

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

January 11, 2016

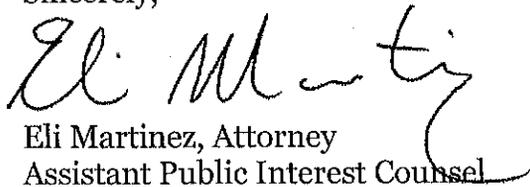
Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: MSEC ENTERPRISES, INC.
DOCKET NO. 2015-1763-MWD**

Dear Ms. Bohac:

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

Sincerely,


Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2015-1763-MWD

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION BY	§	
MSEC ENTERPRISES, INC.	§	TEXAS COMMISSION ON
FOR TPDES PERMIT NO.	§	
WQ0015341001	§	ENVIRONMENTAL QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUESTS**

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 Requests in the above-referenced matter.

I. INTRODUCTION

MSEC Enterprises, Inc. (MSEC or Applicant) has applied for a new permit to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.020 million gallons per day (MGD) in the Interim I phase, a daily average flow not to exceed 0.065 MGD in the Interim II phase, and a daily average flow not to exceed 0.130 MGD in the Final phase.

The facility will be located approximately 1,700 feet south of the intersection of Mail Route Road and Farm-to-Market Road 2854, on the south side of Farm-to-Market Road 2854, in Montgomery County, Texas 77316. The treated effluent will be discharged to Mound Creek; thence to Lake Creek in Segment No. 1015 of the San Jacinto River Basin. The unclassified receiving water uses are minimal aquatic life use for Mound Creek (upstream of the section described in Appendix D of the Texas Surface Water Quality Standards (TSWQS)) and high

aquatic life use for Mound Creek (section described in Appendix D of the TSWQS). The designated uses for Segment No. 1015 are high aquatic life use, public water supply, and primary contact recreation.

The TCEQ received MSEC Enterprises, Inc.'s application for a new TPDES permit on February 3, 2015 and declared it administratively complete on March 12, 2015. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in English on April 4, 2015, in the *Conroe Courier*. The NORI was published in Spanish on April 3, 2015, in the *El Observador News*. 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 in English on July 23, 2015, in the *Conroe Courier*. The NAPD was published in Spanish on July 24, 2015, in the *El Observador News*. The public comment period ended on August 24, 2015. The Executive Director's decision and Response to Comments was mailed October 27, 2015, extending the deadline for requests for reconsideration or contested case hearing thirty calendar days to November 30, 2015.¹ 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. 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, 76th 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,

¹ 30 TAC §55.201(a)

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).

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.

III. DISCUSSION

A. Determination of Affected Person Status

The Office of the Chief Clerk received three timely filed requests for a contested case hearing on the issuance of Applicant's permit from J. Duncan Cartwright & Joe Cartwright, Paul D. Coombs, and Martha Mayer. 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.

Each of the requests indicates the requestors are concerned that the permitted activities will result in contamination of surface water and pose a hazard to human health, the environment, and terrestrial life. In addition, the request by Martha Mayer raises the concern that the characteristics and uses of Mound Creek are not correctly represented in the application. All of these concerns are protected by the law under which the application will be considered.²

However, after reviewing the maps created by the Executive Director indicating the relative distances of the requestors' properties, OPIC cannot conclude that there is a likely

² 30 TAC § 55.203(c)(1).

impact on the requestors or that a reasonable relationship exists between the interests stated in the requests and the activity regulated. Any potential impacts from the permitted activities would be minimized by the distance between the outfall and the requestors' properties.³

For these reasons, OPIC cannot conclude that any of the requestors are affected persons, and recommends that the Commission deny each hearing request. However, if the Commission should find that a reasonable relationship does in fact exist between any of the requestors and the permitted activities, OPIC offers the following analysis on referral to SOAH for a contested case hearing.

B. Issues Raised in the Hearing Request

Dissemination of Pollutants Harmful to Life

Each Requestor raises the concern that Applicant's discharge will pose a health risk to human, animal, and vegetative life in the region.

Pollution of Water Sources

Each Requestor raises the concern that surface water may be contaminated by the Applicant's activities, including Mound Creek and individual water wells.

Improper Characterization of Mound Creek

Requestor Martha Mayer raises the concern that the application does not correctly depict the uses and characteristics of Mound Creek.

³ 30 TAC § 55.203(c)(3) & (4).

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.

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 dissemination of pollutants harmful to life, pollution of water sources, and inaccuracies relating to characteristics and uses of Mound Creek are all issues of fact.

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.⁴ 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.⁵

⁴ See 30 TAC §55.209(e)(6)

⁵ *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 protection of water quality, human and terrestrial life, and accuracy of the application materials are addressed by the law governing this application.⁶ OPIC therefore finds that each of the raised issues is appropriate for referral to the State Office of Administrative Hearings for a contested case hearing.

G. Issues Recommended for Referral

In the event the Commission disagrees with OPIC's conclusion on affected person status and refers this matter to the State Office of Administrative Hearings, OPIC would recommend that the following issues of fact be referred for a contested case hearing:

- 1) Does the permit adequately protect human, animal, and vegetative life in the region?
- 2) Does the permit protect Mound Creek and private water sources from contamination?
- 3) Does the application correctly represent the characteristics and uses of Mound Creek?

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 six months from the first date of the preliminary hearing until the proposal for decision is issued.

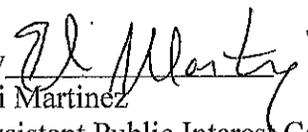
⁶ 30 TAC § 55.203(c)(5).

IV. CONCLUSION

Due to the distance between the regulated activities and the homes of the requestors, OPIC recommends that the Commission deny the hearing requests. If the Commission disagrees and grants a hearing to one or more of the requestors, OPIC would recommend an evidentiary hearing on the issues recommended in Section III G above. OPIC further recommends a hearing duration of six months.

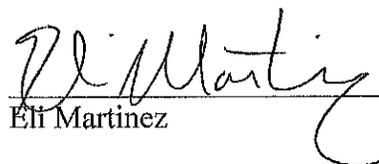
Respectfully submitted,

Vic McWherter
Public Interest Counsel

By 
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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 the Public Counsel's Response to Hearing Requests 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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