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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 27, 2014

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: NUECES RIVER AUTHORITY
TCEQ DOCKET NO. 2014-1317-MWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Isabel Segarra Treviño".

Isabel G. Segarra Treviño, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2014-1317-MWD

**IN THE MATTER OF THE
APPLICATION BY THE NUECES
RIVER AUTHORITY FOR A NEW
TCEQ PERMIT
NO. WQ0015083001**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

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

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

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Request for Hearing in the above-referenced matter and respectfully recommends granting the request for a contested case hearing filed by Jean and Dan Huffman.

I. INTRODUCTION

A. Background of Facility

The Nueces River Authority (River Authority) has applied for a new permit, proposed Permit No. WQ0015083001, to authorize the discharge of treated domestic wastewater to serve the City of Leakey and surrounding areas. The proposed facility and disposal site, the Nueces River Authority Leakey Regional Wastewater Treatment Facility (Facility), will be located at 64 Stanford Hollow Road, approximately two miles south of the intersection of U.S. Highway 83 and Ranch Road 337, on the west side of U.S. Highway 83, Leakey in Real County, Texas 78873. The Facility will be located in the drainage basin of Patterson Creek, in Segment No. 2113 of the Nueces River Basin.

The Facility will treat effluent using an activated sludge process using the extended aeration mode. Construction on the facility has not commenced. During the Interim phase, the

daily average flow is not to exceed 250,000 gallons per day via surface irrigation of up to 93.5 acres of public access pastureland. The facility will include storage ponds with a total surface area of 2.02 acres and a total capacity of 11.5 acre-feet for storage of treated effluent prior to irrigation. During the Final phase, the daily average flow is not to exceed 360,000 gallons per day via surface irrigation of up to 93.5 acres of public access pastureland. The facility will include storage ponds with a total surface area of 2.91 acres and a total capacity of 16.6 acre-feet.

The proposed facility will treat effluent using an influent lift station, a manual bar screen, a mechanical bar screen, a grit removal system, an oxidation ditch, a final clarifier (two during the Final phase), an aerated sludge holding tank (during the Final phase), a belt filter press, sludge drying beds, and a chlorine contact chamber. The proposed facility will dispose of sludge only at a TCEQ authorized land application site, and, co-disposal landfill.

The effluent limits in both phases of the draft permit, based on a daily average, are 20 mg/l BOD₅, 20 mg/l TSS, and 126 CFU or MPN/100 ml of *E. coli*. The effluent shall contain a chlorine residual of at least 1.0 mg/l after a detention time of at least 20 minutes based on peak flow. The draft permit provides the option of changing the site to non-public access land, if the applicant notifies the TCEQ that access will be restricted before operating the facility. The effluent limits for non-public access, based on a single grab, is 65 mg/l BOD₅.

B. Procedural Background

The TCEQ received the River Authority's application on March 18, 2013 and the TCEQ Executive Director (ED) declared the application administratively complete on March 27, 2013. The TCEQ prepared a Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) and the River Authority published it in English on April 7, 2013 in the *Uvalde Leander-News* newspaper in Uvalde County, and on April 10, 2013 in the *Hill Country Herald* newspaper in

Real County. The ED's staff completed the technical review of the River Authority's application on November 6, 2013, and prepared a draft permit. The TCEQ prepared a Notice of Application and Preliminary Decision for Water Quality Permit (NAPD) and the River Authority published it in English on February 16, 2014 in the *Uvalde Leander-News* newspaper in Uvalde County, and on February 19, 2014 in the *Hill Country Herald* newspaper in Real County. Affidavits received by the TCEQ on April 19, 2013 and February 28, 2014 show that no alternate language publication was required for this permit application. The public comment period ended on March 21, 2014.

The Chief Clerk mailed the Executive Director's Decision and Response to Public Comment on August 8, 2014 and the deadline for filing requests for a contested case hearing was Wednesday, September 10, 2014.

The TCEQ Chief Clerk's office received a timely request for a contested case hearing from Jean and Dan Huffman on March 14, 2014. As discussed below, the OPIC recommends granting the Huffmans' hearing request because the Huffmans are affected persons and the request raises one issue that is relevant and material to the River Authority's application.

II. APPLICABLE LAW

A person may request the TCEQ reconsider the ED's decision on an application or hold a contested case hearing on an application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. WATER CODE (TWC) § 5.556). The requirements of House Bill 801 only apply to applications declared administratively complete on or after September 1, 1999. The TCEQ declared the River Authority's application administratively complete on March 27, 2013. Therefore, the River Authority's application is subject to the procedural requirements of House Bill 801.

The rules of the TCEQ require that a person seeking a hearing must substantially comply with the following: (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who filed the request, (2) identify the requestor's personal justiciable interest affected by the application, including a written statement describing the requestor's location or distance in relation to the proposed facility or activity, and, how or why the requestor believes he or she will be affected by the proposed facility or activity in a manner not common to members of the general public, (3) request a contested case hearing, (4) list all relevant and material disputed issues of fact that were raised during the comment period and that are the basis of the hearing request, and (5) provide any other information specified in the public notice of the application. 30 TEX. ADMIN. CODE (TAC) § 55.201(d) (2012).

Only affected persons are granted contested case hearings. TWC § 5.556(c). An affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." 30 TAC § 55.203(a). This justiciable interest does not include an interest common to the general public. *Id.* Relevant factors considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

The Commission shall grant an affected person's timely filed contested case hearing request if the request: (1) raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application, (2) is timely filed with the Chief Clerk, (3) is made pursuant to a right to hearing authorized by law, and (4) complies with the request for reconsideration and contested case hearing requirements.

30 TAC § 55.211(c). Responses to hearing requests must specifically address:

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

30 TAC § 55.209(e).

III. DISCUSSION

The Huffmans timely filed a request for a contested case hearing on March 14, 2013 for the River Authority's proposed Permit No. WQ0015083001.

A. Determination of Affected Person Status

The hearing request does not list the Huffmans' address. However, the hearing request states that Jean and Dan Huffman are co-executors of T. W. Huffman, Jr. Upon review of the permit file, OPIC found a map submitted by the River Authority which lists "T.W. Huffman" as a landowner with a physical address of 399 John Davis Road, and, a mailing address of #44 Sunnygrove, Odessa, Texas 79761. The T. W. Huffman tract is on the eastern side of U.S. Highway 83, across from the proposed facility site.

For a hearing requestor to be an affected person, the request must be based on an interest that is protected under the law governing the permit application. 30 TAC 55.203(a). The TCEQ administers waste water discharge permit applications pursuant to its authority under TWC § 26.027(a). The Huffmans' hearing request lists numerous issues. From OPIC's review of the request, these issues can be grouped into three categories: (1) issues that are beyond the scope of TCEQ's jurisdiction; (2) issues that are beyond the scope of the water quality permit application process; and, (3) issues that are relevant and material to this application and protected under the law governing the application.

- 1. The Huffmans' concerns about bridge integrity, main trunk line integrity, dam integrity, condemnation, public funding, attorney conduct, and bad faith conduct by the River Authority are beyond the scope of TCEQ's jurisdiction and are not protected by the law governing this application.**

The Huffmans are concerned about the potential destruction of a bridge and rupture of a main trunk line on Davis Crossing, above Patterson Creek, due to a flash flood event. Huffman Hearing Request, 7–9. Further, the Huffmans are concerned that a different proposed project's dams will not meet state dam safety standards. Huffman Hearing Request, 10. The TCEQ is not tasked with ensuring bridge, main trunk line, and dam integrity. The Huffmans are concerned that the City of Leakey and the Nueces River Authority hold insufficient rights to install a main sewer trunk line on John Davis Road and related necessary easements. Further, even if the City and the River Authority held these rights, the Huffmans believe the City and the River Authority do not have sufficient public funds to complete the project. Huffman Hearing Request, 11–19, 21–22. The condemnation and public funding issues raised by the Huffmans are local government matters over which the TCEQ has no jurisdiction. The Huffmans also note that in prior communications with the River Authority, documents were mailed to the Huffmans

instead of one of their legal representatives. Huffman Hearing Request, 19. Attorney conduct is regulated by the State Bar of Texas, not the TCEQ.

Lastly, the Huffmans believe the River Authority has engaged in bad faith conduct related to a public hearing held on this matter. Huffman Hearing Request, 23–24. While the TCEQ works closely with river authorities, like the Nueces River Authority, the TCEQ has no jurisdiction to regulate the conduct of river authorities with members of the public. Further, OPIC reviewed the public notices provided by the River Authority and found that they comply with the notice requirements in 30 TAC Ch. 39. The NORI was published in English on April 7, 2013 in the *Uvalde Leander-News* newspaper in Uvalde County, and on April 10, 2013 in the *Hill Country Herald* newspaper in Real County. The NAPD was published in English on February 16, 2014 in the *Uvalde Leander-News* newspaper in Uvalde County, and on February 19, 2014 in the *Hill Country Herald* newspaper in Real County. Alternate language publication was not required for this application.

2. The Huffmans' concerns about trees, the Real County economy, and, dredge and fill permitting are beyond the scope of TCEQ's jurisdiction and not protected by the law governing this application.

The scope of the issues raised by a hearing request must present an interest that is protected under the law governing the permit application. Here, the wastewater discharge permit process protects water quality. The Huffmans are concerned about the loss of trees and the effect of the River Authority's actions on the Real County economy. Huffman Hearing Request, 6, 10. These are not water quality issues and cannot be considered by the TCEQ in the wastewater permit application process. The Huffmans are also concerned that the River Authority may be trying to circumvent the dredge and fill permitting process administered by the U.S. Army Corps

of Engineers. Huffman Hearing Request, 10. The TCEQ is expressly prohibited from engaging in dredge and fill permitting. TWC § 26.027(d) (2009).

3. The Huffmans' concerns regarding whether the facility is located on the 100-year floodplain raise a relevant and material issue that is protected under the law governing this application.

TCEQ rules provide that “[a] wastewater treatment plant unit may not be located in the 100-year flood plain unless the plant unit is protected from inundation and damage that may occur during that flood event.” 30 TAC § 309.13(a). The Huffmans are concerned that “[t]he project does not comply with FEMA 100 year floodplain requirements.” Huffman Hearing Request, 10. The Huffmans’ interest in prohibiting the location of active sludge facilities on 100-year floodways is protected by the law under which the application will be considered. 30 TAC § 309.13(a). The Huffman’s proximity to the facility demonstrates that there is a reasonable relationship between the interest they claim and the activity regulated. Therefore, OPIC finds that the Huffmans are affected persons under 30 TAC § 55.203(a).

B. Issues Raised in the Hearing Request

Jean and Dan Huffman’s hearing request raises the following issues:

1. Whether the bridge at Davis Crossing over Patterson Creek can withstand flash flood events.
2. Whether a high pressure main trunk line can withstand flash flood events.
3. Whether dams in an unrelated project meet state standards.
4. Whether the City of Leakey and Real County are conducting condemnation proceedings legally.
5. Whether the City of Leakey and Real County have public funding available for infrastructure improvements.
6. Whether the River Authority’s attorney’s conduct toward the Huffmans was inappropriate.

7. Whether the River Authority's acted in bad faith toward the public.
8. Whether infrastructure improvements will create loss of trees in Real County.
9. Whether infrastructure improvements will impact the Real County local economy.
10. Whether the River Authority is trying to avoid dredge and fill permitting.
11. Whether the proposed facility is on a 100-year floodplain.

C. Issues Raised in the Comment Period

The Huffmans' issues were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) & (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

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

E. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. 30 TAC § 55.211(c)(2)(A). The issue relating to whether the proposed facility is on a 100-year floodplain is an issue of fact that can be resolved through a contested case hearing.

F. Relevant and Material Issues

The issue relating to whether the proposed facility is on the 100-year floodplain is relevant and material to the Commission's decision under the requirements of 30 TAC § 55.211(c)(2) because siting the proposed facility on a 100-year floodplain is expressly prohibited under Commission rules and the Huffmans are adjacent landowners. As stated in Section III (A) above, all other issues raised by the Huffmans are not relevant and material and could not be addressed by the TCEQ.

G. Issue Recommended for Referral

OPIC recommends that the issue relating to whether the proposed facility is on the 100-year floodplain be referred to the SOAH for a contested case hearing.

H. Maximum Expected Duration of Hearing

Commission Rule 30 TAC § 80.6(b)(5) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

For the reasons set forth above, we recommend granting Jean and Dan Huffman's hearing request and referring this application to SOAH for a contested case hearing on the floodplain issue discussed above.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2014 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Isabel G. Segarra Treviño

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TCEQ DOCKET NO. 2014-1317-MWD**

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