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*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

January 25, 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: **KBARC, LLC**  
**TCEQ DOCKET NO. 2015-1791-MWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Pranjal".

Pranjal M. Mehta, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



**TCEQ DOCKET NO. 2015-1791-MWD**

<b>IN THE MATTER</b>	<b>§</b>	<b>BEFORE THE</b>
<b>OF THE APPLICATION BY</b>	<b>§</b>	
<b>KBARC, LLC FOR TPDES</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>PERMIT</b>	<b>§</b>	
<b>NO. WQ0015225001</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

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

**I. INTRODUCTION**

**A. Background of Facility**

On February 12, 2014, KBARC, LLC (KBARC or Applicant) applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) permit no. WQ0015225001. The Applicant applied for a new permit to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day (gpd) in the Interim phase and 300,000 gpd in the final phase. The plant site would be located at 6932 Farm-to-Market Road 1179, Bryan, Texas in Brazos County. The proposed facility would serve a proposed residential subdivision. The facility has not been constructed. The facility would be a package plant operated in a single stage nitrification mode. Treatment units in the interim phase would include an equalization basin, two aeration basins, a clarifier, an aerobic digester, and a chlorine contact

chamber. Treatment units in the final phase would include equalization basin, two aeration basins, two clarifiers, two aerobic digesters, and two chlorine contact chambers.

The effluent limitations in both the Interim and Final phases of the draft permit, based on a 30-day average, are 20 mg/l five-day biochemical oxygen demand (BOD5), 20 mg/l total suspended solids (TSS), 126 colony forming units (CFU) or most probable number (MPN) of *E. coli* and 2.0 mg/l minimum dissolved oxygen (DO). In both phases, 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. An equivalent method of disinfection may be substituted only with prior approval of the ED. The effluent limitations in the draft permit would maintain and protect the existing instream uses.

The treated effluent would be discharged to Steep Hollow Branch; then to Wickson Creek; then to Navasota River Below Lake Limestone in Segment No. 1209 of the Brazos River Basin. The unclassified receiving water use is minimal aquatic life use for Steep Hollow Branch. The designated uses for Segment No. 1209 are primary contact recreation, public water supply and high aquatic life use.

## **B. Procedural Background**

TCEQ received Applicant's application on February 12, 2014. On April 7, 2014, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in English on April 29, 2014 in the *Bryan College Station Eagle*, and in Spanish on May 2, 2014 in the *La Voz Hispano*, in Brazos County, Texas. The ED completed the technical review of the application on June 23, 2014 and prepared a draft permit. The Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published in English on August 8, 2014 in the *Bryan*

*College Station Eagle*, and in Spanish on August 1, 2014 in *La Voz Hispano*. The Notice of Public Meeting was published in English on December 26, 2014 in the *Bryan College Station Eagle*, and in Spanish on December 26, 2014 in *La Voz Hispano*. A public meeting was held on February 20, 2015 at the Brazos Center in Bryan, Texas. The Response to Comments was filed on October 10, 2015. The Chief Clerk mailed the Executive Director's Decision on November 5, 2015. The deadline for filing requests for a contested case hearing was December 7, 2015.

The Commission received timely requests for a contested case hearing from attorney Eric Allmon on behalf of Steep Hollow Action Association (SHAA) and Bonnie Weber<sup>1</sup>, Cindy Barnett, Terry Barnett, Paul Bonarrigo, John Cargill, Dina A Cooper, Cecil Leon Cummins, Jeff Dillon, Terry Harper, Cathy Hegwood, Joe Hegwood, Carmen M Januse, Frank Januse, Amanda Jouett, Dr. Ryan Jouett, Carolyn Kellam, Marvin Wayne Kellam, Sandra Kroll, Terry C Kroll, Bruce W Lester, Katherine Dawn Lester, Amy Mccoslin, Sue C Mclin, Dr. Susan Moreland, Jim Nachlinger, Ronnie O'Neal Jr., Stephen G Phillips, David Pugh, Gabby Ring, Annie Lin Risinger, Ted A Skalaban, Dr. Brian Spence, Bob Sprott, Sue Sprott, Donnie Vernon, Leah Scamardo Vernon, Steve Weaver, Gary N Wentrcek, Gary Wingenbach, Brandon W Zemanek, Cindy A Zemanek, Ronnie W Zemanek. The Commission also received a request for reconsideration from SHAA and Bonnie Weber.

For the reasons stated herein, OPIC recommends that the hearing requests from SHAA and 26 other individuals be granted. OPIC further recommends denial of the request for reconsideration filed by SHAA and Bonnie Weber.

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<sup>1</sup> SHAA and Bonnie Weber filed a request for reconsideration and a request for contested case hearing on December 4, 2015 and a supplement to the request on December 7, 2015. Both the documents were timely filed.

## II. APPLICABLE LAW

This application was declared administratively complete on July 1, 2013. 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 TEXAS 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 TEX. ADMIN. CODE (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. 30 TAC § 55.203(b). 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).

Further, 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. 30 TAC § 55.205(b).

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).

## II. DISCUSSION

### A. Request for Reconsideration

The hearing request filed by attorney Eric Allmon on behalf of Steep Hollow Action Association and Bonnie Webber also requested reconsideration of the ED's decision on the Applicant's application. Under 30 TAC § 50.139, any person may file a request for reconsideration. The request must include the reasons why the ED's determination should be reconsidered by the Commission. The request for reconsideration has stated issues and concerns about the application including the impaired nature of the downstream waters for bacteria and no need for the proposed facility considering the availability of alternative service from the City of Bryan. These issues and concerns are within the Commission's jurisdiction. As discussed further below, OPIC recommends that these issues be referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing. However, at this point in the process prior to further development of the record through a contested case hearing, OPIC cannot conclude whether the Applicant's application should be granted or denied in light of the concerns raised in the request for reconsideration. Therefore OPIC must recommend denial of the request for reconsideration. OPIC further discusses the hearing requests below.

### B. Determination of affected person status

#### Steep Hollow Action Association (SHAA)

To gain standing as a group, SHAA must present at least one member who would individually qualify as an affected person. 30 TAC § 55.205(a)(1). SHAA named members (Geneva Freeman, Carl & Sue McLin, Annie Lin Risinger and Bonnie Weber) as individuals who own property adjacent to the receiving stream near the discharge point. According to SHAA, the discharge of pollutants by the wastewater treatment plant will potentially

contaminate these members' respective properties and thereby impact their ability to use and enjoy their properties. Among these members, SHAA named Bonnie Weber as an individual who would individually qualify as an affected person. According to SHAA, Bonnie Weber is the owner of property no. 15 as listed in the application's adjacent property owner list. SHAA states that Ms. Weber resides upon the property and enjoys time outdoors on this property as well as uses this property for wildlife management as recognized in the county tax records. SHAA also states that while her property is upstream of the discharge point under normal conditions, precipitation events often cause water in the receiving stream to back up onto her property, and pollutants discharged from the wastewater treatment plant will contaminate her property during these periods. SHAA claims that such contamination would potentially impair the use of her property for wildlife management purposes. SHAA further states that the facility would potentially produce foul odors that would impact her ability to use and enjoy her property for outdoor activities.

Applicant lists Ms. Weber's property as Tract 15 on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Ms. Weber's property is in close proximity to the discharge route and proposed facility. Ms. Weber's interests are preventing contamination that would potentially impair the use of her property and preventing nuisance odors from the wastewater treatment plant. These concerns are protected by the law under which the application will be considered. Water quality is protected by the Texas Water Code. The TCEQ administers the TPDES program to manage point source pollutant discharges into the waters of Texas. TWC § 5.013(a). Therefore, discharges of treated wastewater into water in the state from facilities regulated under the TPDES program are required to meet the requirements of Texas Surface Water Quality Standards. (TSWQS) 30 TAC Chapter 307. Odor

is specifically addressed by TCEQ regulations concerning the siting of domestic wastewater plants. 30 TAC § 309.13. Therefore a reasonable relationship exists between the water contamination and nuisance odor concerns expressed in the hearing request and the TCEQ's regulation of the proposed facility. Because of her proximity to the proposed facility, Ms. Weber could be affected by the operations from the facility in a manner not common to members of the general public. Therefore, OPIC finds that Ms. Weber would individually qualify as an affected person based on the factors set forth in 30 TAC § 55.203(c).

The second requirement for group standing is the interests the group seeks to protect must be germane to the organization's purpose. 30 TAC § 55.205(a)(2). SHAA states that the purposes of SHAA include protection of the health and safety of the residents and landowners in the Steep Hollow area, as well as protecting the air, land, and water of the Steep Hollow area. These purposes also include participating in government decisions affecting these interests. The proposed wastewater treatment plant and discharge route are within the Steep Hollow area. Therefore, OPIC finds that the interests raised by SHAA are germane to the group's purpose, and SHAA has satisfied the second requirement for group standing.

Finally, as required by 30 TAC § 55.205(a)(3), neither the claim asserted by SHAA nor the relief requested by SHAA requires the participation of individual SHAA members. SHAA has satisfied the § 55.205 requirements for group standing, and therefore, OPIC recommends that the Commission find that SHAA is an affected person in this matter.

*Requestors who are within close proximity to the discharge route and/or proposed facility*

*Bonnie Weber*

In addition to the hearing request filed by attorney Eric Allmon on behalf of Bonnie Weber, Ms. Weber also filed a separate hearing request. Her hearing request states that she is a landowner whose property shares a fence line with the proposed facility. Her hearing request has raised concerns about potential flooding, leakage, erosion, nuisance odor, adverse impact on the quality of the water in the creek and surrounding soils and complete alteration of the current ecosystem. Her hearing request has also questioned the need of the facility when there is already an existing municipality within three to four miles of the facility.

While analyzing the affected person status for SHAA, OPIC has already concluded that because of her proximity to the proposed facility, Ms. Weber's interests are not common to members of the general public and a reasonable relationship exists between the water contamination and nuisance odor concerns expressed in the hearing request and the TCEQ's regulation of the proposed facility. OPIC borrows the same analysis and again concludes that Ms. Bonnie Weber is an affected person entitled to a contested case hearing.

Paul Bonarrigo

Mr. Bonarrigo's hearing request states several reasons for denying the Applicant's application. The hearing request states that there is already a wastewater treatment facility with the capacity to handle the proposed discharge. The hearing request also states that the proposed system is historically problematic and creates significant issues including nuisance odor and potential adverse effects to water supply. The hearing request further states that the proposed site is within the 100 year flood plain that would create potential environmental and health hazard issues.

Applicant lists Mr. Bonarrigo's property as Tract 24 on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Mr. Bonarrigo's

property is in close proximity to the proposed facility and discharge route. Mr. Bonarrigo's concerns are flooding, nuisance odor, potential negative impacts on environment and public health and the need for the facility. The Commission does not have jurisdiction to regulate flooding as a part of the wastewater permitting process. TCEQ is mandated to implement 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 enhance the quality of the water in the state." TWC § 26.081(a). Therefore the concerns about regionalization are protected by the law under which the application will be considered. Also, a reasonable relationship exists between the nuisance odor concerns and the TCEQ's regulation of the proposed facility. Because of his proximity to the proposed facility, Mr. Bonarrigo could be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Mr. Bonarrigo would qualify as an affected person entitled to a contested case hearing based on the factors set forth in 30 TAC § 55.203(c).

*Dina A Cooper*

Ms. Cooper's hearing request has raised concerns about environmental impact from the operations at the proposed facility including increased noise and traffic, nuisance odors and adverse effect on the property values in the neighborhood. The hearing request also raises concerns about the site to be located in the 100 year flood plain.

Ms. Cooper's name does not appear on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Ms. Cooper's property is in close proximity to the discharge route and proposed facility. The Commission does not have jurisdiction to regulate flooding, noise, traffic and adverse impact on the property values. As

discussed earlier, odor is addressed by TCEQ regulations concerning the siting of domestic wastewater plants. 30 TAC § 309.13. Therefore a reasonable relationship exists between the nuisance odor concerns expressed in the hearing request and the TCEQ's regulation of the proposed facility. Because of her proximity to the proposed facility, Ms. Cooper could be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Ms. Cooper would qualify as an affected person entitled to a contested case hearing based on the factors set forth in 30 TAC § 55.203(c).

Terry Harper

Ms. Harper's hearing request has raised numerous concerns including significant risk of damaging the environment around the facility, noise pollution, foul odors, decreasing property values, risk of spillage during truck transportation, pests spreading contaminants in the community impacting health, increased traffic and increased safety risk, unsuitable site characteristics and future maintenance of the plant after expiry of the period of operations.

Applicant lists Ms. Harper's property as Tract 32 on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Ms. Harper's property is in close proximity to the discharge route and proposed facility. Among Ms. Harper's concerns, nuisance odor is addressed by TCEQ regulations concerning the siting of domestic wastewater plants. 30 TAC § 309.13. Therefore a reasonable relationship exists between the nuisance odor concerns expressed in the hearing request and the TCEQ's regulation of the proposed facility. Because of her proximity to the proposed facility, Ms. Harper could be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Ms. Harper would qualify as an affected person entitled to a contested case hearing based on the factors set forth in 30 TAC § 55.203(c).

Sue C Mclin

Sue Mclin's hearing request states that the proposed plant is less than a mile from her back door. The hearing request also states that she wants to protest building this wastewater plant. However, the hearing request does not state any reasons or concerns.

Applicant lists Ms. Mclin's property as Tract 13 on the affected landowner's map accompanying the application. The map prepared by the ED confirms that the Ms. Mclin's property is in close proximity to the discharge route and proposed facility. As Ms. Mclin's hearing request does not state any concerns or interests, OPIC cannot analyze how Ms. Mclin could be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, in the absence of such information, OPIC finds that Ms. Mclin would not qualify as an affected person.

Jim Nachlinger

Mr. Nachlinger's hearing request states that his property adjoins the Steep Hollow Branch which will be the discharge area for the plant. The hearing request further states that considering the nature of steep hollow branch, it would result in an open sewage ditch when the untreated sewage is discharged into it. His hearing request raises concerns about health and safety of his family, flooding, no need for the wastewater treatment plant and adverse impact on the livestock and wildlife as they use the branch as a water source.

Applicant lists Mr. Nachlinger's property as Tract 9 on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Mr. Nachlinger's property is in close proximity to the discharge route and proposed facility. As discussed earlier, the water quality concerns are protected by the law under which the application will be

considered. Also, a reasonable relationship exists between the water quality interest expressed in the hearing request and the TCEQ's regulation of proposed facility.

Because of his proximity to the proposed facility, Mr. Nachlinger could be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Mr. Nachlinger would qualify as an affected person entitled to a contested case hearing based on the factors set forth in 30 TAC § 55.203(c).

Annie Lin Risinger

Annie Risinger's hearing request states that her property is bordered by steep hollow creek. Her hearing request raises concerns about diminished property value, unpleasant smell, disruption to water plane and adverse impact on her life.

Applicant lists Ms. Risinger's property as Tract 12 on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Ms. Risinger's property is in close proximity to the discharge route and proposed facility. As discussed earlier, TCEQ does not have jurisdiction to regulated property values. However, a reasonable relationship exists between the nuisance odor concerns expressed in the hearing request and the TCEQ's regulation of the proposed facility. Because of her proximity to the proposed facility, Ms. Risinger could be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Ms. Risinger would qualify as an affected person entitled to a contested case hearing based on the factors set forth in 30 TAC § 55.203(c).

Dr. Brian Spence

Dr. Spence's hearing request states that the proposed treatment plant would be located directly behind his residence. His hearing request raises concerns about the negative

environmental impacts when the facility is not properly managed, flooding, negative impact on the Steep Hollow Wickson Creek and the Navasota River, noise, nuisance odors, emissions pollutants, increase chance for spillage, contaminating the local environment, increased traffic, spread of more contaminants, negative effect on the health of the community, decreased property value, negative impact on her quality of life as well as the neighbors.

Applicant lists Dr. Spence's property as Tract 27 on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Dr. Spence's property is in close proximity to the discharge route and proposed facility. Dr. Spence's concerns about water quality and nuisance odor are protected by the law under which the application will be considered. Also, a reasonable relationship exists between the water quality interest and odor concerns expressed in the hearing request and the TCEQ's regulation of proposed facility. Because of his proximity to the proposed facility, Dr. Spence could be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Dr. Spence would qualify as an affected person entitled to a contested case hearing based on the factors set forth in 30 TAC § 55.203(c).

*Dr. Ryan Jouett & Amanda Jouett*

Dr. Jouett and Mrs. Jouett (the Jouetts) filed separate hearing requests stating identical concerns. Dr. Jouett's hearing request states that their property is about 880 yards from the proposed facility. Their hearing requests have raised concerns about the possible runoff from the wastewater treatment plant, nuisance odors, increased noise and traffic, no necessity for the wastewater treatment plant, plant location being in the flood zone area, negative impact on their property value and adverse impact of the pollutants to the environment around their property, pond on their property and fish and turtle in the pond and birds around the pond.

Applicant lists the Jouetts' property as Tract 32 on the affected landowner's map accompanying the application. The map prepared by the ED confirms that the Jouetts' property is in close proximity to the discharge route and proposed facility. The Jouetts' concerns about water quality and nuisance odor are protected by the law under which the application will be considered. Also, a reasonable relationship exists between the water quality interest and odor concerns expressed in the hearing request and the TCEQ's regulation of proposed facility. Because of their proximity to the proposed facility, the Jouetts could be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that the Jouetts would qualify as affected persons entitled to a contested case hearing based on the factors set forth in 30 TAC § 55.203(c).

*Sandra Kroll & Terry C Kroll*

Sandra Kroll and Terry Kroll (the Krolls) filed separate hearing requests stating identical concerns. Their hearing requests state that the proposed site is within a flood zone area and would cause potential environmental harm. Their hearing requests further state that the proposed plant is within a three to four mile radius of an existing municipality which nullifies the need for such facility.

The Krolls do not appear on the affected landowner's map accompanying the application. From the map prepared by the ED, the Krolls' property appears to be within close proximity of the proposed facility or the proposed discharge route. The Krolls' concerns are flooding and need for the proposed plant. As discussed earlier, the Commission does not have jurisdiction to regulated flooding in the context of a wastewater discharge permit. However, as discussed earlier, TCEQ is mandated to implement 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 enhance the quality of the water in the state.” TWC § 26.081(a). Therefore the Krolls’ concerns about regionalization are protected by the law under which the application will be considered. Therefore, OPIC finds that considering the Krolls’ proximity to the proposed facility, the Krolls would qualify as an affected person based on the factors set forth in 30 TAC § 55.203(c) and that a reasonable relationship exists between the concerns about the need for the facility and the Commission’s regionalization policy. *Id.*

*Bruce W Lester & Katherine Dawn Lester*

Bruce Lester and Katherine Lester (the Lesters) filed separate hearing requests stating identical concerns. Their hearing requests have raised concerns about increased traffic, nuisance odors, damaging property value, erosion, pond flooding or marshy areas creating mosquitoes and West Nile disease, contamination of Wickson Water, increased noise and pollution.

Applicant lists the Lesters’ property as Tract 28 on the affected landowner’s map accompanying the application. The map prepared by the ED confirms that same property is in close proximity to the discharge route and proposed facility. The Lesters’ concerns about water quality and nuisance odor are protected by the law under which the application will be considered. Also, a reasonable relationship exists between the water quality interest and odor concerns expressed in the hearing request and the TCEQ’s regulation of proposed facility. Because of their proximity to the proposed facility, the Lesters could be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that the Lesters would individually qualify as an affected person entitled to a contested case hearing based on the factors set forth in 30 TAC § 55.203(c).

Requesters who are within close proximity to the discharge route and/or proposed facility and who filed identical hearing requests

Cindy Barnett, Terry Barnett, Cathy Hegwood, Joe Hegwood, Carmen M Januse, Frank Januse, Ms. Amy Mccoslin, Mr. Ronnie O'Neal Jr., David Pugh, Gabby Ring, Steve Weaver, and Jeff Dillon filed separate but identical hearing requests. These hearing requests state numerous concerns including environmental impact, adverse impact to current residents within the surrounding area including foul odors, and risk of contaminating multiple water sources including drinking water sources, groundwater, environment and soil.

Applicant lists Cindy Barnett and Terry Barnett's property as Tract 21 on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Cindy & Terry Barnett's property is in close proximity to the discharge route and proposed facility.

Cathy Hegwood and Joe Hegwood do not appear on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Cathy & Joe Hegwood's property is in close proximity to the discharge route and proposed facility.

Applicant lists Carmen Januse and Frank Januse's property as Tract 10 on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Carmen & Frank Januse's property is in close proximity to the discharge route and proposed facility.

Applicant lists Amy McCoslin's property as Tract 5 on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Ms. McCoslin's property is in close proximity to the discharge route and proposed facility.

Applicant lists Ronnie O'Neal Jr.'s property as Tract 4 on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Mr. O'Neal's property is in close proximity to the discharge route and proposed facility.

David Pugh's name does not appear on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Mr. Pugh's property is in close proximity to the discharge route and proposed facility.

Gabby Ring's name does not appear on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Mr. Ring's property is in close proximity to the discharge route and proposed facility.

Steve Weaver's name does not appear on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Mr. Weaver's property is in close proximity to the discharge route and proposed facility.

Jeff Dillon's name does not appear on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Mr. Dillon's property is in close proximity to the discharge route and proposed facility.

As discussed earlier, water quality concerns are protected by the law under which the application will be considered. Also, a reasonable relation exists between the water quality interest expressed in these hearing requests and the TCEQ's regulation of TPDES program. Concerns about nuisance odors are also addressed by the law governing this application. Though some of these requesters are not immediately adjacent to the facility or the discharge route, they are close enough to be affected by the odors. Because of their proximity to the proposed facility, these requestors could be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Cindy Barnett, Terry

Barnett, Cathy Hegwood, Joe Hegwood, Carmen M Januse, Frank Januse, Ms. Amy Mccoslin, Mr. Ronnie O'Neal Jr., David Pugh, Gabby Ring, Steve Weaver, and Jeff Dillon would qualify as affected persons entitled to a contested case hearing based on the factors set forth in 30 TAC § 55.203(c).

Requestors who are not within close proximity to the discharge route and/or proposed facility

John Cargill

Mr. John Cargill's hearing request has raised concerns about airborne hazards creating respiratory and gastrointestinal infections. The hearing request has also raised concerns about raw sewage attracting houseflies and cockroaches which creates a health hazard for those living near wastewater treatment facility. The hearing request states that when the domestic wastewater is not managed properly, it would spread disease and would create a health hazard to the residential establishments surrounding the facility and to the cattle being raised downstream. The hearing request has further raised concerns about groundwater contamination and contaminating water wells on C6 Ranch that supplies water for both human and animals' consumption on the property.

Mr. Cargill's name does not appear on the affected landowner's map accompanying the application. From the map prepared by the ED, Mr. Cargill's property does not appear to be within close proximity of the proposed facility or the proposed discharge route. Because of his location relative to the proposed facility, OPIC finds Mr. Cargill is not likely to be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Mr. Cargill does not qualify as an affected person based on the factors set forth in 30 TAC § 55.203(c).

Cecil Leon Cummins

Mr. Cummins' hearing request raises numerous concerns including environmental impact, adverse impact to current residents within the surrounding area, the lack of a need for the plant and disproportionate benefits to the developer, increased traffic and flooding.

Mr. Cummins' name does not appear on the affected landowner's map accompanying the application. From the map prepared by the ED, Mr. Cummins' property does not appear to be within close proximity of the proposed facility or the proposed discharge route. Because of his location relative to the proposed facility, OPIC finds that Mr. Cummins is not likely to be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Mr. Cummins does not qualify as an affected person based on the factors set forth in 30 TAC § 55.203(c).

Dr. Susan Moreland

Dr. Susan Moreland's hearing request has raises concerns about increased traffic, noise, odor, decreasing home value and potential contamination of groundwater.

Dr. Moreland's name does not appear on the affected landowner's map accompanying the application. From the map prepared by the ED, Dr. Moreland's property does not appear to be within close proximity of the proposed facility or the proposed discharge route. Because of her location relative to the proposed facility, OPIC finds that Dr. Moreland is not likely to be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Dr. Moreland does not qualify as an affected person based on the factors set forth in 30 TAC § 55.203(c).

Mr. Stephen G Phillips

Stephen Phillips' hearing request raises concerns about detrimental environmental impact, declined standard of living and impact on the adjacent properties.

Mr. Phillips' name does not appear on the affected landowner's map accompanying the application. From the map prepared by the ED, Mr. Phillips' property does not appear to be within close proximity of the proposed facility or the proposed discharge route. Because of his location relative to the proposed facility, OPIC finds that Mr. Phillips is not likely to be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Mr. Phillips does not qualify as an affected person based on the factors set forth in 30 TAC § 55.203(c).

Mr. Ted A. Skalaban

Ted Skalaban's hearing request has raised concerns about the underground water contamination, ability of the current infrastructure to handle increased commercial traffic, adverse impact on the property values and quality of life of property residents.

Mr. Skalaban's name does not appear on the affected landowner's map accompanying the application. From the map prepared by the ED, Mr. Skalaban's property does not appear to be within close proximity of the proposed facility or the proposed discharge route. Because of his location relative to the proposed facility, OPIC finds that Mr. Skalaban is not likely to be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Mr. Skalaban does not qualify as an affected person based on the factors set forth in 30 TAC § 55.203(c).

Gary N. Wentrcek

Mr. Wentrcek's hearing request raises concerns about the adverse environmental impacts, risks of contamination to water sources including Wickson Creek, Navasota River, private wells and groundwater in the area, unsuitability of the proposed plant due to its proximity to Brazos County's flood plain zone, adverse effect on the quality of life of the families living in the proximity of the plant, nuisance odor, noise, adverse impact on the property values, the lack of need for the proposed facility and significant impact on Mr. Wentrcek's well-being and quality of life.

Mr. Wentrcek's name does not appear on the affected landowner's map accompanying the application. From the map prepared by the ED, Mr. Wentrcek's property does not appear to be within close proximity of the proposed facility or the proposed discharge route. Because of his location relative to the proposed facility, OPIC finds that Mr. Wentrcek is not likely to be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Mr. Wentrcek does not qualify as an affected person based on the factors set forth in 30 TAC § 55.203(c).

Gary Wingenbach

Mr. Wingenbach's hearing request raises concerns about the significant degradation to the quality of his life as a surrounding neighbor, decrease in his home's value, and a risk of contaminated effluent spilling into water sources including Wickson creek which is his drinking water source.

Mr. Wingenbach's name does not appear on the affected landowner's map accompanying the application. From the map prepared by the ED, Mr. Wingenbach's property does not appear to be within close proximity of the proposed facility or the proposed discharge route. Because of

his location relative to the proposed facility, OPIC finds that Mr. Wingenbach is not likely to be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Mr. Wingenbach does not qualify as an affected person based on the factors set forth in 30 TAC § 55.203(c).

Carolyn Kellam & Marvin Wayne Kellam

Carolyn Kellam & Marvin Kellam (the Kellams) filed separate hearing requests stating identical concerns. Ms. Kellam's hearing request states that the Kellams are located within a half mile radius of the proposed site. Their hearing requests have raised concerns about nuisance odors, possible leakage, the location of the facility being in the flood zone, the lack of need for the wastewater treatment plant, negative impact on the air quality and adverse impact on their property value.

The Kellams do not appear on the affected landowner's map accompanying the application. From the map prepared by the ED, the Kellams' property does not appear to be within close proximity of the proposed facility or the proposed discharge route. Because of their location relative to the proposed facility, OPIC finds that the Kellams are not likely to be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Carolyn Kellam & Marvin Kellam do not qualify as affected persons based on the factors set forth in 30 TAC § 55.203(c).

Requesters who are not within close proximity to the discharge route and/or proposed facility and who filed identical hearing requests

Bob Sprott, Sue Sprott, Donnie Vernon, Leah Vernon, Brandon W. Zemanek, Cindy A. Zemanek and Ronnie W. Zemanek filed separate but identical hearing requests. These hearing requests state numerous concerns including environmental impact, adverse impact to current

residents within the surrounding area and disproportionate benefit to the developer. Their hearing requests mentions that the proposed plant poses a risk of contaminating multiple water sources including drinking water sources, groundwater, environment and soil.

Bob Sprott and Sue Sprott do not appear on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Mr. & Ms. Sprott's property is not in close proximity to the discharge route and proposed facility.

Donnie Vernon and Leah Vermon do not appear on the affected landowner's map accompanying the application. The map prepared by the ED confirms that Mr. & Ms. Vermont's property is not in close proximity to the discharge route and proposed facility.

Brandon Zemanek, Cindy Zemanek and Ronnie Zemanek do not appear on the affected landowner's map accompanying the application. The map prepared by the ED confirms that their property is not in close proximity to the discharge route and proposed facility.

Because of their location relative to the proposed facility, OPIC does not find that these requesters could not be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Bob Sprott, Sue Sprott, Donnie Vernon, Leah Vermon, Brandon W. Zemanek, Cindy A. Zemanek and Ronnie W. Zemanek do not qualify as an affected person based on the factors set forth in 30 TAC § 55.203(c).

**C. Issues raised in the hearing requests**

1. Whether the operational requirements in the draft permit are adequate to ensure that the proposed facility is properly operated and maintained according to the TCEQ rules.
2. Whether the proposed facility would cause potential odor problems.
3. Whether the siting of the proposed plant complies with the TCEQ's rules.

4. Whether the plant design would be suitable to protect surrounding properties from floodwater considering the proposed location of the site in proximity to the floodplain.
5. Whether the proposed discharge would adversely impact the receiving water body because of increased bacteria, other pathogens, oxygen-demanding substances, nutrients and other contaminants.
6. Whether the proposed discharge would impair surface water quality of the receiving water making it unsuitable for human consumption or use by livestock and wildlife.
7. Whether the authorized discharge under the draft permit along with other discharges, would have a cumulative impact on the receiving water bodies violating anti-degradation requirements of the TCEQ rules.
8. Whether the proposed discharge would harm endangered species, including the Navasota ladies'-tresses, within the watershed and in the surrounding area.
9. Whether the draft permit would prevent any potential discharge of raw sewage or undiluted effluent into the creek or receiving water.
10. Whether any solid byproduct of the plant would be handled properly without creating any spillage or adverse impact on the surroundings.
11. Whether the characteristics of the discharge route are adequate to receive the volume of discharge proposed and whether the proposed discharge would disrupt the receiving watershed.
12. Whether the proposed discharge would cause erosion of the receiving streambed.
13. Whether the proposed discharge would contribute to soil contamination along the discharge route.
14. Whether the proposed discharge would create problems of algae blooms.

15. Whether the chemicals that will be used at the proposed facility would create any adverse impact on the surroundings.
16. Whether the proposed facility would unreasonably interfere with the use and enjoyment of surrounding properties or neighbors' quality of life.
17. Whether the applicant's compliance history warrants denial or modification of the permit.
18. Whether the draft permit would be protective of public health, aquatic vegetation, aquatic life and other wildlife.
19. Whether there is a need for the proposed facility or any feasible regional treatment alternative exists.
20. Whether the proposed discharge may cause any adverse impact to groundwater.
21. Whether the operations of the proposed facility would cause any adverse impact to the wetlands.
22. Whether the proposed facility would cause any adverse impact to air quality.
23. Whether the proposed facility would create noise, traffic or other related problems.
24. Whether the proposed facility would adversely affect the requesters' property values.

**E. Which issues raised in the hearing request are disputed**

All of the issues raised in the hearing request are disputed.

**F. Whether the dispute involves questions of fact or of law**

The disputed issues involve questions of fact.

**G. Whether the issues were raised during the public comment period**

All of the issues were raised during the public comment period.

**H. Whether the hearing request is based on issues raised solely in a public comment which has been withdrawn**

The hearing requests are not based on issues raised solely in a public comment which has been withdrawn.

**I. Whether the issues are relevant and material to the decision on the application**

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

Relevant and material issues are those governed by the substantive law under which this permit is to be issued. 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 requirements for classification of wastewater treatment facilities, wastewater collection systems, and occupational licenses and registration are specified under 30 TAC Chapter 30. Therefore the issue no. 1 related to operational requirements is related and material.

Issue no. 2 questions whether permitted activities would result in nuisance odors. Odor is specifically addressed by TCEQ regulations concerning the siting of domestic wastewater plants. 30 TAC § 309.13. The Commission rules require domestic wastewater treatment facilities to meet buffer zone requirements for the abatement and control of nuisance odors pursuant to 30 TAC § 309.13(e) prior to construction of the new wastewater facility. Therefore issue no. 2 is relevant and material.

Issue no. 3 concerns suitability of the site for the proposed relocated facility for a wastewater treatment plant. One of the stated purposes in the TCEQ rules on Domestic

Wastewater Effluent Limitations and Plant Siting (30 TAC Chapter 309) is selection of a site that minimizes the possible contamination of ground and surface waters. 30 TAC § 309.10 (b). TCEQ's siting requirements under 30 TAC § 309.13(a)-(d) were developed to protect surface and groundwater. Therefore, issue no. 3 is relevant and material.

Many requesters raise general flooding concerns which cannot be addressed in this proceeding. However, given concerns raised that the site will be located in a flood plain, issue no. 4 concerning the plant design protective of surrounding properties from the floodwater is relevant and material.

The Commission is responsible for the protection of water quality under the TWC Chapter 26 and 30 TAC Chapters 307 and 309, as well as under specific rules related to the wastewater systems found at 30 TAC Chapter 217. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require that the proposed permit "maintain the quality of water in the state consistent with public health and enjoyment." 30 TAC § 307.1. Therefore, issues nos. 5, 6, 8, 9, 11, 13, 14, 15, 16, 18, 20, 21 are relevant and material.

The TCEQ's Tier 2 antidegradation standards are detailed in 30 TAC § 307.5(b)(2). Therefore issue no. 7 is relevant and material.

TCEQ rules at 30 TAC § 312.8(74) defines sludge as solid, semi-solid or liquid residue generated during the treatment of domestic sewage in treatment works. As discussed in the Response to Comments Response 9, the draft permit addresses how the Applicant is authorized to dispose of sewage sludge generated at the facility. In addition to the Chapter 312 rules, the Commission's Chapter 305 rules require an applicant to address proper management of sludge. 30 TAC § 305.536 (Requirements for Applications and Permits with Sludge Related Conditions).

Therefore, issue no. 10 relating to the handling of sludge properly without creating any spillage or adverse impact on the surroundings is relevant and material.

TCEQ does not have jurisdiction to address the issue of erosion as a part of the wastewater permitting process. Therefore, the issue no. 12 about this proposed facility's potential impact on erosion is outside the scope of the evaluation of a domestic wastewater discharge permit application and is not relevant and material.

Issue no. 17 concerns whether the applicant's compliance history justifies denial or modification of the permit. 30 TAC Chapter 60 requires that the Commission rate the compliance history of every owner and operator of a facility that is regulated under any of the state's applicable environmental laws and create a compliance history report. According to TWC §26.0281, the Commission is required to review the compliance history of every Applicant and facility when an application for a discharge permit is received. Therefore, issue no. 17 is relevant and material.

TCEQ adheres to a regionalization policy, as expressed in TWC §§ 26.003, 26.0282, 26.081 and 30 TAC § 307.1. Pursuant to the TWC § 26.0282, in 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 and regional treatment options available. Therefore, issue no. 19 related to the regionalization and need for the proposed facility is relevant and material.

The Texas Clean Air Act provides that certain facilities may be exempt from the requirements of an air quality permit if, upon review, it is found that those facilities will not make a significant contribution of air contaminants to the atmosphere and that human health and environment will be protected. According to the TCEQ rules in 30 TAC § 106.532, wastewater treatment plants have undergone this review and are permitted by rule, provided the wastewater

treatment plant only performs the functions listed in the rule. While the Commission regulates air quality, the application in question concerns a wastewater discharge application. Concerns about air quality cannot be addressed by the law applicable to this proceeding, therefore issue no. 22 is not relevant and material.

The Commission does not have jurisdiction to regulate noise, traffic and related issues. Therefore issue no. 23 is not relevant and material.

Issue no. 24 concerns impact to the property values. The Commission does not have jurisdiction to review the effect, if any, the location of the wastewater treatment facility might have on the property values and marketability of nearby property. Therefore, issue No. 24 concerning the adverse effect on the Requesters' property values is not relevant and material.

#### **I. Issues for Referral**

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

1. Whether the operational requirements in the draft permit are adequate to ensure that the proposed facility is properly operated and maintained according to the TCEQ rules.
2. Whether the proposed facility would cause potential odor problems.
3. Whether the siting of the proposed plant complies with the TCEQ's rules.
4. Whether the plant design would be suitable to protect surrounding properties from floodwater considering the proposed location of the site in proximity to the floodplain.
5. Whether the proposed discharge would adversely impact the receiving water body because of increased bacteria, other pathogens, oxygen-demanding substances, nutrients and other contaminants.
6. Whether the proposed discharge would impair surface water quality of the receiving water making it unsuitable for human consumption or use by livestock and wildlife.

7. Whether the authorized discharge under the draft permit along with other discharges, would have a cumulative impact on the receiving water bodies violating anti-degradation requirements of the TCEQ rules.
8. Whether the proposed discharge would harm endangered species, including the Navasota ladies'-tresses, within the watershed and in the surrounding area.
9. Whether the draft permit would prevent any potential discharge of raw sewage or undiluted effluent into the creek or receiving water.
10. Whether any solid byproduct of the plant would be handled properly without creating any spillage or adverse impact on the surroundings.
11. Whether the characteristics of the discharge route are adequate to receive the volume of discharge proposed and whether the proposed discharge would disrupt the receiving watershed.
12. Whether the proposed discharge would contribute to soil contamination along the discharge route.
13. Whether the proposed discharge would create problems of algae blooms.
14. Whether the chemicals that will be used at the proposed facility would create any adverse impact on the surroundings.
15. Whether the proposed facility would unreasonably interfere with the use and enjoyment of surrounding properties or neighbors' quality of life.
16. Whether the applicant's compliance history warrants denial or modification of the permit.
17. Whether the draft permit would be protective of public health, aquatic vegetation, aquatic life and other wildlife.

18. Whether there is a need for the proposed facility or any feasible regional treatment alternative exists.
19. Whether the proposed discharge may cause any adverse impact to groundwater.
20. Whether the operations of the proposed facility would cause any adverse impact to the wetlands.

#### **IV. 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 nine months from the first date of the preliminary hearing until the proposal for decision is issued.

#### **V. CONCLUSION**

For the reasons stated herein above, OPIC recommends granting the hearing requests of SHAA, Bonnie Weber, Paul Bonarrigo, Dina Cooper, Terry Harper, Sue McIn, Jim Nachlinger, Annie Risinger, Dr. Brian Spence, Dr. Ryan Jouett, Amanda Jouett, Sandra Kroll, Terry Kroll, Bruce Lester, Katherine Lester, Cindy Barnett, Terry Barnett, Cathy Hegwood, Joe Hegwood, Carmen Januse, Frank Januse, Amy McCoslin, Ronnie O'Neal Jr., David Pugh, Gabby Ring, Steve Weaver and Jeff Dillon. OPIC also recommends denying request for reconsideration from SHAA and Bonnie Weber. Furthermore, OPIC recommends referring this application to the SOAH for a nine-month hearing on the issues listed in Section III. I above.

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2016 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing 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.

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