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Jon Niermann, *Commissioner*
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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 9, 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: DMS REAL TREE, LLC
TCEQ DOCKET NO. 2015-1264-MWD**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Request in the above-entitled matter.

Sincerely,


Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2015-1264-MWD

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION BY	§	
DMS REAL TREE, LLC	§	TEXAS COMMISSION ON
FOR TPDES PERMIT NO.	§	
WQ0015293001	§	ENVIRONMENTAL QUALITY

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

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 Hearing Request in the above-referenced matter.

I. INTRODUCTION

A. Background of Facility

DMS Real Tree, LLC. (DMS or Applicant) has applied for new TPDES Permit No. ~~WQ0015293001~~ to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 540,000 gallons per day. The proposed facility is an activated sludge process plant operated in the complete mix mode. Treatment units in the Interim I phase will include a bar screen, an aeration basin, a final clarifier, a sludge digester, and a chlorine contact chamber. Treatment units in the Interim II phase will include a bar screen, four aeration basins, a final clarifier, four sludge digesters, and a chlorine contact chamber. Treatment units in the Final phase will include a bar screen, nine aeration

basins, two final clarifiers, nine sludge digesters, and two chlorine contact chambers. The facility has not been constructed.

Sludge generated from the treatment facility would be hauled by a registered transporter and disposed of at a TCEQ authorized land application site, codisposal landfill, or facility authorized to treat sludge. The facility would be located approximately 2,500 feet north of the intersection of Highway 21 and Yarrington Road, in Hays County, Texas 78640. The treated effluent would be discharged to Hemphill Creek, then to Morrison Creek, then to Lower San Marcos River in Segment No. 1808 of the Guadalupe River Basin. The unclassified receiving water use is limited aquatic life use for Hemphill Creek. The designated uses for Segment No. 1808 are high aquatic life use, public water supply, and primary contact recreation.

B. Procedural Background

The TCEQ received DMS Real Tree, LLC's application for new TPDES permit No. WQ0015293001 on August 25, 2014 and declared it administratively complete on September 4, 2014. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on October 9, 2014, in the *Austin American-Statesman*. The NORI was published in Spanish on October 9, 2014 in *¡Ahora Sí!*. The ED completed the technical review of the application and prepared an initial TPDES draft permit.

The Notice of Application and Preliminary Decision (NAPD) was published on April 27, 2015, in the *Austin American-Statesman*. The NAPD was published in Spanish on April 30, 2015 in *¡Ahora Sí!*. The public comment period ended on June 1, 2015. The Executive Director's response to comments was mailed on July 10, 2015, and the time period for filing hearing requests ended on August 10, 2015.

On August 10, 2015, the TCEQ received a timely hearing request from Jacqueline Cullom on behalf of the City of San Marcos (Requestor or San Marcos). As discussed below, OPIC recommends granting the hearing request and referring the matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

II. DISCUSSION

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 (TWC) § 5.556 added by Acts 1999, 76th Leg., ch 1350 (commonly known as "House Bill 801"). Under 30 Texas Administrative Code ("TAC") § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) 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;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

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, safety, and 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.

This standard does not require the requester to show that they will ultimately prevail on the merits, only that they “show that they will potentially suffer harm or have a justiciable interest that will be affected.” *United Copper Industries v. Grissom*, 17 S.W.3d 797, 803 (Tex. App.—Austin 2000, pet. dismiss’d) (citing *Heat Energy Advanced Tech., Inc. v. West Dallas Coalition for Env’tl. Justice*, 962 S.W.2d 288, 289 (Tex. App.—Austin 1998, pet. denied)).

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(e).

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;
- (7) a maximum expected duration for the contested case hearing.

B. Determination of Affected Person Status

The hearing request states that the City is an affected person, by virtue of its status as a governmental entity with authority over and interest in the issues relevant to the application. Specifically, the City cites to its authority as a home rule municipality to operate a utility system inside or outside its corporate limits.¹ The proposed location of the plant in the application is within an area projected to be served by San Marcos as reflected in the City's adopted Wastewater Master Plan, and the City has codified a policy disfavoring sewer package treatment plants.² Additionally, the City owns the San Marcos Airport, near the proposed discharge route.

Based on the authority over and interest in the issues relevant to the application and the City's ownership of property along the discharge route, the city of San Marcos has shown a personal justiciable interests related to legal rights, duties, privileges, powers, or economic interests affected by the application.³ Because of the City's expressed concern about regionalization, in light of the City's Master Plan and expressed intention to serve the area covered by the application, OPIC finds that a reasonable relationship exists between the interests claimed and the activity regulated.⁴ Therefore, OPIC recommends that the Commission find that the City of San Marcos is an affected person.

¹ Tex. Local Gov't Code §402.001(b).

² San Marcos City Code §70.052(a)(10)

³ See 30 Tex. Admin. Code ("TAC") §55.203(a); see also 30 TAC §55.203(b) and 30 TAC §55.203(c)(6).

⁴ See 30 TAC §55.203(c)(3)

C. Issues Raised in the Hearing Request

1. Has Applicant demonstrated that connecting to the City of San Marcos Wastewater Utility is not feasible given the costs, financial, managerial, and technical capabilities of the City of San Marcos Wastewater Utility?
2. Does the Applicant have all necessary property rights and rights to provide service as proposed in its permit?
3. Will the proposed facility be adequately designed, constructed, operated, and maintained?

D. Issues raised in Comment Period

All of the issues in the hearing requests were raised during the public comment period.

E. Disputed Issues

There is no agreement on the issues raised in the hearing requests and, therefore, these issues are disputed.

F. 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. All of the remaining issues are issues of fact.

G. Relevant and Material Issues

In order to refer an issue to 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.⁵ Relevant and material issues are those governed by the substantive law under which this permit is to be issued.⁶

According to Texas Water Code (TWC), § 26.081(a), TCEQ is mandated to implement the state policy to “encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and

⁵ 30 TAC30 TAC §§ 55.201(d)(4), 55.209(e)(6) and 55.211(c)(2)(A).

⁶ 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.”)

enhance the quality of the water in the state.” Additionally, TWC § 26.0282 provides that:

[i]n considering the issuance, amendment, or renewal of a permit to discharge waste, the commission may deny or alter the terms and conditions of the proposed permit, amendment, or renewal based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order pursuant to provisions of this subchapter. This section is expressly directed to the control and treatment of conventional pollutants normally found in domestic wastewater.

As stated in ED’s Response to Comments, ED has approved renewal applications, new or major amendments to increase flow in situations where (1) there is no wastewater treatment plant or collection system within 3 miles of a proposed facility, (2) an Applicant requests service from a neighboring plant and its request was denied, or (3) the Applicant can successfully demonstrate that an exception should be granted based on costs, affordable rates, and financial, managerial, and technical capabilities of the existing system. The City contends the proposed permit violates the Commission’s regionalization policy because the Applicant failed to demonstrate that the costs, financial, managerial, and technical capabilities of the City’s wastewater provider make it infeasible to connect to the City’s water system. This issue is relevant and material to the issue of regionalization under TWC §26.081(a).

The remaining issues disputed by the City are not relevant and material to the Commission’s decision on the application. With respect to concerns about property rights, TCEQ permits do not authorize any injury to property or invasion of property rights nor convey any property rights. 30 TAC §305.122(c)&(d). As noted in the Response to Comments, it is the responsibility of the Applicant to acquire all property rights necessary to use the discharge route. With respect to concerns about the design, operation, and maintenance of the proposed facility, 30 TAC §217.6 addresses submittal and approval of these plans prior to plant construction through a process separate from

this permitting process. For these reasons, OPIC cannot recommend referral of issues 2 and 3 listed above.

H. Issue for Referral

OPIC recommends that the Commission refer the following disputed issue of fact to the State Office of Administrative Hearings for a contested case hearing:

1. Has Applicant demonstrates that connecting to the City of San Marcos Wastewater Utility is not feasible given the costs, financial, managerial, and technical capabilities of the City of San Marcos Wastewater Utility?

III. MAXIMUM EXPECTED DURATION OF HEARING

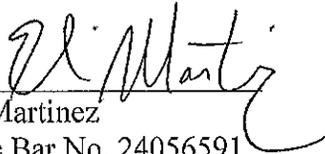
Commission Rule 30 TAC § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year 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 six months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

For the reasons stated above, OPIC recommends granting the hearing request of the City of San Marcos and referring this application to the State Office of Administrative Hearings for a contested hearing of no longer than six months on the issue listed above.

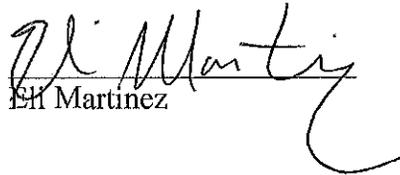
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2015 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Hearing Request 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

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TCEQ DOCKET NO. 2015-1264-MWD

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