

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Jon Niermann, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*



Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 24, 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: TEXAS DEPARTMENT OF TRANSPORTATION
TCEQ DOCKET NO. 2016-1703-IWD**

Dear Ms. Bohac:

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

Sincerely,


Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2016-1703-IWD

APPLICATION BY THE TEXAS	§	BEFORE THE
DEPARTMENT OF	§	TEXAS COMMISSION ON
TRANSPORTATION FOR	§	ENVIRONMENTAL QUALITY
PERMIT NO. WQ0005011000	§	

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

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) and files this Response to Hearing Requests in the above-referenced matter. OPIC recommends denying the requests for a contested case hearing filed by: Galveston Baykeeper, Environment Texas, Save Our Springs Alliance, Galveston Bay Foundation, Turtle Island Restoration Network, and the Houston Audubon. Although OPIC cannot currently recommend approval of these requests because of a lack of information showing how identified members are affected persons, if additional information is submitted in the form of a reply filed by November 7, 2016, OPIC may reconsider its recommendation.

I. INTRODUCTION

The Texas Department of Transportation (TXDOT or Applicant) has applied for Water Quality Permit No. WQ0005011000 to operate TXDOT MS4s located in TXDOT right-of-ways (ROWS) throughout the state. This statewide permit authorizes the discharge of stormwater from the TXDOT ROWs located within Phase I MS4 areas based on the 1990 U.S. Census data for cities and for small MS4s located in "urbanized areas" as established by the 2000 and 2010 U.S.

Census.

The TCEQ received the application on March 18, 2013; the application was declared administratively complete on April 18, 2013, and technically complete on December 4, 2014. The Applicant published seventeen separate combined *Notices of Receipt of Application and Intent to Obtain Water Quality Permit Amendment (NORI)/ Notices of Application and Preliminary Decision for Water Quality TPDES Permit Amendment and Renewal (NAPD)* across the state in English in the *Abilene Reporter – News, Amarillo Globe – News, Texarkana Gazette, Dallas Morning News, Austin American Statesman, Houston Chronicle, Corpus Christi Caller Times, El Paso Times, Laredo Morning News, Lubbock Avalanche Journal, Midland Reporter Telegram, The Monitor, San Angelo Standard-Times, San Antonio Express- News, Wichita Falls Times Record News, and Victoria Advocate* between April 7, 2016 and April 15, 2016.

An alternative language combined NORI/NAPD was published in Spanish in *La Voz Hispana, La Opinion, Al Dia, Ahora Si, La Voz, El Paso Y Mas, El Editor, El Nuevo Herald, Conexion, Tiempo, and Revista De Victoria* between April 7, 2016 and April 15, 2016. The public comment period ended on May 16, 2016. The Executive Director's Response to Comments and Final Decision Letter were mailed on August 15, 2016. The deadline to request a hearing was September 14, 2016.

II. REQUIREMENTS OF APPLICABLE LAW

A. Requirements to Obtain Affected Person Status

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code § 5.556 added by Acts 1999, 76th Leg., ch 1350

(commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TEXAS ADMINISTRATIVE CODE (TAC) § 55.201(d). Under 30 TAC § 55.203(a), an affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include:

- 1) whether the interest claimed is one protected by the law under which the application will be considered;
- 2) distance restrictions or other limitations imposed by law on the affected interest;
- 3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- 4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- 5) likely impact of the regulated activity on use of the impacted natural resource by the person; and

- 6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- 1) whether the requestor is an affected person;
- 2) which issues raised in the hearing request are disputed;
- 3) whether the dispute involves questions of fact or law;
- 4) whether the issues were raised during the public comment period;
- 5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's response to Comment;
- 6) whether the issues are relevant and material to the decision on the application; and
- 7) a maximum expected duration for the contested case hearing.

A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (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.¹

¹ 30 TAC § 55.205(a).

III. DISCUSSION

On September 14, 2016, the Commission received a hearing request from Jen Powis, representing Galveston Baykeeper; Luke Metzger, representing Environment Texas; Kelly Davis, representing the Save Our Springs Alliance; Scott Jones, representing the Galveston Bay Foundation; and Joanie Steinhaus, representing the Turtle Island Restoration Network. On May 6, 2016 and May 10, 2016, identical hearing requests were received by the Commission from the same entities and representatives, with the addition of Helen Drummond, representing Houston Audubon.

The September 14, 2016 request raises the following concerns: 1) the geographic scope of the permit, and specifically that it should cover the entire state of Texas, 2) that stormwater discharges will result in exceedances of water quality standards for heavy metals and other pollutants, 3) that the permit fails to adopt explicit timeframes, benchmarks, and best management practices that are applicable to the Edwards Aquifer region, 4) that the permit fails to adopt a cumulative effect analysis in the watershed or require more mitigation for redevelopment areas since roadways are known polluters, 5) that the permit fails to require wet weather testing, if not numeric limits, and 6) that the permit fails to require additional benchmarking for floatables since roadways are the leading cause of this pollutant. Additionally, the request disagrees with the Executive Director's conclusion that the stormwater involved in this permit is not capable of hydrologic modeling, which would result in additional provisions to comply with current law.

The May 6, 2016 and May 10, 2016 request echos these concerns and additionally asserts that: 1) assuming less than primary contact for any Texas stream violates the Clean Water Act, 2)

the permit does not properly protect endangered species, and 3) the permit neglects to adequately require spill prevention and response. The May 6, 2016 and May 10, 2016 request states that Galveston Baykeeper (GBK) is a nonprofit organization working to ensure that every waterway in Texas is swimmable, fishable, and drinkable. GBK's core mission is to ensure the aquatic integrity of the Lower Galveston Bay watershed by focusing on the protection of wetlands and other critical habitats, advocating for adequate mitigation of lost wetland resources, and enforcing all aspects of compliance with the Clean Water Act.

The May 6, 2016 and May 10, 2016 request also specifies that each of the remaining entities—including Galveston Bay Foundation, Environment Texas, Houston Audubon, Save our Springs Alliance, and Turtle Island Restoration Network—are likewise nonprofit entities concerned with Texas's rivers, streams, bays and estuaries.

OPIC finds that the interests the requestor groups and associations seek to protect are germane to the organizations' purpose, and that many issues raised would be appropriate for referral to hearing.

However, none of the requests identify a member who would otherwise have standing to request a hearing in their own right. The requests assert that "each member or staff listed below is directly affected through their recreational, scientific, educational, or vocational activities related to these waters across the state," but do not specifically identify a residence or activity for each member that would be potentially affected by a particular stormwater discharge authorized under the permit. Because these requests only identify general activities taking place anywhere in the state of Texas, OPIC cannot find that these groups or their representatives would be adversely affected by the proposed facility or activity in a manner not common to members of the general public.

For this reason, OPIC cannot find that the requestors have satisfied the requirements for group or association standing and cannot recommend that the Commission grant these hearing requests. However, 30 TAC §55.205(c) authorizes OPIC to request an explanation of how a group or association meets the requirements of subsection §55.252(a). OPIC may reconsider its recommendation if such an explanation is provided by the reply deadline of November 7, 2016.

IV. CONCLUSION

OPIC respectfully recommends that the Commission deny the hearing requests of Galveston Baykeeper, Environment Texas, Save Our Springs Alliance, Galveston Bay Foundation, Turtle Island Restoration Network, and the Houston Audubon. However, if the requested information is submitted by November 7, 2016, OPIC may recommend granting the hearing request of any of these entities based on their reply.

Respectfully submitted,

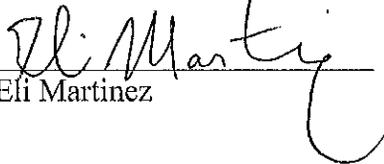
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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, the original and seven true and correct copies of the Office of the Public Counsel's Response to Hearing Requests were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Eli Martinez

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TCEQ DOCKET NO. 2016-1703-IWD

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