

TCEQ DOCKET NO. 2016-0229-MWD

APPLICATION BY SOUTHSTAR	§	BEFORE THE TEXAS
	§	
AT VINTAGE OAKS, LLC FOR	§	COMMISSION ON
	§	
PERMIT NO. WQ0015320001	§	ENVIRONMENTAL QUALITY

APPLICANT'S RESPONSE TO HEARING REQUESTS

TO THE HONORABLE COMMISSIONERS:

COMES NOW SouthStar at Vintage Oaks, LLC ("Applicant") and pursuant to 30 Texas Administrative Code ("TAC"), Chapter 55, Subchapter F (Sections 55.200-55.211) submits this Response to Hearing Requests to the Texas Commission on Environmental Quality ("TCEQ") to challenge the standing of each party filing a hearing request on Application for a Texas Land Application Permit No. WQ0015320001 (the "Application") on the grounds that the requests for hearing do not meet applicable statutory and regulatory requirements. In support of this Response, Applicant respectfully submits the following:

I. Summary of Facts

On December 3, 2014, Applicant applied to the TCEQ for a new Permit No. WQ0015320001 to authorize the disposal of treated domestic wastewater ("Permit"). The Application was declared administratively complete on January 20, 2015. The Executive Director completed a technical review of the Application on June 11, 2015 and accordingly published his Preliminary Decision and a draft permit on August 8, 2015. If granted, the Permit would allow the disposal of treated domestic wastewater at a daily average flow of not to exceed 130,000 gallons per day via surface irrigation of 40 acres of public trails. The proposed site for the contemplated wastewater treatment facility would be located in the Vintage Oaks at the Vineyard subdivision, 0.2 miles east of the intersection of Vintage Way and State Highway 46, partially within the City of New Braunfels' extraterritorial jurisdiction. No discharge of pollutants into waters in the state would be authorized by the Permit.

Notices concerning the Application and opportunity for public comment were published on August 8, 2015. Multiple comments were received and a public meeting was held on September 10, 2015, at the New Braunfels Civic Center. The period for public comment ended on November 2, 2015, and the TCEQ Executive Director issued a Response to Public Comment on December 28, 2015. The Decision of the Executive Director, finding that the Application meets the requirements of applicable law, and enclosing a copy of the Response to Public Comment was sent to protestants and other parties on January 7, 2016. The period for requesting reconsideration or a contested case hearing ended on February 8, 2016. Thomas Chaney timely filed a request for a contested case hearing during this period on October 12, 2015. Five other comments denominated as requests for a contested case hearing were received in February and March of 2015, in advance of the public meeting. Nineteen other requests were received that the Executive Director may treat as contested case hearing requests; however, these requests were also received in February and

March of 2015, and are thus untimely, and additionally, only requested a “public hearing” rather than a contested case hearing, which most likely meant that they wanted a public meeting.

This Response is divided into three sections. The first section reviews applicable legal standards for a person to be an affected party entitled to a contested case hearing. The second section summarizes the issues raised by the commenters. The third section reviews the specific hearing requests.

II. Legal Standards

a. Request for a Contested Case Hearing

In order for TCEQ to consider a hearing request, it must first determine whether the request meets certain requirements. As set out in 30 TAC § 55.201(c):

A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided by subsection (a) of this section, may not be based on an issue that was 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, and, for applications filed on or after September 1, 2015, must be based only on the requestor's timely comments.

According to TCEQ Rules, a hearing request must substantially comply with the following requirements:

(1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. . . .

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely 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) for applications filed:

(A) before September 1, 2015, list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; . . . and

(5) provide any other information specified in the public notice of application.

30 TAC § 55.201(d).

b. Entitlement to Request Contested Case Hearing – Affected Person Standard

In order to grant a contested case hearing, TCEQ must find the requestor is an “affected person” under the statute and rules. Tex. Water Code § 5.56. The Texas Water Code articulates the overall standard for this determination, “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. An interest common to members of the general public does not qualify as a personal justiciable interest.” Tex. Water Code § 5.115(a); *see also* 30 TAC § 55.203(a). 30 TAC § 55.203(c) and (e) sets out the following factors for TCEQ to consider in making this determination:

(c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

- (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;
- (6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and
- (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

(d) In determining whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the commission may also consider the following:

- (1) the merits of the underlying application and supporting documentation in the commission's administrative record, including whether the application meets the requirements for permit issuance;
- (2) the analysis and opinions of the executive director; and

(3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.

(e) In determining whether a person is an affected person for the purpose of granting a hearing request for an application filed before September 1, 2015, the commission may also consider the factors in subsection (d) of this section to the extent consistent with case law.

For the affected-person determination, the requestor, not the permit applicant, bears the burden of proof. 30 TAC § 80.17(a); *see Texas Comm'n on Envtl. Quality v. City of Aledo*, 03-13-00113-CV, 2015 WL 4196408, at *4 (Tex. App.—Austin July 8, 2015) (finding that the statute and rules “squarely places that burden of a showing on the requesting person” and that TCEQ makes the determination based on the information submitted by the requesting person).

c. Timeliness of Request for Contested Case Hearing

A request for a contested case hearing “must be filed no later than 30 days after the chief clerk mails . . . the executive director’s decision and response to comments and provides instructions for requesting that the commission reconsider the executive director’s decision or hold a contested case hearing.” 30 TAC § 55.201(a). Implicitly, such a request may not be submitted before the Executive Director’s decision and response to comments, not only due to the date requirement above, but also because such a request must substantially comply with a requirement to specify any disputes with the Executive Director’s responses. 30 TAC § 55.201(d)(4)(A). It would be impossible for a contested case hearing request submitted before the Executive Director’s comments are sent out to substantially comply with this requirement. As mentioned above, the Executive Director’s Response to Public Comment and The Decision of the Executive Director were sent to the parties on January 7, 2016.

III. Interests Raised That Are Not Protected by TCEQ

Before discussing the failure of each requestor to meet the affected person standard on a case-by-case basis, a common deficiency shared by all of the hearing requests should be addressed. As noted above, SouthStar seeks a no-discharge permit from the TCEQ pursuant to Chapter 26 of the Texas Water Code. In reviewing a permit application, the TCEQ is guided by the requirements of Chapter 26 of the Texas Water and TCEQ regulations. Therefore, a contested hearing should not be granted to the extent that the requestor raises issues outside of the TCEQ’s jurisdiction or the scope of its consideration in making a wastewater permit determination. *See* Tex. Water Code § 5.115(a) (requiring party to hearing to have a “justiciable interest” related to the proceedings); 30 TAC § 55.203(c)(a) (directing the TCEQ to consider, in affected person determination, whether “the interest claimed is one protected by the law under which the application will be considered”); *TCEQ v. City of Aledo*, 03-13-00113-CV, 2015 WL 4196408, at *6 (Tex. App.—Austin July 8, 2015, no pet.). A recent court of appeals decision found that issues outside those TCEQ is authorized to regulate should not be addressed in a contested case hearing, and that consequently could not be used to show affected-person status. *See Sierra Club v. Texas Comm'n on Envtl. Quality*, 455 S.W.3d 214, 224-26 (Tex. App.—Austin 2014, no pet.). As stated in that case:

[It] would have been reasonable for TCEQ to determine that Gardner's and Williams's stated concerns over possible traffic and railway accidents involving by-product materials were not reasonably related to the disposal of byproduct at the WCS site because TCEQ has no jurisdiction over the transportation of radioactive materials and because the permit does not allow WCS to receive by-product material by rail. Relatedly, it would have been reasonable for TCEQ to determine that Gardner is not an affected person given that her concern regarding the effects of possible negative publicity on her business is not reasonably related to the WCS facility because the relevant regulations involve public health, safety, and the environment—not publicity.

Sierra Club, 455 S.W.3d at 225-26 (citations omitted).

In the present case, the Executive Director, in his response to Public Comment, identified many of the concerns raised in the hearing requests as falling outside TCEQ jurisdiction in this matter. Comment 119 of the Response raised a host of issues, including property value, aesthetic concerns, density of development, and compliance with the Vintage Oaks Master Plan. Exec. Dir.'s Resp. Comm. at 70–72. In response to this comment, the Executive Director stated as follows:

The permitting process is intended to control the discharge of pollutants into water in the state and to protect the water quality of the state's rivers, lakes, and coastal waters. TCEQ does not have jurisdiction to address concerns such as those listed in Comment 119 above in the wastewater permitting process.

Id. at 72. The Executive Director responded similarly to comments raising concerns related to general “quality of life” and “noise and lights” from the facility. *See id.* at 24 (TCEQ “does not have authorization to consider quality of life or living conditions, as long as water quality is maintained”), 27 (“The TCEQ does not have authority to address noise or lights in evaluation of a wastewater discharge permit”).

Consequently, to the extent requestors raise concerns limited to property value, aesthetics, density of development, compliance with the Vintage Oaks Master Plan, quality of life, or noise and light pollution, these concerns create no basis for TCEQ to find the requestor an affected person or grant his or her hearing request.

IV. No Party is an Affected Person

a. Mr. Chaney is not an affected person

Mr. Chaney's request identifies five types of potential contested issues: odor, light and noise pollution, quality of life, development density, and impact on the Edwards Aquifer recharge zone. As discussed above, in section III, the issues of light and noise pollution, quality of life, and development density lie outside TCEQ jurisdiction and cannot serve as the basis for a justiciable interest.

With respect to odor, TCEQ rules require domestic wastewater treatment facilities to meet buffer zone requirements for the abatement and control of nuisance odors according to 30 TAC §

309.13(e). Applicant has chosen to meet the buffer zone requirements by owning the area. The concern of odor was explicitly addressed in the ED's Response to Comments. Exec. Dir. Resp. Comm at 22–23. Mr. Chaney's request for hearing offers no additional relevant facts or material dispute of the ED's Response to show why he might be affected by nuisance odors despite the buffer zone and other factors identified.

With respect to Mr. Chaney's concerns about the effect on the Edwards Aquifer recharge zone, these concerns were raised in the public hearing and comprehensively addressed by the Executive Director's Response. In the first place, given its location in the Edwards Aquifer recharge zone, SouthStar's proposed facility will have to meet the specific requirements of 30 TAC Chapter 213. As recognized by the Executive Director, SouthStar has, pursuant to these requirements, submitted an Edwards Aquifer Protection Plan, including a water pollution abatement plan and an organized sewage collection system plan, for review and approval. 30 TAC § 213.5; *see* Exec. Dir.'s Resp. Comm. at 9. In fact, the Draft Permit sets significantly stricter limits for discharge upstream of the recharge zone—5 mg/l BOD, 5 mg/l TSS, 2 mg/l ammonia nitrogen, and 1 mg/l phosphorus—than required by 30 TAC Chapter 213. The Executive Director has observed that “SouthStar's [organized sewage collection system plan] includes the technical requirements for the design of the collection system that are more stringent than the requirements for similar systems in other parts of the state.” Exec. Dir.'s Resp. Comm. at 9.

Further, though Mr. Chaney asserts that the disposal facility will result in “raw sewage” polluting the drinking water supply, the permit SouthStar seeks does not authorize any discharge of pollutants to water and specifically prohibits unauthorized discharge. SouthStar Draft Permit, at 9. The permit at issue is a “no-discharge” Texas Land Application Permit, which does not allow discharge to groundwater or a surface water body of any effluent, much less raw sewage; rather, the proposed permit requires effluent to be applied to crops at a rate that does not allow runoff into the groundwater or a body of water. SouthStar Draft Permit, at 34; *see* Exec. Dir.'s Resp. Comm., at 11. It should be noted that raising hypothetical system failures or harms that would themselves constitute permit violations will not support a finding that a requestor is an affected person. *See Collins v. Tex. Nat. Res. Conservation Comm'n*, 94 S.W.3d 876, 883 (Tex. App.—Austin 2002, no pet.).

Also, as a new wastewater facility located on the Edwards Aquifer recharge zone, the proposed SouthStar facility will be required to comply with rule 30 TAC § 213.6(a)(4), which requires it to be “designed, constructed, and operated such that there are no bypasses of the treatment facilities or any discharges of untreated or partially treated wastewater.” As mentioned above, the Draft Permit actually exceeds those limits. The draft permit also includes provisions designed to protect water quality, including the requirement to maintain vegetation in irrigation areas, and a prohibition on irrigating frozen or saturated ground. SouthStar Draft Permit at 34–35. The Executive Director highlighted these protections when responding to a comment regarding discharge of effluent into the Edwards Aquifer. Exec. Dir.'s Resp. Comm. at 7–8. Finally, the activity allowed by the proposed permit complies with proposed effluent application rates set by 30 TAC § 309.20(b)(3)(A), according to calculations that have been reviewed and approved by the Executive Director. Exec. Dir.'s Resp. Comm. at 8.

With specific reference to the concern that heavy rainfall would cause raw sewage to pollute the local water supply, the Executive Director observed that even in periods of torrential

rains or flooding, “the proposed storage pod will contain highly treated and disinfected effluent to be used for irrigation. The pond will be lined, will not be allowed to overflow, and will have an embankment.” *Id.* at 24.

Of the concerns raised by Mr. Chaney, each either relates to an issue over which TCEQ has no jurisdiction or was previously raised in the public hearing and comprehensively addressed in the Executive Director’s Response. Accordingly, Mr. Chaney is not an affected person entitled to a contested case hearing.

b. Ms. Saleck is not an affected person

Ms. Saleck’s request for a contested case hearing was submitted on February 19, 2015, in advance of the preparation of a draft permit and the September 10, 2015 public meeting. Accordingly, the request was untimely and should not be considered, as discussed in section II, above.

Additionally, Ms. Saleck’s request does not specify the proximity of her property to the proposed facility; she includes only the general statement that she owns property somewhere within Vintage Oaks. Further, her current place of residence is in Colorado. Accordingly, she has not provided enough information to determine that she resides close enough to the proposed facility to be at risk for the particularized harm to her protected interests necessary to qualify as an affected person. *See* 30 TAC § 55.201(d)(2) (requiring a hearing request to explain “in plain language the requestor’s location and distance relative to the proposed facility”).

Ms. Saleck’s request fails to contain a specific statement concerning how she fears her interests will be affected by the SouthStar permit, stating only “[w]e are concerned about the wastewater treatment facility and the impact it will have on the community, water quality, aesthetic impact, and impact on the dry Comal Creel [sic], Comal and Guadalupe [sic] rivers.” Under TCEQ rules, a hearing request must substantially comply with the requirement to offer specific written statement explaining “how or why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the public.” 30 TAC § 55.201(d). Further, as discussed above, in section III, the issue of aesthetic impact lies outside TCEQ jurisdiction and cannot serve as the basis for a justiciable interest. It is uncertain what Ms. Saleck means by “impact . . . on the community,” but it can be assumed that this generalized concern is outside TCEQ’s jurisdiction in making wastewater permitting decisions. *See* Exec. Dir. Resp. Comm. at 24 (TCEQ “does not have authorization to consider quality of life or living conditions, as long as water quality is maintained”).

Regarding Ms. Saleck’s general concern on the impact the proposed facility will have on water quality, the draft permit contains effluent limits of 5 mg/l CBOD₅ and 5 mg/l TSS, 2 mg/l ammonia-nitrogen, and 1 mg/l total phosphorus, based on a daily average, which exceed the standards set by the Edwards Aquifer rules. SouthStar Draft Permit, at 35; 30 TAC § 213.6. Also, all effluent will be disinfected via ultraviolet light and must meet a daily average *e coli* limit of 126 CFU or MPN/100 ml. SouthStar Draft Permit, at 1–2. As stated above, the permit SouthStar seeks does not authorize any discharge of pollutants to water and specifically prohibits unauthorized discharge. SouthStar Draft Permit, at 9. As recognized by the Executive Director, the proposed permit contains a multitude of provisions designed to protect both surface and

groundwater quality, including, but not limited to the following: soil depth requirements, vegetation maintenance, irrigation restrictions, and buffer areas. Exec. Dir. Resp. Comm. at 43–44. As a result, the Executive Director has been satisfied that leeching, seeping, or runoff of the effluent will not occur. *Id.*

More specifically, Ms. Saleck identifies as a concern the impact of the proposed facility on the dry Comal Creek, Comal River, and Guadalupe River. As discussed above, the proposed permit does not allow discharge into the groundwater or surface water, but rather, requires effluent to be applied to crops at a rate that does not allow runoff. SouthStar Draft Permit, at 34; *See* Exec. Dir.’s Resp. Comm., at 11. It should be noted that raising hypothetical system failures or harms that would themselves constitute permit violations will not support a finding that a requestor is an affected person. *See Collins v. Tex. Nat. Res. Conservation Comm’n*, 94 S.W.3d 876, 883 (Tex. App.—Austin 2002, no pet.).

Of the concerns raised by Ms. Saleck, each either relates to an issue over which TCEQ has no jurisdiction or was previously raised in the public hearing and comprehensively addressed in the Executive Director’s Response. Further, Ms. Saleck’s request was submitted before the Executive Director’s Response and so not only does it fail to qualify as a request for hearing under the Rules, but there is no basis to conclude that her concerns were not adequately addressed by the ED’s Response, especially since Ms. Saleck has submitted no further comment or request for hearing following the Response. Accordingly, Ms. Saleck is not an affected person entitled to a contested case hearing.

c. Mr. Rimeliin is not an affected person

Mr. Rimeliin’s request for a contested case hearing was submitted on February 17, 2015, in advance of the preparation of a draft permit and the September 10, 2015 public meeting. Accordingly, the request was untimely and should not be considered, as discussed in section II, above.

Additionally, Mr. Rimeliin’s request incorrectly reports the location of the Rimeliin residence as “less than 200 yards” from the proposed facility. In fact, Applicant’s review of pertinent maps indicates that this distance is over 450 yards. In light of the actual distance, Mr. Rimeliin does not reside close enough to the proposed facility to be at risk for the particularized harm to his protected interests necessary to qualify as an affected person.

Mr. Rimeliin’s request identifies eight concerns: (1) environmental impact on Edwards Aquifer, Dry Comal Creek, Comal River, and Guadalupe River; (2) exposure to odor; (3) exposure to “chemicals;” (4) density of development; (5) strain on the water supply caused by additional density; (6) aesthetics; (7) decrease in property value; and (8) the developer’s failure to abide by the Master Plan. As discussed above, in section III, the issues of density of development, aesthetics, property values, and conformance to the Master Plan lie outside TCEQ jurisdiction and cannot serve as the basis for a justiciable interest.

With regard to the environmental impact on the Edwards Aquifer, specifically with reference to the Dry Comal Creek, Comal River, and Guadalupe River, these concerns were raised in the public hearing and comprehensively addressed by the Executive Director’s Response. In

the first place, given its location in the Edwards Aquifer recharge zone, SouthStar's proposed facility will have to meet the specific requirements of 30 TAC Chapter 213. As recognized by the Executive Director, SouthStar has, pursuant to these requirements, submitted an Edwards Aquifer Protection Plan, including a water pollution abatement plan and an organized sewage collection system plan, for review and approval. 30 TAC § 213.5; *see* Exec. Dir.'s Resp. Comm. at 9. In fact, the Draft Permit sets significantly stricter limits for discharge upstream of the recharge zone—5 mg/l BOD, 5 mg/l TSS, 2 mg/l ammonia nitrogen, and 1 mg/l phosphorus—than required by 30 TAC Chapter 213. The Executive Director has observed that “SouthStar's [organized sewage collection system plan] includes the technical requirements for the design of the collection system that are more stringent than the requirements for similar systems in other parts of the state.” Exec. Dir.'s Resp. Comm. at 9. Also, as discussed above, the proposed permit does not allow discharge into the groundwater or surface water, but rather, requires effluent to be applied to crops at a rate that does not allow runoff. SouthStar Draft Permit, at 34; *See* Exec. Dir.'s Resp. Comm., at 11.

With respect to odor, TCEQ rules require domestic wastewater treatment facilities to meet buffer zone requirements for the abatement and control of nuisance odors according to 30 TAC § 309.13(e). Applicant has chosen to meet the buffer zone requirements by owning the area. The concern of odor was explicitly addressed in the ED's Response to Comments. Exec. Dir. Resp. Comm. at 22–23. Mr. Rimeliin's request for hearing offers no additional relevant facts or material dispute of the ED's Response to show why he might be affected by nuisance odors despite the buffer zone and other factors identified.

Mr. Rimeliin's request also raises his concern that he will be exposed to chemicals associated with the treatment of waste water. This concern was raised in public comment, and the Executive Director explained in response that it is based on a mistaken assumption: “No chemicals will be used for wastewater treatment, other than to coagulate and filter out the phosphorus with the sludge.” Exec. Dir.'s Resp. Comm. at 10. SouthStar's proposed facility will not use chlorine or other chemicals to treat wastewater, but rather will treat wastewater with a membrane bioreactor system and use ultraviolet light to disinfect treated effluent. *Id.* at 64. Furthermore, the proposed permit does not authorize discharge of effluent or pollutants into the groundwater or surface water bodies. SouthStar Proposed Permit, at 9. It should be noted that raising hypothetical system failures or harms that would themselves constitute permit violations will not support a finding that a requestor is an affected person. *See Collins v. Tex. Nat. Res. Conservation Comm'n*, 94 S.W.3d 876, 883 (Tex. App.—Austin 2002, no pet.).

Mr. Rimeliin also raised the concern that “[a]dding this sewer system will allow the developer to quadruple the number of houses in this area. This concentration of waste will put additional strain on our limited water supply system.” Comment 119, addressed in the Executive Director's Response, raised an identical concern. The Executive Director's response to this Comment indicated that the issue is outside TCEQ jurisdiction in the wastewater permitting process, presumably because it relates to density issues, rather than discharge of pollutants into the water supply. Exec. Dir.'s Resp. Comm., at 72.

Of the concerns raised by Mr. Rimeliin, each either relates to an issue over which TCEQ has no jurisdiction or was previously raised in the public hearing and comprehensively addressed in the Executive Director's Response. Further, Mr. Rimeliin's request was submitted before the Executive Director's Response and so not only does it fail to qualify as a request for hearing under

the Rules, but there is no basis to conclude that his concerns were not adequately addressed by the Executive Director's Response, especially since Mr. Rimeliin has submitted no further comment or request for hearing following the Response. Accordingly, Mr. Rimeliin is not an affected person entitled to a contested case hearing.

d. Ms. Rimeliin is not an affected person

Ms. Rimeliin's request for a contested case hearing was submitted on February 17, 2015, in advance of the preparation of a draft permit and the September 10, 2015 public meeting. Accordingly, the request was untimely and should not be considered, as discussed in section II, above.

Additionally, Ms. Rimeliin's request incorrectly reports the location of the Rimeliin residence as "less than 200 yards" from the proposed facility. In fact, as referenced above, Applicant's review of pertinent maps indicate that this distance is over 450 yards. In light of the actual distance, Ms. Rimeliin does not reside close enough to the proposed facility to be at risk for the particularized harm to her protected interests necessary to qualify as an affected person.

Ms. Rimeliin's request cursorily identifies four concerns: "[w]ater quality, property value, aesthetic quality, and potential health risk." As discussed above, in section III, the issues of property value and aesthetic quality lie outside TCEQ jurisdiction and cannot serve as the basis for a justiciable interest.

From her request, it is not clear how TCEQ granting the proposed permit would affect her water quality or pose a potential health risk. Under TCEQ rules, a hearing request must substantially comply with the requirement to offer a specific written statement explaining "how or why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the public." 30 TAC § 55.201(d). Of course, TCEQ's jurisdiction in the wastewater permitting process concerning potential health risks would be generally confined to risks caused by pollutants or water quality.

Regarding Ms. Rimeliin's general concern on the impact the proposed facility will have on water quality, the draft permit contains effluent limits of 5 mg/l CBOD₅ and 5 mg/l TSS, 2 mg/l ammonia-nitrogen, and 1 mg/l total phosphorus, based on a daily average, which exceed the standards set by the Edwards Aquifer rules. SouthStar Draft Permit, at 35; 30 TAC § 213.6. Also, all effluent will be disinfected via ultraviolet light and must meet a daily average *e coli* limit of 126 CFU or MPN/100 ml. SouthStar Draft Permit, at 1-2. As stated above, the permit SouthStar seeks does not authorize any discharge of pollutants to water and specifically prohibits unauthorized discharge. SouthStar Draft Permit, at 9. As recognized by the Executive Director, the proposed permit contains a multitude of provisions designed to protect both surface and groundwater quality, including, but not limited to the following: soil depth requirements, vegetation maintenance, irrigation restrictions, and buffer areas. Exec. Dir. Resp. Comm. at 43-44. As a result, the Executive Director has been satisfied that leeching, seeping, or runoff of the effluent will not occur. *Id.* It should be noted that raising hypothetical system failures or harms that would themselves constitute permit violations will not support a finding that a requestor is an affected person. See *Collins v. Tex. Nat. Res. Conservation Comm'n*, 94 S.W.3d 876, 883 (Tex. App.—Austin 2002, no pet.).

Of the concerns raised by Ms. Rimeliin, each either relates to an issue over which TCEQ has no jurisdiction or was previously raised in the public hearing and comprehensively addressed in the Executive Director's Response. Further, Ms. Rimeliin's request was submitted before the Executive Director's Response and so not only does it fail to qualify as a request for hearing under the Rules, but there is no basis to conclude that her concerns were not adequately addressed by the Executive Director's Response, especially since Ms. Rimeliin has submitted no further comment or request for hearing following the Response. Accordingly, Ms. Rimeliin is not an affected person entitled to a contested case hearing.

e. Ms. White withdrew her request

Ms. White's request for a contested case hearing was submitted on March 3, 2015, in advance of the preparation of a draft permit and the September 10, 2015 public meeting. However, Ms. White withdrew her request electronically on March 2, 2016.

f. Ms. Walton withdrew her request

Ms. Walton's request for a contested case hearing was submitted on February 27, 2015, in advance of the preparation of a draft permit and the September 10, 2015 public meeting. However, on March 12, 2016 she electronically stated that she withdrew her request for a hearing.

g. Other commenters did not request a contested case hearing and are not affected persons

In addition to the parties identified above, the TCEQ docket for this matter has identified several other parties as having submitted a hearing request: Sandra Langston (3/4/15), Rex Lee Brown (3/4/15), Russ S. Garner (3/3/15), John Hudson Blodgett (3/3/15), Sandy Peyton (3/3/15), Rick Peyton (3/3/15), Franklin Houser (3/3/15), Sabrina A. Houser-Amaya (3/3/15), Ricki Ann Holt (3/3/15), Jenny Jurica (3/3/15), Jeff Thomas (3/2/15), Judith Ann Walton (2/27/15), Kevin Jurica (2/24/15), Connie Terao (2/24/15), Michaela Cade (2/23/15), James Chew (2/22/15), Thomas Crossan (2/18/15), Ronald Fincher (2/16/15), Carl Thompson (2/13/15). In each of these cases, the party did not request a contested case hearing, but rather a "public hearing," "hearing," or "hearing for public comment." Each of these requests was made in advance of the September 10, 2015 public meeting on this permit. In no case did the parties above make a request for a contested case hearing or any other hearing after the public meeting. Therefore, each of these parties was likely requesting a public meeting, which occurred, rather than a contested case hearing. Given that none of these parties submitted objections or requests following the public meeting and the comments of the executive director, their concerns were apparently satisfied. In addition, each of these requests were directed at the original plan—involving a packed bed media filter system where wastewater would be recirculated through a textile filter system. In response to feedback from TCEQ and to assuage concerns, Applicant elected to change the system to an ultra filtration membrane system. This system meets far stricter effluent limits than the originally-planned system. Presumably this changed plan, combined with the Executive Director's comments, satisfied the concerns of these parties.

To the extent that any request of the parties above is construed to be a request for a contested case hearing, none of these parties have demonstrated that he or she is an affected person

for the purposes of the Texas Water Code. *See* Tex. Water Code § 5.56; 30 TAC § 55.203. First, in no case does the request specify the requestor’s proximity to the proposed facility as required by 30 TAC § 55.201(d)(2). The majority of the requests contain no information concerning the party’s residence. The closest any of these requests get to specifying such a distance is the requests of Sandy Peyton, Rick Peyton, and Ronald Fincher, which specify that the requestor resides somewhere within Vintage Oaks (the requests of Jeff Thomas, Michaela Cade, and James Chew could also be interpreted to include a statement that the requestor resides in the subdivision). Since none of these requests contain the required information regarding proximity, none demonstrate that the requestor is an affected person.

Further, as discussed above, each purported request is untimely under 30 TAC § 55.201 since each was submitted in advance of the preparation of Applicant’s draft permit and the September 10, 2015 public meeting.

The individual requests fall into three general categories: (1) requests that provide no information on why the requestor believes he or she will be adversely affected; (2) requests in which the only information on adverse effect relates to issues outside TCEQ jurisdiction; and (3) requests that relate to one or more issues within TCEQ jurisdiction, but which were comprehensively addressed by the Executive Director’s December 28, 2015 Response to Public Comment. Thus, none of these requests may show the required justiciable interest needed to establish affected person status. 30 TAC § 55.203.

1. No adverse effect information

Three parties—Franklin Houser, Sabrina A. Houser-Amaya, Jenny Jurica—submitted merely a bare request for a “public hearing,” accompanied by no other information. Russ Garner states only that he believes “the developer is not being completely honest in their intent” and that a public hearing will “allow all the facts to come out.” Thomas Crossan’s request similarly makes no claim of adverse effect, stating only that the permit application is not available for viewing. None of these five parties even attempts a showing of adverse effect, and accordingly, none can establish affected person status.

2. Adverse effects stated lie outside TCEQ jurisdiction

Another party, Ricki Ann Holt, identifies only a single potential adverse effect “Southstar has totally ignored the wishes of the present property owners and abandoned the covenants promised to VO property owners” (this quote is drawn from a comment submitted on 2/22/15; Ms. Holt’s 3/3/15 hearing request makes no showing of adverse effect, but does specifically refer to this earlier-filed comment). As discussed above in section III, concerns of this sort fall outside TCEQ jurisdiction and thus cannot be used as an adverse effect to establish affected person status. In response to a submitted comment alleging that covenants to Vintage Oaks property owners would be violated by the wastewater facility, the Executive Director clarified, “TCEQ does not have jurisdiction under the Texas Water Code or its regulations to address, or consider, the actions of a developer in its determination of whether or not to issue a water quality permit.” Exec. Dir. Resp. Comm at 58–59. Since Ms. Holt identifies no potential adverse effect in her request that lies within TCEQ jurisdiction, she cannot establish affected person status.

Several parties who fall into the third category below additionally raised potential adverse effects that are outside TCEQ jurisdiction. Since these potential adverse effects cannot form a justiciable interest, this portion of these parties' requests should be disregarded. Jeff Thomas raised concerns about effects on property values and future water rates. Rick and Sandy Peyton suggested that the project would increase noise levels, truck traffic, and also suggested the project would lower property values. Connie Terao suggested that increased population and overdevelopment would result from approving the application. Michaela Cade raised a concern about noise. As discussed in section III, all of these issues lie outside TCEQ jurisdiction and cannot be considered in the affected person analysis. *See* Exec. Dir. Resp. Comm. at 70–72.

3. Potential adverse effects have been comprehensively addressed

Of the parties discussed in this section, only nine submitted requests that identify any potential adverse effect that could arguably lie within TCEQ jurisdiction. Each of those potential adverse effects is identified below. In every case, these concerns were fully aired and discussed at the public meeting and comprehensively addressed by the Executive Director's Response. To the extent that the parties' requests may be construed to be requests for a contested case hearing, no such hearing is necessary since no request offers additional relevant facts or material dispute of the ED's Response.

Jeff Thomas's request asserted that the permit "is a bad idea which will . . . endanger the environment." This generically-worded concern for negative environmental effect fails to establish that Mr. Thomas is an affected party. Under TCEQ rules, a hearing request must substantially comply with the requirement to offer a specific written statement explaining "how or why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the public." 30 TAC § 55.201(d). General reference to the environment, without more, does not substantially comply with this requirement. Further, the Executive Director comprehensively addressed the multitude of specific environmental concerns raised. *See generally*, Exec. Dir. Resp. Comm.

Other requests contain more specific environmental concerns, albeit those already comprehensively addressed by the Executive Director's Response. Requests submitted by Sandra Langston, Rex Lee Brown, John Hudson Blodgett, Kevin Jurica, Carl Thompson, and Connie Terao raise concerns regarding the effect of the proposed permit on the Edwards Aquifer recharge zone and the Dry Comal Creek bed. These concerns were raised in the public hearing and comprehensively addressed by the Executive Director's Response. In the first place, given its location in the Edwards Aquifer recharge zone, SouthStar's proposed facility will have to meet the specific requirements of 30 TAC § 213.6(a)(4), which requires it to be "designed, constructed, and operated such that there are no bypasses of the treatment facilities or any discharges of untreated or partially treated wastewater." The draft permit also includes provisions designed to protect water quality, including the requirement to maintain vegetation in irrigation areas, and a prohibition on irrigating frozen or saturated ground. SouthStar Draft Permit at 34–35. The Executive Director highlighted these protections when responding to a comment regarding discharge of effluent into the Edwards Aquifer. Exec. Dir.'s Resp. Comm. at 7–8. Finally, the activity allowed by the proposed permit complies with proposed effluent application rates set by 30 TAC § 309.20(b)(3)(A), according to calculations that have been reviewed and approved by the Executive Director. Exec. Dir.'s Resp. Comm. at 8. As recognized by the Executive Director,

SouthStar has, pursuant to these requirements, submitted an Edwards Aquifer Protection Plan, including a water pollution abatement plan and an organized sewage collection system plan, for review and approval. 30 TAC § 213.5; *see* Exec. Dir.'s Resp. Comm. at 9. The Executive Director has observed that "SouthStar's [organized sewage collection system plan] includes the technical requirements for the design of the collection system that are more stringent than the requirements for similar systems in other parts of the state." Exec. Dir.'s Resp. Comm. at 9.

The permit SouthStar seeks does not authorize any discharge of pollutants to water and specifically prohibits unauthorized discharge. SouthStar Draft Permit, at 9. The permit at issue is a "no-discharge" Texas Land Application Permit, which does not allow discharge to groundwater or a surface water body of any effluent, much less raw sewage; rather, the proposed permit requires effluent to be applied to crops at a rate that does not allow runoff into the groundwater or a body of water. SouthStar Draft Permit, at 34; *see* Exec. Dir.'s Resp. Comm., at 11. It should be noted that raising hypothetical system failures or harms that would themselves constitute permit violations will not support a finding that a requestor is an affected person. *See Collins v. Tex. Nat. Res. Conservation Comm'n*, 94 S.W.3d 876, 883 (Tex. App.—Austin 2002, no pet.).

Three other requesters, Sandy Peyton, Rick Peyton, Connie Terao in addition to raising these concerns, included a specific concern regarding dispersion of effluent during flooding. Addressing this concern, the Executive Director observed that even in periods of torrential rains or flooding, "the proposed storage pod will contain highly treated and disinfected effluent to be used for irrigation. The pond will be lined, will not be allowed to overflow, and will have an embankment." Exec. Dir.'s Resp. Comm. at 24.

Ronald Fincher additionally included a specific concern that "the spray of the treated water can flow downhill . . . and potentially become a contaminant of the primary water source." Regarding these concerns, the draft permit contains effluent limits of 5 mg/l CBOD₅ and 5 mg/l TSS, 2 mg/l ammonia-nitrogen, and 1 mg/l total phosphorus, based on a daily average, which exceed the standards set by the Edwards Aquifer rules. SouthStar Draft Permit, at 35; 30 TAC § 213.6. Also, all effluent will be disinfected via ultraviolet light and must meet a daily average *e coli* limit of 126 CFU or MPN/100 ml. SouthStar Draft Permit, at 1–2. As stated above, the permit SouthStar seeks does not authorize any discharge of pollutants to water and specifically prohibits unauthorized discharge. SouthStar Draft Permit, at 9. As recognized by the Executive Director, the proposed permit contains a multitude of provisions designed to protect both surface and groundwater quality, including, but not limited to the following: soil depth requirements, vegetation maintenance, irrigation restrictions, and buffer areas. Exec. Dir. Resp. Comm. at 43–44. As a result, the Executive Director has been satisfied that leeching, seeping, or runoff of the effluent will not occur. *Id.*

Similarly, Michaela Cade and James Chew included concerns concerning raw sewage leaks. The Executive Director, in response to "concern about [the facility] leaking raw sewage," responded:

The proposed WWTF must be designed in accordance with the design criteria in 30 TAC Chapter 217. In addition, the proposed facility is a new wastewater treatment facility and, if approved for construction and operation, must comply with the Edwards Aquifer rules, specifically 30 TAC § 213.6(a)(4) which states that

“[n]ew land application wastewater treatment plants located on the recharge zone must be designed, constructed, and operated such that there are no bypasses of the treatment facilities or any discharges of untreated or partially treated wastewater.”

Id. at 26.

Michaela Cade, in addition to the concerns set out above, raised a concern regarding a power failure at the facility. The Executive Director responded to an identical concern by citing the draft permit’s Operational Requirements Item 4, which requires that the permittee is responsible for installing, prior to operating the facility, “adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failures by means of alternate power sources, standby generators, and/or retention of inadequately treated wastewater.” Exec. Dir. Resp. Comm. at 27, citing Draft Permit at 12.

Carl Thompson, in stating environmental concerns similar to those discussed above, proposed that SouthStar’s applications should be joined and considered together with another application for a similar permit. The Executive Director responded to this proposal by noting that “neither the Texas Water Code nor the TCEQ’s rules provide a mechanism for multiple pending permits from different applicants to be considered together.

Across the board, none of the parties’ requests offer additional relevant facts or any material dispute of the comprehensive treatment of the issues within TCEQ jurisdiction offered by the Executive Director’s Response. So not only do all these parties fail to meet the requirements of 30 TAC §§ 55.201 and 55.203, there is no need for a contested case hearing on any of the issues raised in these requests.

V. Potential Issues for Referral

To the extent TCEQ determines that one or more parties are affected persons who have properly submitted a request for a contested case hearing, Applicant requests that the contested case hearing be referred to SOAH.

TCEQ must determine which issues should be referred to SOAH for consideration in the contested case hearing. As discussed in detail above, every issue raised in a hearing request has been addressed by the Executive Director’s Response to Comments. Though Applicant accordingly does not believe that any issues need further examination in a contested case hearing, the following issues represent the concerns which lie within TCEQ jurisdiction and may be properly explored on referral to SOAH:

Concerns regarding the effect of the disposal facility operation on the Edwards Aquifer recharge zone are raised by many parties. As noted above, these concerns were raised in the public hearing and comprehensively addressed by the Executive Director’s Response. In the first place, given its location in the Edwards Aquifer recharge zone, SouthStar’s proposed facility will have to meet the specific requirements of 30 TAC Chapter 213. As recognized by the Executive Director, SouthStar has, pursuant to these requirements, submitted an Edwards Aquifer Protection Plan, including a water pollution abatement plan and an organized sewage collection system plan, for review and approval. 30 TAC § 213.5; *see* Exec. Dir.’s Resp. Comm. at 9. In fact, the Draft Permit sets significantly stricter limits for discharge upstream of the recharge zone—5 mg/l BOD,

5 mg/l TSS, 2 mg/l ammonia nitrogen, and 1 mg/l phosphorus—than required by 30 TAC Chapter 213. The Executive Director has observed that “SouthStar’s [organized sewage collection system plan] includes the technical requirements for the design of the collection system that are more stringent than the requirements for similar systems in other parts of the state.” Exec. Dir.’s Resp. Comm. at 9.

Also, as a new wastewater facility located in the Edwards Aquifer, the proposed SouthStar facility will be required to comply with rule 30 TAC § 213.6(a)(4), which requires it to be “designed, constructed, and operated such that there are no bypasses of the treatment facilities or any discharges of untreated or partially treated wastewater.” The draft permit also includes provisions designed to protect water quality, including the requirement to maintain vegetation in irrigation areas, and a prohibition on irrigating frozen or saturated ground. SouthStar Draft Permit at 34–35. The Executive Director highlighted these protections when responding to a comment regarding discharge of effluent into the Edwards Aquifer. Exec. Dir.’s Resp. Comm. at 7–8. Finally, the activity allowed by the proposed permit complies with proposed effluent application rates set by 30 TAC § 309.20(b)(3)(A), according to calculations that have been reviewed and approved by the Executive Director. Exec. Dir.’s Resp. Comm. at 8.

In the event, however, that the TCEQ determines that the potential impact of the facility on the Edwards Aquifer is a legitimate issue, Applicant submits that the issue might best be phrased in the following way: “Will the proposed disposal of treated domestic wastewater result in the existing quality of the Edwards Aquifer being degraded” as per 30 TAC §213.1(1)?

VI. Prayer

For the reasons set forth above, SouthStar respectfully requests that TCEQ deny the requests, not refer this matter for a contested case hearing, and issue Permit No. WQ0015320001.

Should TCEQ find merit in any of the requests, SouthStar requests that TCEQ refer the matter to SOAH and limit the issues to be addressed in the contested case hearing to the issue described above in the last paragraph of Section V.

While reserving and maintaining its arguments set forth above that no person is an affected party, Applicant respectfully requests in the alternative, if the TCEQ is undecided about the standing of some of the commenters, that the TCEQ not designate any parties but instead refer the questioned party status to SOAH with instructions for SOAH to conduct a preliminary hearing on standing to be followed by a contested case hearing if and only if SOAH determines that one or more commenters qualify as affected parties. In this way, the TCEQ would avoid prematurely designating someone as a party when the probabilities are very high that no one will appear at the SOAH proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2016, a true and correct copy of the foregoing document has been served upon all parties listed on the attached Service List via certified mail or hand delivery.


Philip S. Haag

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New Braunfels, TX 78132-2769

E J & Valerie Pisciotta
1661 Decanter Dr
New Braunfels, TX 78132-2695

Deborah D Pollan
2033 Appellation
New Braunfels, TX 78132-2772

Denise Pollan
2033 Appellation
New Braunfels, TX 78132-2772

William A Pollan
2033 Appellation
New Braunfels, TX 78132-2772

David Pope
2321 Appellation
New Braunfels, TX 78132-2775

Jill Pope
2321 Appellation
New Braunfels, TX 78132-2775

Mr Leon Gerald Reeves Sr
609 Cross Oak
New Braunfels, TX 78132-2675

Sheila Reeves
609 Cross Oak
New Braunfels, TX 78132-2675

Kari Reichert
1046 Provence Pl
New Braunfels, TX 78132-2769

Scott Reichert
1046 Provence Pl
New Braunfels, TX 78132-2769

Jason Retzloff
811 Cross Oak
New Braunfels, TX 78132-2664

Deborah Riegelsberger
1344 Pinot Grigio
New Braunfels, TX 78132-0205

Gary Riegelsberger
1344 Pinot Grigio
New Braunfels, TX 78132-0205

Lynn Riegelsberger
1344 Pinot Grigio
New Braunfels, TX 78132-0205

Louis Rimmelin
1154 Sapling Spg
New Braunfels, TX 78132-2676

Michael Roberson
1190 Via Principale
New Braunfels, TX 78132-2697

Phyllis Saks
1965 Zinfandel
New Braunfels, TX 78132-2646

Richard Saks
1965 Zinfandel
New Braunfels, TX 78132-2646

Steve Sallman
4925 Greenville Ave Ste 1020
Dallas, TX 75206-4085

Craig Santanna
1014 Petite Verdot
New Braunfels, TX 78132-2682

Tim Schuett
1123 Barolo Ct
New Braunfels, TX 78132-2669

James Shelgren
1011 Comanche Rdg
New Braunfels, TX 78132-2748

Greg Skrobarcek
1050 Provence Pl
New Braunfels, TX 78132-2769

Melissa Smith
1467 Decanter Dr
New Braunfels, TX 78132-2690

Melinda Spradling
1012 Breve Cir
New Braunfels, TX 78132-2692

Mrs Brenda R Sturtevant
1170 Sapling Spg
New Braunfels, TX 78132-2676

Brenda & Mr John Wesley Sturtevant
1170 Sapling Spg
New Braunfels, TX 78132-2676

Mr John Wesley Sturtevant
1170 Sapling Spg
New Braunfels, TX 78132-2676

Kyle Terao
2241 Appellation
New Braunfels, TX 78132-2774

Seth Terao
2241 Appellation
New Braunfels, TX 78132-2774

Ms Felicia S Thomas
1128 Provence Pl
New Braunfels, TX 78132-2770

John E Trout
1257 Magnum
New Braunfels, TX 78132-2927

Hedy Veach
1182 Sapling Spg
New Braunfels, TX 78132-2676

Ray Veach
1182 Sapling Spg
New Braunfels, TX 78132-2676

Ron Walton
1308 Bordeaux Ln
New Braunfels, TX 78132-2681

Ronald J Walton Sr
1308 Bordeaux Ln
New Braunfels, TX 78132-2681

Allison Weiler
1528 Decanter Dr
New Braunfels, TX 78132-
2693

Allison & Jeff Weiler 1528
Decanter Dr
New Braunfels, TX 78132-2693

Carla Western
2026 Appellation
New Braunfels, TX 78132-2772

John Western
2026 Appellation
New Braunfels, TX 78132-2772

Randal Dean White
2230 Pinot Blanc
New Braunfels, TX 78132-4800

Randy White
2230 Pinot Blanc
New Braunfels, TX 78132-4800

Rori White
2230 Pinot Blanc
New Braunfels, TX 78132-4800

James A Whitmore
Usaf Retired
257 Dry Bear Crk
New Braunfels, TX 78132-1633

Kenneth E Wilson
2226 Meritage
New Braunfels, TX 78132-3943

Pam Wilson
2226 Meritage
New Braunfels, TX 78132-3943

Fran & Mark Zamzow
1614 Angolo
New Braunfels, TX 78132-2782

Marcia Zierlein
1404 Strada Curva
New Braunfels, TX 78132-2779