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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

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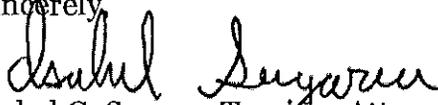
Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: THE VILLAS AT TIMBERWOOD HOMEOWNERS ASSOCIATION
TCEQ DOCKET NO. 2015-1790-MWD**

Dear Ms. Bohac:

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

Sincerely,


Isabel G. Segarra Treviño, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2015-1790-MWD

**IN THE MATTER OF THE
APPLICATION BY THE VILLAS
AT TIMBERWOOD
HOMEOWNERS ASSOCIATION,
INC. FOR A RENEWAL OF TPDES
PERMIT
NO. WQ0014670001**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUEST FOR HEARING AND REQUEST FOR RECONSIDERATION**

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 and Request for Reconsideration in the above-referenced matter and respectfully submits the following.

I. INTRODUCTION

A. Background of Facility

The Villas at Timberwood Homeowners Association, Inc. (Timberwood or Applicant) has applied to the TCEQ for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014670001 to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 18,000 gallons per day via non-public access subsurface drip irrigation system with a minimum area of 4.13 acres. The Timberwood Development Wastewater Treatment Facility (Facility) currently serves the Villas at Timberwood Homeowners Association.

The Facility consists of septic tanks and a subsurface drip dispersal system. Treatment units include two tanks with a total volume of 28,723 gallons, effluent filter, and one storage tank with a volume of 57,446 gallons. The Applicant is required to provide at least three days of

temporary storage for times when the Facility is out of service due to emergency or for scheduled maintenance. The effluent limitation in the draft permit, based on a daily average flow of 18,000 gallons per day, is 65mg/l biochemical oxygen demand (BOD). The Applicant must also comply with the rules for subsurface area drip dispersal systems found in 30 Texas Administrative Code (TAC) § 222.81(a) and (b).

Sludge generated by the Facility is hauled by a registered transporter to the City of LaCoste Wastewater Treatment Facility to be digested, dewatered, and then disposed of with the bulk of the sludge accepted by the LaCoste Facility. The draft permit also authorizes the disposal of sludge at a TCEQ authorized land application site or co-disposal landfill.

The Facility and disposal site are located 820 feet southeast of the intersection of Harmony Hills and Shady Acres, and the disposal area is located 1,600 feet southeast of the intersection of Harmony Hills and Shady Acres, in Bexar County, Texas 78260. The Facility and disposal site are located in the drainage basin of Mustang Creek in Segment No. 1910 of the San Antonio River Basin. No discharge of pollutants into water in the state is authorized by this permit.

B. Procedural Background

The TCEQ received the application on October 27, 2014, and declared it administratively complete on November 17, 2014. The Notice of Receipt and Intent to Obtain a Water Quality Permit Renewal was published in English on November 26, 2014, in Bexar County in the *San Antonio Express-News* newspaper and in Spanish on December 3, 2014, in Bexar County in the *La Prensa* newspaper. The TCEQ Executive Director's (ED) staff completed the technical review of the application and prepared a draft permit. The Notice of Application and Preliminary Decision for a Water Quality Land Application Permit for Municipal Wastewater Renewal was published in English on May 6, 2015, in Bexar County in the *San Antonio Express-News* newspaper and in

Spanish on May 13, 2015, in Bexar County in the *La Prensa* newspaper. Alternate language publication in Spanish was required for this application. The public comment period ended on June 12, 2015. The Chief Clerk mailed the Executive Director's Decision and Response to Public Comment on October 27, 2015 and the deadline for filing requests for a contested case hearing was November 30, 2015. The TCEQ Chief Clerk's office received a timely hearing request from the San Antonio Water System (SAWS).

II. APPLICABLE LAW

A person may request the TCEQ reconsider the ED's decision on an application or hold a contested case hearing on an 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). The requirements of House Bill 801 only apply to applications declared administratively complete on or after September 1, 1999. The TCEQ declared Timberwood's application administratively complete on November 17, 2014. Therefore, Timberwood's application is subject to the procedural requirements of House Bill 801.

TCEQ rules require that a person seeking a hearing must substantially comply with the following: (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who filed the request, (2) identify the requestor's personal justiciable interest affected by the application, including a written statement describing the requestor's location or distance in relation to the proposed facility or activity, and, how or why the requestor believes he or she will be 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 and that are the basis of the hearing request, and (5)

provide any other information specified in the public notice of the application. 30 TAC § 55.201(d).

Only affected persons are granted contested case hearings. TWC § 5.556(c). 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). Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.203(b). This justiciable interest does not include an interest common to the general public. *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 contested case hearing request if the request: (1) 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, (2) is timely filed with the Chief Clerk, (3) is made pursuant to a right to hearing authorized by law, and (4) complies with the request for reconsideration and contested case hearing requirements. 30 TAC § 55.211(c). 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 on an application to renew or amend a permit under Chapter 26 of the TWC 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). *See also* TWC § 26.028(d).

III. DISCUSSION

A. Right to a Contested Case Hearing

As an initial matter, the Commission must determine whether a right to hearing exists pursuant to TWC § 26.028(d). Upon reviewing these statutory provisions and application file, OPIC concludes that a right to a hearing does exist for this application.

While OPIC finds that this renewal application satisfies some of the requirements of TWC § 26.028(d), we cannot find that it satisfies TWC § 26.028(d)(4). The application does not propose

to increase the amount of effluent authorized, nor does it materially change the pattern or place of discharge. The renewal contains the same effluent limitation as the original permit, thereby maintaining the quality of the waste authorized to be discharged. The notices informed the public of the right to request a public meeting on this application, but no public meeting requests were submitted. The ED's Response to Public Comment was mailed by the Chief Clerk on October 27, 2015.

OPIC finds, however, that the hearing request submitted by the San Antonio Water System and the effluent limitation tables submitted as part of the application reveal that the Applicant was out of compliance with the sole monitoring condition in its existing permit, biochemical oxygen demand (BOD), from September 2013 through July 2014. The relevant compliance period includes the five years prior to the agency's receipt of the application. 30 TAC § 60.1. Therefore, the exceedances noted by SAWS occurred within the relevant compliance period. From the information provided by the hearing request and the Response to Comments, it seems this non-compliance with the permit was not reported as required by 30 TAC § 305.125(a). Had these exceedances been reported, they could have been, and it seems they should have been, included in Applicant's compliance history report. While the ED's Response to Public Comments made changes to the draft permit because of the continuing violation noted above, it remains unclear whether the Applicant has corrected the problem. These permit exceedances raise issues about Timberwood's ability to comply with a material term of its permit, particularly given the nature and duration of the permit exceedance and the uncertainty as to whether it has been addressed. TWC § 26.028(d)(4). Furthermore, OPIC notes that even if the initially-compiled compliance history report (omitting these violations and classifying the Applicant as a high performer) is taken at face value, the relevant statutes and rules applicable to this permit state only that the Commission

“may” renew eligible “no increase renewals” under TWC Chapter 26 without the necessity of a hearing and “may” consider the Applicant’s classification when using its compliance history to make a decision; there is no statutory prohibition on holding a hearing on this application and the Commission still maintains discretion to grant a hearing request. TWC §26.028(d); TWC §5.754(a); TWC §5.754(e); 30 TAC §60.3(a)(4)(A)(1). For these reasons, OPIC finds that a right to hearing does exist in this matter and recommends that SAWS’ hearing request be evaluated under the remaining applicable requirements of 30 TAC Chapter 55.

Also, as noted by SAWS, the Facility is situated on the Edwards Aquifer, which is the foremost drinking water source for the City of San Antonio, Texas. Protection of drinking water is a public interest concern and, even if it were determined there is no right to a hearing on this application and therefore no affected persons, nothing precludes the Commission from holding a hearing if it determines that the public interest warrants doing so. TWC § 5.556(f).

For these reasons, OPIC recommends the Commission consider the affected person status of SAWS under the analysis presented below.

B. Determination of Affected Person Status

For a hearing requestor to be an affected person, the request must be based on an interest that is protected under the law governing the permit application. 30 TAC § 55.203(a). As further explained below, OPIC finds that San Antonio Water System (SAWS) is an affected person.

SAWS filed a timely hearing request that substantially complies with the procedural requirements for hearing requests pursuant 30 TAC § 55.201(d). In its hearing request, SAWS states that it “is the water and sewer utility for the City of San Antonio” located in Bexar County, Texas. Further, SAWS notes that the Facility “is located in San Antonio’s extraterritorial jurisdiction (ETJ) and subject to San Antonio’s Aquifer Protection Ordinance, which is

administered by SAWS.” Texas Health and Safety Code Section 121.003(a) provides that “[t]he governing body of a municipality or the commissioners court of a county may enforce any law that is reasonably necessary to protect the public health.” Through the ordinance cited by SAWS, San Antonio has delegated authority to SAWS to protect the public health by protecting drinking water quality. OPIC finds that this governmental entity is vested with authority to seek affected person on this permit application. 30 TAC § 55.203(c)(6).

SAWS is concerned about additional pollutant loading in the Edwards Aquifer because the Facility is located immediately above the Edwards Aquifer Recharge Zone. SAWS states that it sources most of its drinking water from the Edwards Aquifer. SAWS is also concerned about the Applicant’s ability to comply with its permit and remains unpersuaded that changes made to the draft permit by the ED will bring the Applicant into compliance.

OPIC finds that SAWS is an affected person under the factors listed in 30 TAC § 55.203(e). The location of the Facility within San Antonio’s ETJ supports affected person status. 30 TAC § 55.203(c)(2)–(4). Because most of SAWS drinking water is drawn from the Edwards Aquifer, contamination of the aquifer could impact SAWS’s ability to use this natural resource. 30 TAC § 55.203(c)(5). SAWS’s administration of San Antonio’s Aquifer Protection Ordinance also supports affected person status as it render SAWS an appropriate governmental entity to participate in water quality issues. 30 TAC § 55.203(c)(6). For these reasons, OPIC finds that SAWS is an affected person.

C. Issues Raised in the Hearing Request

The hearing requester raises the following issues:

1. Whether the Applicant is capable of complying with the effluent limitation in the permit.

2. Whether the permit is adequately protective without additional special provisions to ensure compliance with permit terms.
3. Whether the Applicant should disclose the cause of its permit noncompliance.

D. Issues Raised in the Comment Period

Issues must be raised during the comment period and must have not been withdrawn. 30 TAC §§ 55.201(c) & (d)(4), 55.211(c)(2)(A). Issues No. 1–3 were raised during the comment period and have not been withdrawn.

E. Disputed Issues

There is no agreement between the requester and the ED on the issues raised in the hearing request.

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. 30 TAC § 55.211(c)(2)(A). Issues No. 1 and 2 are issues of fact. However, OPIC cannot find that Issue No. 3 is an issue of fact.

G. Relevant and Material Issues

Issues No. 1–2, relating to the Applicant’s ability to comply with the permit requirements, are relevant and material to the Commission’s decision pursuant to TWC § 32.101. This section of the TWC, which outlines subsurface area drip dispersal system application procedures, instructs the Commission to “consider all evidence admitted, including compliance history, in determining whether to issue, amend, extend, or renew a permit” and deny a permit if the Commission “concludes that the applicant’s compliance history is unacceptable.” TWC § 32.101(d). Further,

30 TAC § 305.127(3) provides that “a schedule prescribing a timetable for achieving compliance with permit conditions, the appropriate law, and regulation may be incorporated into a permit.”

H. Issue Recommended for Referral

OPIC recommends referring to SOAH Issues No. 1–2 discussed in Section III. C.

I. Maximum Expected Duration of Hearing

Commission Rule 30 TAC § 80.6(b)(5) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing. 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(e)(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. REQUEST FOR RECONSIDERATION

Any person may file a request for reconsideration of the ED’s decision. 30 TAC § 55.201(e). The request must be in writing and filed with the Chief Clerk no later than thirty days after the Chief Clerk mails the ED’s decision and response to comments. The request must expressly state that the person is requesting reconsideration of the ED’s decision and give reasons why the decision should be reconsidered.

In addition to requesting a hearing, SAWS also requested reconsideration of this application. Specifically, SAWS requests that the Commission revisit the ED’s decision not to include a SAWS-recommended timetable in the permit for the Applicant’s disclosure of the cause of its noncompliance, and, changes that must be made to the Facility to make it compliant.

OPIC cannot opine on the necessity or sufficiency of such permit provisions without an evidentiary hearing. As discussed above, OPIC supports convening a hearing to address these issues. However, at this time, OPIC cannot recommend granting this request for reconsideration.

V. CONCLUSION

For the reasons set forth above, OPIC recommends granting the hearing request of the San Antonio Water System and referring this application to SOAH for a six-month contested case hearing on the two issues discussed in Sections III. C. Further, OPIC recommends denying the request for reconsideration on this matter.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2016 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing and Request for Reconsideration 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.

for *Vic McWherter*
Isabel G. Segarra Treviño

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TCEQ DOCKET NO. 2015-1790-MWD

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