0.33 miles from the site. There is, therefore, a reasonable relationship between the interests raised in the request and the activity regulated.<sup>8</sup> The expressed concerns related to contamination of ground and surface water, and nuisance odors are protected by the law under which the application will be considered. OPIC therefore recommends to the Commission that Frank Trapasso be found an affected person.

#### **C. Issues raised in 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) & (d)(4), 55.211(c)(2)(A).

#### **D. Disputed Issues**

There is no agreement between the Applicant, the Executive Director, and the Requestors on the issues presented above.

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<sup>7</sup> 30 TAC § 55.203(c)(1).

<sup>8</sup> 30 TAC § 55.203(c)(3).

**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. *See* 30 TAC §55.211(b)(3)(A) and (B). The issues concerning potential contamination of groundwater and surface water, depletion of water resources, nuisance issues related to noise and odor, and defects in the application and notice process—including misstatements related to the location of the property, the distance of the proposed plant site from the City of Fair Oaks Ranch wastewater treatment plant, characterization of the land on which disposal will take place, and posting of the complete application in the county in where the property will be located, are all issues of fact. However, OPIC is of the opinion that the issue regarding potential willful neglect of permit obligations by the permittee based on a history of deceptive and coercive acts is conjectural, not authorized by the proposed permit, and inappropriate for referral.

**F. Relevant and Material Issues**

The hearing request raises 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). Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.<sup>9</sup> 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.<sup>10</sup>

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<sup>9</sup> See 30 TAC §55.209(e)(6)

<sup>10</sup> *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.”)

Potential contamination of ground and surface water may adversely affect the use of impacted natural resources and this danger is addressed by the Commission rules.<sup>11</sup> The possibility of odor nuisance is also specifically addressed by 30 TAC section 309.13(e) and (g). For the above reasons, these issues are appropriate for referral to State Office of Administrative Hearings.

Conversely, OPIC agrees with the Executive Director's opinion that the concerns over noise and depletion of water resources fall outside of the scope of TCEQ jurisdiction to maintain and protect water quality of the state, as implicitly authorized by the Texas Water Code Chapter 26. Noise nuisance is not addressed by the Texas Water Code, and the proposed permit does not authorize consumption of water, but rather its treatment and disposal. These issues therefore cannot be considered relevant and material to the Commission's decision.

OPIC notes that one of the technical errors in the application—as well as the notice defect raised by some requestors—have been cured and rendered moot. Specifically, while the original permit application indicated that there were no WWTPs within three miles of the proposed facility, on November 12, 2014, TCEQ received an updated portion of the application that corrected the original representation and indicated that the City of Fair Oaks Ranch WWTP was within three miles of the proposed facility. Further, although initially the application and draft permit were not made available in Kendall County where the facility is proposed to be located—but at the Fair Oak Ranch City Hall located in Bexar County—subsequent to the public meeting on the application, the Applicant published a combined NORI and NAPD on December

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<sup>11</sup> See 30 TAC Chapter 307. *See also* 30 TAC §309.13(c).

19, 2014 in the *Boerne Star* to correct this notice deficiency. For this notice, the required documents for public view were posted at the Kendall County Courthouse, 201 E. San Antonio Avenue, Boerne, Texas, in the county where the facility is proposed to be located. Because these defects have been cured, OPIC does not find that they are appropriate for referral.

**G. Issues Recommended for Referral**

OPIC recommends that the following disputed issues of fact be referred to the State Office of Administrative Hearings for a contested case hearing:

- 1) Will the permitted activity result in contamination of surface or groundwater?
- 2) Will the permitted activity pose an odor nuisance?

**H. Maximum Expected Duration of Hearing**

Commission Rule 30 TEX. ADMIN. CODE § 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 TEX. ADMIN. CODE §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**

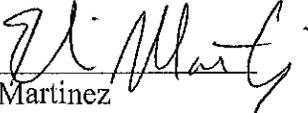
OPIC recommends denying the requests for reconsideration and granting the contested case hearing requests of Steve Hartpence, Mary & James McConnel, Cheryl & Harry Schilling, and Frank Trapasso. Due to the distance between their property and the proposed application

area, OPIC recommends that the Commission deny the request of Dee Anna and Gary Manitzas.

OPIC further recommends that this matter be referred to SOAH for an evidentiary hearing on the issues recommended above for a maximum duration of nine months.

Respectfully submitted,

Vic McWherter  
Public Interest Counsel

By   
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**CERTIFICATE OF SERVICE**

I hereby certify that on August 17, 2015, the original and seven true and correct copies of the Office of the Public Counsel's Response to Requests for Reconsideration and Requests for a Contested Case 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.

  
Eli Martinez

**MAILING LIST**  
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**TCEQ DOCKET NO. 2015-0841-MWD**

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