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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*

January 11, 2016

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: SOUTH CENTRAL WATER COMPANY  
DOCKET NO. 2015-1707-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, appearing to read "Rudy Calderon".

Rudy Calderon, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2015-1707-MWD**

**IN THE MATTER OF THE  
APPLICATION OF SOUTH  
CENTRAL WATER COMPANY,  
FOR TPDES PERMIT  
NO. WQ0014988001**

**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 (Commission or TCEQ) files this Response to Request for Hearing in the above-referenced matter and respectfully shows the following.

**I. Introduction**

**A. Background of Facility**

South Central Water Company (Applicant) has applied to the TCEQ to renew its existing Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014988001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 0.075 million gallons per day in the Interim I phase, at a daily average flow not to exceed 0.25 million gallons per day in the Interim II phase and a daily average flow not to exceed 0.5 million gallons per day in the Final phase. The plant site will be located approximately 1,600 feet southeast of the intersection of U.S. Highway 281 and Farm-to-Market Road 1863 in the town of Bulverde in Comal County, Texas 78163.

The Cibolo Valley Wastewater Treatment Facility (Facility) will be an activated sludge process plant operated in the complete mix mode. Treatment units in all phases

will include bar screens, aeration basins, final clarifiers, filter, aerobic sludge digesters, and a chlorine contact chamber. The Facility has not been constructed. The treated effluent will be discharged to a roadside ditch along Wiley Road; then to an unnamed tributary; then to Upper Cibolo Creek in Segment No. 1908 of the San Antonio River Basin. The unclassified receiving water uses are minimal aquatic life use for the roadside ditch along Wiley Road and limited aquatic life use for unnamed tributary. The designated uses for Segment No. 1908 are high aquatic life use, aquifer protection, public water supply, and primary contact recreation. The effluent limitations in the all phases of the draft permit, based on a 30-day average, are 5 mg/l five-day carbonaceous biochemical oxygen demand (CBOD<sub>5</sub>), 5 mg/l total suspended solids (TSS), 2 mg/l ammonia-nitrogen (NH<sub>3</sub>-N), 0.5 mg/l Total Phosphorus, 126 colony forming units (CFU) or most probable number (MPN) of *E. coli* per 100 ml, and 4.0 mg/l minimum dissolved oxygen (DO).

## **B. Procedural Background**

TCEQ received this renewal application on October 13, 2014. On January 6, 2015, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on January 22, 2015 in the *Austin American Statesman* and *iAhora sí!* (Spanish) on January 29, 2015. The application was declared technically complete on February 27, 2015. The Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published on May 30, 2015 in the *Austin American Statesman* and in *iAhora sí!* (Spanish) on June 04, 2015. The public comment period closed on July 6, 2015. On September 16, 2015, the ED filed his Response to Public

Comment, and on September 17, 2015, the ED mailed notice of his final decision. The deadline to request a contested case hearing was October 19, 2015.

TCEQ received timely comments and a request for a contested case hearing from Michael L. Maurer, Sr. (Requestor).

## **II. Applicable Law**

### **A. Right to a Contested Case Hearing on a "No Increase Renewal" Application**

Texas Water Code § 26.028(d) states that the Commission may approve an application to renew a permit without a public hearing, under certain conditions. 30 *TAC* §§ 50.113(d)(4), 55.211(d)(4). 30 Texas Administrative Code § 55.201(i)(5) provides that no right to a hearing exists for certain water quality discharge permits. These authorizations include applications to renew or amend a permit if the applicant is not trying to:

- (A) increase significantly the quantity of waste to be discharged;
- (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.

OPIC finds that the draft renewal permit satisfies all five elements of Section 55.201(i)(5). First, the draft permit would not increase the quantity of waste that could be discharged from the existing permit. Second, effluent limitations and monitoring requirements would remain the same or be more protective than the existing permit

requirements. Third, the ED solicited requests for a public meeting, but did not receive a request from a local member of the legislature nor did he determine that there was substantial public interest in the proposed activity. Fourth, the ED has filed a response to comments that addresses all timely and significant public comment. Finally, the applicant's compliance history is "satisfactory."

Therefore, OPIC finds that the Commission may approve the application without holding a contested case hearing on the proposed renewal. For these reasons, OPIC recommends that the hearing request be denied.

## **B. Affected Person Criteria**

The ED declared this application administratively complete on January 6, 2015. 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)*.

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**

While OPIC recommends denial of the hearing request based on the analysis laid out in Section II.A. above, the following analysis is provided should the Commission decide that a right to a contested case hearing does exist in this matter.

##### Michael L. Maurer Sr.

Mr. Maurer submitted a timely hearing request to the TCEQ which raised issues related to regionalization, water quality, impact on the Edwards Aquifer Recharge Zone, and stormwater and silt runoff during construction. However, Mr. Maurer failed to include an address in his hearing request and therefore his request is not compliant with 30 TAC 55.201(d)(1). His failure to include an address in his hearing request makes it impossible to identify Mr. Maurer's location in relation to the Facility and to therefore analyze his affectedness. For this reason, OPIC recommends denial of Mr. Maurer's request for hearing.

#### **B. Issues Raised in the Hearing Request**

The following issues have been raised in the hearing request:

- (1) Whether the Facility will violate TCEQ's regionalization policy.
- (2) Whether the Facility will affect water quality in the discharge route.
- (3) Whether the Facility will adversely affect the Edwards Aquifer Recharge Zone.
- (4) Whether there will be unpermitted stormwater and silt runoff during construction.

### **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 requester and the ED on the issues raised in the hearing request.

### **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 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)*. 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.*

Mr. Maurer’s hearing request raises the issues of regionalization, water quality, impact on the Edwards Aquifer Recharge Zone, and stormwater and silt runoff during construction. While OPIC recommends denial of the hearing request, should the Commission find that Mr. Maurer is an affected person, OPIC finds that the issues of regionalization, water quality, and impact on the Edwards Aquifer Recharge Zone are relevant and material issues.

**G. Issues Recommended for Referral**

Should the Commission determine Mr. Maurer is an affected person, OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

- (1) Whether the Facility will violate TCEQ’s regionalization policy.
- (2) Whether the Facility will affect water quality in the discharge route.
- (3) Whether the Facility will adversely affect the Edwards Aquifer Recharge Zone.

**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. Should the Commission find that Mr. Maurer has a right to a hearing and is an affected person, 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 hearing request from Mr. Michael L. Maurer, Sr. Should the Commission find that Mr. Maurer has a right to a hearing in his matter and is an affected person, OPIC recommends referral on the issues referenced in Section III.G above. OPIC further recommends a hearing duration of nine months.

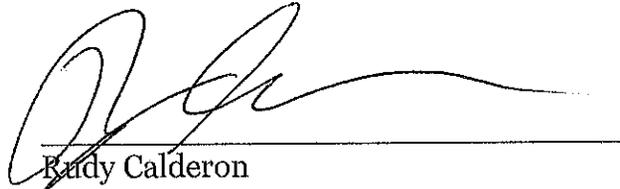
Respectfully submitted,

Vic McWherter  
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## CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2016 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**  
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**DOCKET NO. 2015-1707-MWD**

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