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October 24, 2016

Office of the Chief Clerk
Texas Commission on Environmental Quality
Mail Code 105
P.O. Box 13087
Austin, Texas 78711-3087

RE: Permit No. WQ0005011000; Application of Texas Department of Transportation for Combined Phase I and II Municipal Separate Storm Sewer System (MS4) Permit

Dear Chief Clerk:

Enclosed for filing is Texas Department of Transportation's Response to Request for Contested Case Hearing in the above-referenced matter.

Please contact me at (512) 463-8630 if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Carow". The signature is fluid and cursive, written over a light blue horizontal line.

J. Stephen Carow
Associate General Counsel

Attachment(s)

OUR VALUES: *People • Accountability • Trust • Honesty*

OUR MISSION: *Through collaboration and leadership, we deliver a safe, reliable, and integrated transportation system that enables the movement of people and goods.*

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TPDES PERMIT NO. WQ0005011000

APPLICANT'S RESPONSE TO HEARING REQUEST

The Texas Department of Transportation ("TxDOT" or "Applicant") files this Response to Contested Case Hearing Requests that have been filed relative to TxDOT's application for a statewide Texas Pollutant Discharge Elimination System (TPDES) combined Phase I and II Municipal Separate Storm Sewer System (MS4) Permit No. WQ0005011000 ("Permit" or "Application"). TxDOT respectfully requests that the Texas Commission on Environmental Quality ("TCEQ" or "Commission") deny the hearing requests filed in this proceeding and approve the Permit. As presented below, TxDOT requests that the Commission find that the hearing requests filed in this proceeding are not valid hearing requests, that the persons requesting a contested case hearing ("Requestors") are not "affected persons", and that the requests do not raise disputed issues of fact that are relevant and material to the Commission's decision on the MS4 Permit Application.

Who Are The Contested Hearing Requestors?

The TCEQ staff completed its technical review and received EPA's concurrence to issue the permit on February 24, 2016. The TCEQ staff then prepared the draft Permit for public comment in early 2016. During the public comment period on the draft Permit that ended on May 16, 2016, the TCEQ received a set of comments filed jointly by six different associations: Galveston Baykeeper, Galveston Bay Foundation, Environment Texas, Save Our Springs Alliance, Houston Audubon, and the Turtle Island Restoration Network (the "Associations"). On September 14, 2016, five of the six Associations (the "Requestors") filed a Request for Contested Case Hearing (the "Hearing Request"). Houston Audubon, which joined in the earlier comments, did not join in the Hearing Request filed in September.

The Executive Director's Response to Comments

The substance of all public comments and the Executive Director's responses were incorporated in the Executive Director's Response to Comments ("RTC"). The RTC compiles, assesses and responds

to all written comments provided to the TCEQ during the comment period. The Commission should give the RTC weight in evaluating the Hearing Requests and determining whether there are truly disputed issues of fact that are relevant and material to the Permit application. The RTC supports a determination that there are no material, disputed issues of fact that would justify a contested case hearing for this Permit.

Hearing Request Requirements

Pursuant to 30 TAC § 55.201(a), a contested-case hearing request must be filed no later than 30 days after the Chief Clerk mails the RTC. The Requestors satisfied this basic timing requirement. However, before considering the merits of a contested-case hearing request, the TCEQ must determine whether the request meets the other necessary requirements established by the Commission at 30 TAC § 55.201(c) and (d). A timely, written hearing request must substantially comply with the following:

- (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; and
- (4) 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 requester should, to the extent possible, specify any of the executive director's response to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy.

Affected Person Requirement

At the outset, before it can grant a contested case hearing, the TCEQ must find that a requestor is an “affected person”. Fundamentally, an affected person must have “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.” (emphasis added). Texas Water Code §5.115, 30 TAC §55.203(a). For an individual requestor, Section 55.203(c) directs the Commission to consider:

- (1) whether the claimed interest is protected under the law under which the permit 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 the use of property of the person; and
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person.

Additional Requirements for a Group or Association

In this case, all five Requestors are associations. Therefore, the Requests must meet additional requirements: (1) one or more members of the 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)). These requirements were very clearly reiterated in the instructions from the Chief Clerk in the notice of the Decision of the Executive Director issued on August 15, 2016.

The consideration of hearing requests by the Commission has been informed by a recent decision

of the Third Court of Appeals in *Sierra Club v. Texas Commission on Environmental Quality and Waste Control Specialists*, No. 03-11- 000102-CV (filed April 4, 2014), upholding the Commission’s denial of Sierra Club’s request for a contested-case hearing relating to an application for a by-product disposal license. The court recognized the TCEQ’s primary authority to determine the need for a contested-case hearing. The *Sierra Club* Court noted that the critical threshold question in a contested-case hearing request is whether the requestor is an “affected person”. Citing the Supreme Court decision in *Texas Commission on Environmental Quality v. City of Waco*, 413 S. W. 3d 409, 417 (Tex. 2013), the *Sierra Club* court addressed the definition of “affected person”. An “affected person”, under the Texas Water Code, is “a person 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. Hearing requestors are required to establish that they have standing in the matter: “a concrete and particularized injury in fact, not common to the general public that is (1) actual or imminent; (2) fairly traceable to the issuance of the permit as proposed; and (3) likely to be redressed by a favorable decision on its complaint.” The court held that a facially conforming request for a contested case hearing is not sufficient and that the TCEQ has the discretion to inquire into, weigh and resolve matters that might go to the underlying merits of the permit application, including the likely impact of the regulated activity on the hearing requestor.

As pointed out by the *Sierra Club* court, hearing requestors have to do more than make a facially conforming request. Requestors have an obligation to do more than say “the magic words”. They must support their requests with specific and sufficient evidence that demonstrate how they will be personally affected by the Permit Application. They must show a particularized injury in fact, not common to the general public.

The TxDOT MS4 Requestors Are Not Affected Persons

The Requestors in this MS4 matter have been afforded ample opportunity to provide evidence of particularized adverse impacts to specific Association members traceable to the TxDOT MS4 Permit. The public comment period extended beyond the normal thirty day notice period from April 8, 2016 to

May 15, 2016 and included publication in 27 newspapers statewide. Subsequently, they had an additional 30 days after the RTC was issued to provide specific evidence of particularized member impacts in their Hearing Request.

In this case, a review of whether the Requestors are “affected persons” requires a denial of the Hearing Request. Initially, there is no evidence presented in the Hearing Request that TxDOT’s draft MS4 Permit is “germane” to any of the individual organization’s respective purposes. A blanket, unsubstantiated statement is made in the first page of the Requests that all of the Requestors “have dedicated resources and advocacy efforts for decades to improve Texas’ water quality.” Such a self-serving, blanket statement is insufficient to demonstrate an “organization’s purpose.” This is the type of “facially conforming” statement that the *Sierra Club* Court found does not establish a right to a contested hearing. No documentation or evidence relating to and substantiating any of the Requestor Associations’ purpose is proffered by Requestors. Only after a review of evidence pertaining to an organization’s purpose can a determination be made as to whether such organization’s request for a contested case hearing on TxDOT’s MS4 permit is “germane” to its underlying purpose.

Second, and most importantly, there is no evidence presented in the Requests that “one or more members of the association would otherwise have standing to request a hearing in their own right.” Again, the Requestors make a self-serving statement in the Request that “[e]ach member or staff listed below is directly affected through their recreational, scientific, educational, or vocational activities related to these waters across the state and are identified specifically for this purpose.” Again, this is nothing more than a “facially conforming” assertion that is glaringly insufficient to establish standing as an “affected person.” No individual documentation or evidence is provided pertaining to the specific interests of the identified individuals that would distinguish their interests from those of the general public. No property ownership or other property interest is given that would support a personal claim of an adverse effect from stormwater discharges from any TxDOT right of way (“ROW”) covered by the Permit. The need to show a particularized individual injury distinct from the general public is crucial in this case, as almost every person in Texas uses Texas roadways. We are all touched by stormwater runoff

from roadways at one time or another.

There is also a generalized statement in the Hearing Request that each Requestor “is directly affected through their recreational, scientific, educational, or vocational activities related to these waters across the state.” Again, this bald statement does not warrant grant of affected person status. No attempt at all is made to relate any particular water body to any of the specific individuals who must have a justiciable interest in their own right. Further, no specific activities are described or linked to any of the listed individuals. This lack of any unique, individual nexus to TxDOT’s MS4 permit requires that the Hearing Requests be denied. As mentioned above, “an interest common to members of the general public does not qualify as a personal justiciable interest.” (30 TAC 55.203 (a)). In this case, the general interests put forth in the Requests (recreational, scientific, educational, or vocational activities), are undeniably common to members of the general public. Absolutely no attempt is made to show how any of the individual members identified for each respective Requestor organization has a “personal justiciable interest” related to a legal right, duty, privilege, power, or economic interest affected by TxDOT’s Permit Application.

30 TAC 55.201(d)(2) could not be more clear in stating how to demonstrate “personal justiciable interest”. The requestor must include “a brief, but specific, written statement explaining in plain language the requestor’s location and distance 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.” Again, the Requestors have failed to demonstrate their status as an “affected person” and the Hearing Requests must be denied by the Commission.

The Hearing Request Does Not Meet Other Necessary Requirements

The requests do not comply with the requirements in 30 TAC § 55.201(d)(4)(A) for hearing requests. This section states:

For applications filed 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. (emphasis added)

Like the affected person requirements, the requirements of 30 TAC § 55.201(d)(4), were specifically reiterated in the instructions from the Chief Clerk in the notice of the Decision of the Executive Director. The Hearing Request filed on September 14th for no apparent reason failed to comply with this provision.

In the Hearing Request, the Requestors made no attempt to “specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute.” This is particularly disconcerting because the Executive Director went to great lengths in the RTC to understand, organize, articulate and respond to the Associations' original, disorganized comments. The Associations' comments were reviewed and organized in the RTC into sixteen comments and sixteen responses by the Executive Director. The Requestors, without explanation, did not specify which of the sixteen responses in the RTC they had a factual dispute with. They had an obligation to do so, and ignored that obligation.

The Hearing Request instead listed six “factual and legal” issues that Requestors asserted should be considered in a contested case process. Requestors fail to recognize that only relevant and material issues of fact raised during the public comment period may form the basis of a contested case hearing. Despite Requestors' failure to specify which “director's responses to comments that the requestor disputes”, TxDOT nonetheless provides the following responses to Requestors six issue areas, as follows:

1. Requestor states, “ the geographic scope of the permit...should cover the entire state of Texas”

TxDOT response: This is a regulatory, legal issue and is not appropriate for referral to a contested case hearing. Both TCEQ and EPA have promulgated regulations defining the geographic scope of MS4 permits based on urbanized areas and by Phase I areas (generally corporate boundaries of Phase I cities). The Permit as already approved by TCEQ and EPA

meets applicable definitions for the geographic scope of MS4 permits under the TPDES and NPDES program. The TxDOT-regulated area in the Permit meets all geographic requirements by including all previously regulated areas and adding 2010 census urbanized areas.

TxDOT recommends that the Commission not refer this issue to SOAH.

2. Requestor states, "that stormwater discharges will result in exceedances of water quality standards for heavy metals and other pollutants"

TxDOT response: stormwater discharges from roads and rights of way along roads are controlled in the MS4 regulatory program by implementing required structural and non-structural controls. MS4 stormwater discharges, unlike point source discharges, are not subject to treatment and discharge limits for specified pollutants. As stated by EPA, "EPA anticipates that a permit for a regulated small MS4 operator implementing BMPs to satisfy the six minimum control measures will be sufficiently stringent to protect water quality, including water quality standards, so that additional, more stringent and/or more prescriptive water quality based effluent limitations will be unnecessary. (64 FR 68753, December 8, 1999)". This was reiterated by EPA in 2015 in FRL-9939-88-OW. The Requestors' issue is not relevant and material to MS4 regulatory requirements and the Permit. TCEQ has followed applicable regulations and guidance with respect to controls in the Permit.

TxDOT recommends that the Commission not refer this issue to SOAH.

3. Requestor states, "that the permit fails to adopt explicit timeframes, benchmarks, and best management practices that are applicable to the Edwards Aquifer region as described in the comments,"

TxDOT response: there is no material fact issue here. Requestors have mistakenly failed to review the Permit provisions applicable to the Edwards Aquifer. See Part II, Section B of the permit. This part of the Permit is written consistently with other MS4 permits and Phase II MS4 areas within the Edwards Aquifer Region.

TxDOT recommends that the Commission not refer this issue to SOAH.

4. Requestor states, "that the permit fails to adopt a cumulative effect analysis in the watershed or require more mitigation for redevelopment areas since roadways are known major polluters"

TxDOT response: there are no regulatory requirements for the type of cumulative effect analysis sought by Requestors. The MS4 Permit does not analyze cumulative effects. This is a legal issue and does not form a basis for a contested case hearing.

TxDOT recommends that the Commission not refer this issue to SOAH.

5. Requestor states, "(5) that the permit fails to require wet weather testing, if not numeric limits"

TxDOT response: although TxDOT's individual MS4 permits may have included wet weather monitoring over time, wet weather monitoring is not legally mandated under the MS4 program. See, for example, the TCEQ Phase II MS4 General Permit. Once again, Requestors' desire to impose requirements not found in law is not a valid basis to hold a contested case hearing. The TCEQ, EPA and TxDOT all acknowledge that the significant resources put into data collection and tabulation associated with wet weather monitoring may, pursuant to agency discretion, be

more effectively deployed in sampling and monitoring for illicit discharges. This flexibility in monitoring is reflected in MS4 policy. See the EPA Document Evaluating the Effectiveness of Municipal Storm Water Programs (EPA 833-F-07-010). Also see EPA's "Interpretative Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems" wherein EPA encourages adjustments to program elements to "deemphasize some program components and strengthen others, based on the experience gained under the first permit." The Permit's progression to emphasize detection and monitoring of illicit discharges reflects the TCEQ's exercise of this discretion.

TxDOT recommends that the Commission not refer this issue to SOAH.

6. Requestor states, "(6) that the permit fails to require additional benchmarking for floatables since roadways are the leading cause of this pollutant."

TxDOT response: the MS4 regulatory program administered by TCEQ does not require benchmarking for floatables. This is a legal issue that does not form the basis for a contested case hearing. Nevertheless, a floatables program is included in the permit at Part III.B.6(c), as in prior TxDOT permits. The requester seems to have overlooked this part of the permit in their comment.

TxDOT recommends that the Commission not refer this issue to SOAH.

After its six listed issues, the Requestors included a final paragraph that raises new issues that were not raised during the public comment period, and accordingly cannot form the basis for a contested case hearing. See 30 TAC § 55.201(d)(4)(A). However, as a matter of thoroughness, TxDOT offers brief responses to these untimely issues.

- Requestors state: "had the Texas Commission on Environmental Quality modeled stormwater from linear roadways for pollutants, particularly those listed on the state's 303(d) list, additional provisions within the permit would be necessary to comply with current law."

TxDOT responds that TxDOT has provided to TCEQ the computed Event Mean Concentrations for wet weather monitoring under successive Phase I permits. No permit violations were measured or assessed based on these data.

- Requestors comment: "Indeed, TXDOT's own hydraulic design manual has computed the discharge rates for stormwater and various pollutants."

TxDOT responds that TxDOT's Hydraulic Design Manual provides comprehensive guidelines for determining discharge and volume for a storm event (discharge determination), but provides no guidance (aside from references) or computation to the calculation of pollutants.

- Lastly, the Requestors comment: "As such, the lack of wet weather testing to benchmark these discharge rates, coupled with the lack of numeric limits within the permit for discharge rates, cannot be said to 'reduce the discharge of pollutants from the MS4.'"

TxDOT responds that the MS4 permit program does not limit or regulate discharge rates, as a rate would imply volume or velocity restrictions. The requestor seems to be confusing wet weather monitoring with the assessment of impaired water bodies and TMDL requirements. The permit includes control of discharges of pollutants of concern (POCs) to impaired water bodies, as stated in the permit, "The permittee shall control the discharges of POC(s) to impaired waters and waters with approved TMDLs... and shall assess the progress in controlling those pollutants."

As previously argued, these final issues were not timely raised during the public comment period and cannot form the basis for a contested case hearing. See 30 TAC § 55.201(d)(4)(A). TxDOT recommends that the Commission not refer these issues to SOAH.

There is No Opportunity for Requestors to Rehabilitate their Request

As described above, the Requestors entirely failed to meet Section 55.201(d) concerning the required content of a hearing request. The Requestors had one opportunity, and they have failed. While the Requestors have an opportunity to reply to TxDOT's response (Section 55.209(g)), this does not change the fact that their hearing request completely failed to meet TCEQ requirements. Neither does Requestors' right to reply provide an opportunity to rehabilitate their deficient hearing request with new evidence.

Conclusion

TxDOT respectfully recommends the following actions by the Commission:

- (1) Find that none of the Requestors has met the associational standing requirement and that none of the identified individuals is an affected person with a justiciable interest in the Permit Application. If this finding is made, the Hearing Request should be denied.
- (2) If the Commission finds that one or more of the Requestors has met the associational standing requirement, then the Commission should find that there are no relevant and material issues of disputed fact, and the Hearing Request should be denied.

Respectfully submitted,

Texas Department of Transportation

James Bass
Executive Director

Jeff Graham
General Counsel

By 
J. Stephen Carow
Associate General Counsel

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, the Texas Department of Transportation's Response to Request for Contested Case Hearing was filed electronically with the Chief Clerk of the TCEQ, and a copy was served to all persons listed on the attached mailing list via certified mail, return receipt requested.



J. Stephen Carow

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PROTESTANTS/INTERESTED PERSONS:

See attached list.

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