

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Jon Niermann, *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

October 26, 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: AMDT, LLC
TCEQ DOCKET NO. 2015-1433-MWD

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Rudy Calderon".

Rudy Calderon, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2015-1433-MWD

**IN THE MATTER OF THE
APPLICATION OF AMDT LLC,
FOR TPDES PERMIT
NO. WQ0015274001**

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

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

I. Introduction

A. Background of Facility

AMDT LLC (Applicant) has applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0015274001 that will authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The wastewater treatment facility will serve the Grand Oaks Business Park. The Grand Oak Business Park Wastewater Treatment Facility will be an activated sludge process plant operated in the extended aeration mode. Treatment units in the final phase include one bar screen, an equalization basin, two aeration basins, one final clarifier, two aerobic sludge digesters, and one chlorine contact chamber. The facility has not been constructed.

The effluent limitations for Outfall 001 in the Interim and Final phases of the draft permit, based on a 30-day average, are 10 mg/l Biochemical Oxygen Demand (BOD₅), 15 mg/l total suspended solids (TSS), 3 mg/l ammonia nitrogen (NH₃-N), 5.0

mg/l dissolved oxygen (DO), and 126 CFU or MPN/100 ml *E. col.* The effluent shall contain a chlorine residual of at least 1.0 mg/l and shall not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes (based on peak flow) and shall be monitored five times per week by grab sample. An equivalent method of disinfection may be substituted only with prior approval by the ED.

The plant site is located approximately 1.7 miles north of the intersection of Farm-to-Market Road 723 and Farm-to-Market Road 359, in Fort Bend County, Texas 77471. The treated effluent will be discharged via Outfall 001 to a drainage ditch/detention pond; then to a drainage ditch; then to Andrus Creek; then to Upper Oyster Creek in Segment No. 1245 of the Brazos River Basin. The unclassified receiving water uses are minimal aquatic life use for the drainage ditch/detention pond, minimal aquatic life use for the drainage ditch, and high aquatic life use for Andrus Creek. The designated uses for Segment No. 1245 are primary contact recreation, public water supply, and intermediate aquatic life use. Public water supply does not apply from Steep Bank Creek/Brazos River confluence to Dam #3 approximately 0.4 mile downstream from the confluence of the American Canal. A 24-hour minimum DO criterion of 1.0 mg/l applies from the confluence with Steep Bank Creek/Brazos River upstream to Dam #3.

B. Procedural Background

The application was received on June 18, 2014, and declared administratively complete on September 10, 2014. The Notice of Receipt of Application and Intent to Obtain Permit (NORI) was published in English on October 8, 2014 in the *Fort Bend Herald*, and in Spanish on October 8, 2014 in *Las Noticias de Fort Bend*, Fort Bend County, Texas. The ED completed the technical review of the application on December

4, 2014, and prepared a draft permit. The Notice of Application and Preliminary Decision (NAPD) was published in English on February 8, 2015 in the *Fort Bend Herald*, and in Spanish on February 11, 2015 in *Las Noticias de Fort Bend*, in Fort Bend County, Texas. The public comment period ended on March 13, 2015. On August 12, 2015, the ED filed his Response to Public Comment, and on August 14, 2015, the Chief Clerk mailed notice of the ED's final decision and Response to Comments. The deadline to request a contested case hearing was September 14, 2015.

TCEQ received timely comments and requests for a contested case hearing from Charles P. McDonald; Daniel and Catherine Winkler; Roy and Inez Wallace; Michael and Terri Leakey; Bob and Mindy Barrows; Ali Zabarah Family Limited Partnership, LTD.; Deborah Rader; Martin and Marguerite Turk; William and Barbara Bayard; Huntington Oaks Property Owners Association (HOPOA); and Henry and Jan Heyl.

II. Applicable Law

The ED declared this application administratively complete September 10, 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 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. *Id.* 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).

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. *Id.*

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

Charles P. McDonald

According to a map provided to OPIC by the ED and the location provided in Mr. McDonald's hearing request, Mr. McDonald's property is less than 1000 feet from the proposed facility. In his hearing request, Mr. McDonald raises the issues of environmental impact, property value, and aesthetics. Based on his location and issues raised, specifically environmental impact discussed in Section F. below, OPIC has

concluded that Mr. Prescott is an affected person and should be granted a contested case hearing.

Daniel and Catherine Winkler

According to a map provided to OPIC by the ED and the location provided in the Winkler's hearing request, the Winkler's property is approximately 900 feet from the proposed facility. In their hearing request, the Winklers raise the issues of groundwater contamination, odor, flooding, and property value. Based on their location and issues raised, specifically groundwater contamination and odor discussed in Section F. below, OPIC has concluded that the Winklers are affected persons and should be granted a contested case hearing.

Roy and Inez Wallace

According to a map provided to OPIC by the ED and the location provided in the Wallace's hearing request, the Wallace's property is approximately 900 feet from the proposed facility. In their hearing request, the Wallaces raise the issues of groundwater contamination, odor, flooding, and property value. Based on their location and issues raised, specifically groundwater contamination and odor discussed in Section F. below, OPIC has concluded that the Wallaces are affected persons and should be granted a contested case hearing.

Michael and Terri Leakey

According to a map provided to OPIC by the ED and the location provided in the Leakey's hearing request, the Leakey's property is approximately 900 feet from the proposed facility. In their hearing request, the Leakeys raise the issues of groundwater contamination, odor, flooding, and property value. Based on their location and issues raised, specifically groundwater contamination and odor discussed in Section F. below,

OPIC has concluded that the Leakeys are affected persons and should be granted a contested case hearing.

Bob and Mindy Barrows

According to a map provided to OPIC by the ED and the location provided in the Barrows' hearing request, the Barrows' property is approximately 900 feet from the proposed facility. In their hearing request, the Barrows raise the issues of groundwater contamination, odor, flooding, and property value. Based on their location and issues raised, specifically groundwater contamination and odor discussed in Section F. below, OPIC has concluded that the Barrows are affected persons and should be granted a contested case hearing.

Ali Zabarah Family Limited Partnership, LTD.

Ali Zabarah Family Limited Partnership, LTD., through its General Partner Ali M. Zabarah, has submitted a timely hearing request. According to a map provided to OPIC by the ED and the location provided in the Partnership's hearing request, the Partnership owns eight properties that are all within 900 feet of the proposed facility. In its hearing request, the Partnership raises the issues of groundwater contamination, odor, water well buffer zone requirements, flooding, and property value. Based on their location and issues raised; specifically groundwater contamination, odor, and water well buffer zone requirements discussed in Section F. below, OPIC has concluded that the Partnership is an affected person and should be granted a contested case hearing.

Deborah Rader

According to a map provided to OPIC by the ED and the location provided in Ms. Rader's hearing request, Ms. Rader's property is approximately 300 feet from the proposed facility. In her hearing request, Ms. Rader raises the issues of groundwater

contamination, odor, flooding/erosion, decreased tax revenue, and property value. Based on her location and issues raised; specifically groundwater contamination, and odor discussed in Section F. below, OPIC has concluded that Ms. Rader is an affected person and should be granted a contested case hearing.

Martin and Marguerite Turk

According to a map provided to OPIC by the ED and the location provided in the Turks hearing request, the Turks property is approximately 350 feet from the proposed facility. In their hearing request, the Turks raise the issues of groundwater contamination, odor, water well buffer zone requirements, flooding, aesthetics, suitability of the discharge route, and property value. Based on their location and issues raised, specifically groundwater contamination, odor, water well buffer zone requirements, and suitability of the discharge route discussed in Section F. below, OPIC has concluded that the Turks are affected persons and should be granted a contested case hearing.

Huntington Oaks Property Owners Association (HOPOA)

HOPOA submitted a timely hearing request through its President Roy Wallace. In its hearing request, HOPOA raises the issues of groundwater contamination, odor, water well buffer zone requirements, flooding, aesthetics, suitability of the discharge route, and property value. As discussed above, OPIC finds that Mr. Wallace is an affected person. HOPOAs request also identifies Marguerite and Martin Turk as members nearest to the Facility and most likely to be affected. OPIC has also found the Turks to be affected persons as more fully discussed above. Based on the name of the group, OPIC infers that one of the purposes of HOPOA is the protection of member homeowners' use and enjoyment of property. Also, the relief requested by HOPOA

would not require the participation of all members. For these reasons, OPIC finds that HOPOA has satisfied 30 TAC §55.203(c) as an affected association and should be granted a contested case hearing.

William and Barbara Bayard

According to a map provided to OPIC by the ED and the location provided in the Bayard's hearing request, the Bayard's property is approximately 250 feet from the proposed facility. In their hearing request, the Bayards raise the issues of groundwater contamination, odor, plant operations and maintenance, health effects, flooding, environmental effects, radio frequency interference, and property value. Based on their location and issues raised, specifically groundwater contamination, odor, plant operations and maintenance, health effects, and environmental effects discussed in Section F. below, OPIC has concluded that the Bayards are affected persons and should be granted a contested case hearing.

Henry and Jan Heyl

According to a map provided to OPIC by the ED and the location provided in the Heyl's hearing request, the Heyl's property is approximately 8.75 miles from the proposed facility. In their hearing request, the Heyls raise the issues of groundwater contamination, odor, flooding, and property value. However, any adverse effects or concerns would be attenuated by the Heyl's distance from the proposed facility. Therefore, OPIC has concluded that the Heyls do not qualify as affected persons and should not be granted a contested case hearing.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing requests:

- (1) Whether the proposed facility will cause groundwater contamination?
- (2) Whether the proposed plant or discharge will cause nuisance odors?
- (3) Whether the proposed plant or discharge will have adverse health effects?
- (4) Whether the proposed plant violates the water well buffer zone requirements?
- (5) Whether the proposed plant or discharge will have adverse environmental effects?
- (6) Whether Applicant can properly operate and maintain the proposed plant?
- (7) Whether the proposed discharge route is suitable?
- (8) Whether the proposed discharge will create the potential for flooding and erosion?
- (9) Whether the proposed plant or discharge will have an effect on property values?
- (10) Whether the proposed plants appearance will detract from the surrounding area?
- (11) Whether the proposed plant will lower tax revenue?
- (12) Whether the proposed plant will emit disruptive radio frequencies?

C. Issues Raised in the 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) and (d)(4), 55.211(c)(2)(A)*.

D. Disputed Issues

There is no agreement between the hearing requesters and the ED on the issues raised in the hearing requests.

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. *30 TAC § 55.211(c)(2)(A)*. All of the issues presented are issues of fact appropriate for referral to SOAH.

F. Relevant and Material Issues

The hearing requests raise 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)*. In

order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–51 (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”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

Groundwater Quality and Water Well Buffer Zone Restrictions

The hearing requests have raised the issues of groundwater quality and water well buffer zone requirements. The TCEQ regulates the siting of wastewater treatment plants in relation to public and private water wells as required in 30 TAC § 309.13. Therefore, OPIC concludes the issues of groundwater quality and water well buffer zone restrictions raised in the hearing requests are relevant and material to the Commission's decision regarding this application and are appropriate for referral to SOAH for a contested case hearing on this matter.

Odor

The hearing requests have raised the issue of odor. Odor is specifically addressed by the TCEQ in 30 TAC §309.13 concerning the siting of wastewater treatment plants. Therefore, OPIC concludes the issue of odor raised in the hearing requests is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH for a contested case hearing on this matter.

Health Effects

William and Barbara Bayard raised the issue of health effects. Specifically, the increased risk of lung cancer from pollution emanating from the plant. This issue concerns the Texas Surface Water Quality Standards located in 30 TAC Ch. 307. Therefore, OPIC concludes the issue of health effects raised in the hearing requests is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH for a contested case hearing on this matter.

Environmental Effects

Charles McDonald raised the issue of environmental effects. Specifically, he is concerned the discharge will alter the characteristics of the receiving stream producing stagnant water, increased vegetation, and mosquitos. This issue concerns the Texas Surface Water Quality Standards located in 30 TAC Ch. 307. Therefore, OPIC concludes the issue of environmental effects raised in the hearing requests is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH for a contested case hearing on this matter.

Operation and Maintenance

The hearing requests have raised the issues of proper operation and maintenance of the proposed plant. Operation and Maintenance of wastewater facilities are specifically addressed by the TCEQ in 30 TAC chs. 308 and 319. Therefore, OPIC concludes the issues of proper operation and maintenance raised in the hearing requests are relevant and material to the Commission's decision regarding this application and are appropriate for referral to SOAH for a contested case hearing on this matter.

Suitability of the Discharge Route

The hearing requests have raised the issue of the suitability of the discharge route. One of the purposes of TCEQ rules regarding plant siting is to prohibit issuance of a permit for a facility to be located in an area determined to be unsuitable or inappropriate according to standards laid out in 30 TAC §309.10(b). Selecting a suitable and appropriate discharge route is an integral part of plant siting. Therefore, OPIC concludes the issue of the suitability of the discharge route raised in the hearing requests is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH for a contested case hearing on this matter.

Flooding/Errrosion, Property Value, Aesthetics, Loss of Tax Revenue, and Disruptive Radio Frequencies

The hearing requests have raised the issues of flooding/erroson, property value, aesthetics, loss of tax revenue, and disruptive radio frequencies. The Texas Legislature establishes the jurisdiction of the TCEQ, and the Texas Legislature has not given TCEQ the authority to consider these issues when deciding to issue a TPDES permit. Therefore, these issue are not relevant and material to the Commission's decision.

G. Issues Recommended for Referral

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

- (1) Whether the proposed facility will cause groundwater contamination?
- (2) Whether the proposed plant or discharge will cause nuisance odors?
- (3) Whether the proposed plant or discharge will have adverse health effects?
- (4) Whether the proposed plant violates the water well buffer zone requirements?
- (5) Whether the proposed plant or discharge will have adverse environmental effects?
- (6) Whether Applicant can properly operate and maintain the proposed plant?
- (7) Whether the proposed discharge route is suitable?

H. Maximum Expected Duration of Hearing

Commission Rule 30 TAC § 50.115(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 conclusion of the preliminary hearing until the proposal for decision is issued.

IV. Conclusion

OPIC recommends granting the hearing requests of Charles P. McDonald; Daniel and Catherine Winkler; Roy and Inez Wallace; Michael and Terri Leakey; Bob and Mindy Barrows; Ali Zabarah Family Limited Partnership, LTD.; Deborah Rader; Martin and Marguerite Turk; William and Barbara Bayard; Huntington Oaks Property Owners Association (HOPOA) and denying the hearing request of the Henry and Jan Heyl on the issues referenced in Section III.G above. OPIC further recommends a hearing duration of nine months.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: 

Rudy Calderon
Assistant Public Interest Counsel
State Bar No. 24047209
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-3144 Phone
(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2015 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for 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, electronic mail, or by deposit in the U.S. Mail.


Rudy Calderon

MAILING LIST
AMDT, LLC
TCEQ DOCKET NO. 2015-1433-MWD

FOR THE APPLICANT:

Terry Nehls, Managing Partner
AMDT, LLC
1822 Plantation Drive
Richmond, Texas 77406-1232
Tel: (281) 460-7374

Jerry G. Ince
Ince Engineering, LLC
212 East Highway 90A
Richmond, Texas 77406-3722
Tel: 281/239-5357 Fax: 832/ 992-0633

FOR THE EXECUTIVE DIRECTOR

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

John Onyenobi, Technical Staff
TCEQ Water Quality Division, MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-6707 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:

Bob & Mindy Barrows
6303 Cheridan Cir.
Richmond, Texas 77406-7663

Barbara E. & William B. Bayard
6505 FM 723 Rd.
Richmond, Texas 77406-8714

Henry T. & Jan E. Heyl
5227 Auckland Dr.
Sugar Land, Texas 77498-7589

Michael & Terri Leakey
6215 Cheridan Cir.
Richmond, Texas 77406-7633

Charles P. McDonald
2019 Huntington Ln.
Richmond, Texas 77406-7658

Deborah Rader
1803 Huntington Ln.
Richmond, Texas 77406-7659

Marguerite & Martin Turk
1810 Huntington Ln.
Richmond, Texas 77406-7660

Inez H. & Roy D. Wallace
1910 Huntington Ln.
Richmond, Texas 77406-7639

Roy D. Wallace
Huntington Oaks Property Owners
Association
1910 Huntington Ln.
Richmond, Texas 77406-7639

Catherine & Daniel Winkler
2003 Huntington Ln.
Richmond, Texas 77406-7658

Ali M. Zabarah
4802 Copper Manor Ct.
Katy, Texas 77494-6649