

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

August 31, 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: **ARBOR WAY, INC.**
TCEQ DOCKET NO. 2015-0988-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 "Pranjal".

Pranjal M. Mehta, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2015-0988-MWD

**IN THE MATTER
OF THE APPLICATION OF
ARBOR WAY, INC. FOR
RENEWAL OF PERMIT
NO. WQ0014649001**

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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 June 5, 2014, Arbor Way, Inc. (Applicant) applied to the TCEQ for renewal of Permit No. WQ0014649001 to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 430,000 gallons per day via surface irrigation of 170 acres of a golf course. The facility would include a storage pond with a total surface area of 4.5 acres and total capacity of 63.3 acre-feet for storage of treated effluent prior to irrigation. The proposed wastewater treatment facility will serve Travis County Improvement District No. 1.

The facility would consist of an activated sludge process plant using the complete mix mode of single staged nitrification. Treatment units for all phases would include a bar screen, an aeration basin, a final clarifier, a digester, and a chlorine contact chamber. The facility has not been constructed.

The wastewater treatment facility and disposal site are located approximately 1,200 feet northwest of the intersection of Haynie Flat Road and Lakeside Drive, in Travis County, Texas 78669. The wastewater treatment facility and disposal site are located in the drainage basin of Lake Travis in Segment No. 1404 of the Colorado River Basin.

B. Procedural Background

TCEQ received this application on June 5, 2014. On July 16, 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 English on August 4, 2014 in the *Austin American-Statesman*. The Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published in English on February 5, 2015 in the *Austin American-Statesman*. The public comment period ended on March 9, 2015. The Chief Clerk mailed the Executive Director's Decision and Response to Public Comment on May 12, 2015. The deadline for filing requests for a contested case hearing was June 11, 2015.

The Commission received timely requests for a contested case hearing from Katy & Kim Franceschini and Jerry T. Shelby. For the reasons stated herein, OPIC recommends that the Commission deny the hearing requests from Katy & Kim Franceschini (Mr. & Ms. Franceschini) and Jerry T. Shelby.

II. APPLICABLE LAW

This application was declared administratively complete on July 16, 2014. 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 TEX. 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).

There is no right to a contested case hearing for an application under TWC Chapter 26 to renew or amend a permit if:

- (A) the applicant is not applying to:
 - (i) increase significantly the quantity of waste authorized to be discharged; or
 - (ii) change materially the pattern or place of discharge;
- (B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;
- (C) any required opportunity for public meeting has been given;

- (D) consultation and response to all timely received and significant public comment has been given; and
- (E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit.

30 TAC § 55.201(i)(5).

III. DISCUSSION

A. Right to Hearing

Because this application is for a permit renewal under TWC Chapter 26, the hearing request must be evaluated to determine if there is a right to a hearing under 30 TAC § 55.201(i)(5). Based on these requirements, OPIC concludes that there is no right to a contested case hearing in this matter.

Applicant is not applying to increase the quantity of waste to be discharged or the pattern or place of discharge. 30 TAC § 55.201(i)(5)(A). The Applicant has applied for renewal of the existing permit to authorize the discharge of treated domestic wastewater via surface irrigation. This renewal permit would not authorize the Applicant to directly discharge into water in the state. Further, it appears that the standards and criteria in the renewed permit would maintain the quality of the treated domestic wastewater to be disposed of through surface irrigation. 30 TAC § 55.201(i)(5)(B). Neither Mr. & Ms. Franceschini nor Mr. Jerry T. Shelby has contended that any changes have been made to the permit which would trigger a right to hearing under the applicable law. OPIC cannot find that the draft permit changes the Applicant's operation in a manner that increases the quantity of wastewater being disposed of, or materially changes the pattern or place of wastewater disposal.

The ED filed a Response to Comments on May 7, 2015. OPIC is satisfied that the public comments in this matter were processed in accordance with TCEQ rules. 30 TAC § 55.201(i)(5)(D).

Finally, Applicant's compliance history for the previous five years raises no issues regarding its ability to comply with a material term of the permit. 30 TAC § 55.201(i)(5)(E). The Commission rated the Applicant as "Unclassified" performer and the Regulated Entity as "Unclassified" performer in their compliance history classifications developed under the criteria established by the Commission rules. Therefore Applicant's compliance history does not cause OPIC to question Applicant's ability to comply with a material term of the permit. Accordingly, OPIC concludes there is no right to a contested case hearing pursuant to 30 TAC § 55.201(i)(5). In the event the Commission disagrees and determines a hearing should be convened, OPIC provides further analysis below concerning whether requesters are affected persons.

B. Determination of affected person status

Mr. & Ms. Franceschini

Mr. & Ms. Franceschini have shown that they meet the requirements for affected person status under 30 TAC § 55.203(a). Mr. & Ms. Franceschini complied with the requirement to identify a personal justiciable interest affected by this renewal permit application by explaining their location and distance relative to the facility and how and why they believe they will be adversely affected by the operations at the facility in a manner not common to members of the general public. 30 TAC § 55.201(d)(2).

Mr. & Mrs. Franceschini have mentioned in their hearing request that the facility is approximately 750 feet from their home in Lakecliff and their home is located on hole 6 and adjacent to hole 7 of the Lakecliff Golf Course. They further mentioned that when the golf course irrigation system is running, the spray from the commercial gear drive sprinkle heads spray onto their property and when the wind is blowing, it actually covers their windows and house with mist. They further expressed concerns about runoff from the golf course flowing

directly into Lake Travis and ponds around the golf course and subdivision. They are also concerned about the possible contamination due to such runoff. Because of their proximity to the regulated activity and their concerns expressed about contamination, these requesters could be affected by the disposal of wastewater through surface irrigation in a manner not common to members of the general public. Therefore, if the Commission were to determine that a right to hearing exists, OPIC finds that Mr. & Ms. Franceschini would meet the requirements for establishing affected person status.

Jerry T. Shelby

Jerry T. Shelby has shown that he meets the requirements for affected person status under 30 TAC § 55.203(a). Mr. Shelby complied with the requirement to identify his personal justiciable interest affected by this renewal permit application by explaining his location and distance relative to the facility and how and why he believes he will be adversely affected by the operations at the facility in a manner not common to members of the general public. 30 TAC § 55.201(d)(2).

Mr. Shelby has mentioned in his hearing request that the proposed facility is approximately one quarter mile from his home at 25505 Cliff Crossing, Spicewood, Texas 78669. He mentioned in his request that the golf course irrigation system water presently discharges into his property when the system is running. He is concerned about the possible contamination. Because of his proximity to the regulated activity and his concerns expressed about contamination, this requester could be adversely affected by the disposal of wastewater through surface irrigation in a manner not common to members of the general public. Therefore, if the Commission were to determine that a right to hearing exists, OPIC finds that Mr. Shelby would meet the requirements for establishing affected person status.

C. Issues raised in the hearing requests

1. Whether the proposed activities under this renewal application would result in wastewater run-off into Lake Travis or ponds around the subdivision and golf course.
2. Whether the proposed activities under this renewal application would result in contamination of water in Lake Travis or ponds around the subdivision and golf course.
3. Whether the proposed activities under this renewal application would result in wastewater run-off upon Requesters' properties or subdivision streets leading to possible health problems for subdivision residents.
4. Whether the proposed renewal application would adversely affect the Requesters' property values.
5. Whether the proposed activities under this renewal application would create visual detriment for Mr. & Mrs. Franceschini.
6. Whether the proposed activities under this renewal application would adversely harm the wild life ecosystem.
7. Whether the proposed activities under this renewal application would expose firefighters and the neighborhood properties to be protected in case of fire, to the wastewater effluent as the fire water distribution system to the various fire hydrants located throughout the subdivision are integral to the proposed method for disposal of the wastewater effluent under this proposed renewal application.

D. 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 (TSWQS) 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. TSWQS require the protection of surface water, groundwater, aquatic and terrestrial life, and human health.

Therefore, issue no. 1, 2, 3 and 6 related to water quality and use and enjoyment of the property are relevant and material.

Issue no. 4 concerns impact to 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. 4 concerning the adverse effect on the Requesters' property values is not relevant and material. During the water quality permitting process, the Commission also does not have authority to consider issues such as visual aesthetics. Therefore, issue No. 5 is not relevant and material.

The use of wastewater through the fire hydrant system could be authorized under 30 TAC Chapter 210, Use of Reclaimed Water. A Chapter 210 Reuse Authorization may only be obtained in conjunction with a permit from the commission in accordance with the requirements of 30 TAC, Chapter 305. However, the Applicant has not sought such a reuse authorization. Issue no. 7 would be relevant and material to such a reuse authorization, but is not relevant and material to the current permit renewal application.

V. CONCLUSION

Having found that there is no right to hearing for this renewal application, OPIC respectfully recommends the Commission deny all of the hearing requests. However, if the Commission disagrees and chooses to refer this case for a hearing at the State Office of Administrative Hearings (SOAH), OPIC would recommend granting the requests of Mr. & Ms. Franceschini and Mr. Shelby. OPIC would further recommend referral of the following relevant and material issues:

1. Whether the proposed activities under this renewal application would result in wastewater run-off into Lake Travis or ponds around the subdivision and golf course.

2. Whether the proposed activities under this renewal application would result in contamination of water in Lake Travis or ponds around the subdivision and golf course.
3. Whether the proposed activities under this renewal application would result in wastewater run-off upon Requesters' properties or subdivision streets leading to possible health problems for subdivision residents.
4. Whether the proposed activities under this renewal application would adversely harm wild life ecosystem.

If this matter is referred to SOAH, OPIC recommends a hearing duration of six months from the first day of the preliminary hearing to issuance of the proposal for decision.

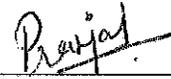
Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: Pranjal
Pranjal M. Mehta
Assistant Public Interest Counsel
State Bar No. 24080488
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-0574 Phone
(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 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.



Pranjal M. Mehta

**MAILING LIST
ARBOR WAY, INC.
TCEQ DOCKET NO. 2015-0988-MWD**

FOR THE APPLICANT:

Robert A. Seale, President
Arbor Way, Inc.
c/o Vorys, Sater, Seymour and Pease,
LLP
700 Louisiana Street, Suite 4100
Houston, Texas 77002

Jack A. Carter, P.E.
Dannenbaum Engineering Corporation
3100 West Alabama Street
Houston, Texas 77098-2004
Tel: 713/527-6462 Fax: 713/527-6338

Jason Schultz, P.E.
Dannenbaum Engineering Corporation
3100 West Alabama Street
Houston, Texas 77098-2004
Tel: 713/527-6487 Fax: 713/527-6456

FOR THE EXECUTIVE DIRECTOR

Alicia Ramirez, Staff Attorney
TCEQ Environmental Law Division
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606

Jose Matinez, Technical Staff
TCEQ Water Quality Division, MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4468 Fax: 512/239-4430

Brian Christian, Director
TCEQ Environmental Assistance
Division, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678

FOR ALTERNATIVE DISPUTE
RESOLUTION

Kyle Lucas
TCEQ Alternative Dispute Resolution,
MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4010 Fax: 512/239-4015

FOR THE CHIEF CLERK:

Bridget Bohac
TCEQ Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311

REQUESTERS:

Katy & Kim Franceschini
24902 Stableford Circle
Spicewood, Texas 78669-3278

Jerry T. Shelby
25505 Cliff Crossing
Spicewood, Texas 78669-3262

