

Jon Niermann, *Chairman*  
Emily Lindley, *Commissioner*  
Bobby Janecka, *Commissioner*  
Toby Baker, *Executive Director*



Vic McWherter, *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

December 18, 2020

Laurie Gharis, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

RE: **JW DEVELOPMENT PARTNERS, LP**  
**TCEQ DOCKET NO. 2020-0717-MWD**

Dear Ms. Gharis:

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 black ink, appearing to read "Sheldon P. Wayne".

Sheldon P. Wayne, Attorney  
Assistant Public Interest Counsel

cc: Mailing List



**TCEQ DOCKET NO. 2020-0717-MWD**

<b>IN THE MATTER OF THE</b>	<b>§</b>	<b>BEFORE THE</b>
<b>APPLICATION BY</b>	<b>§</b>	
<b>JW DEVELOPMENT PARTNERS,</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>LLC FOR TPDES PERMIT NO.</b>	<b>§</b>	
<b>WQ0015778001</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

**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 submits the following.

**I. INTRODUCTION**

**A. Summary of Position**

Preliminarily, OPIC notes that the TCEQ Chief Clerk’s office received one timely hearing request from Phylis L. Johnson. For the reasons discussed herein, OPIC recommends denial of Ms. Johnson’s request.

**B. Background of Facility**

JW Development Partners, LLC (JW Development or Applicant) has applied to TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015778001 (the Draft Permit) to authorize the discharge of treated wastewater at a daily average flow of 32,000 gallons per day. The proposed domestic wastewater treatment facility (the proposed Facility) will be a submerged fixed bed biofilm reactor package plant system. Treatment units will include an influent fine screen, an aeration basin, a tube settler tank, a sludge holding tank, and a chlorine contact chamber. The proposed Facility will be

located at 3560 County Road 305, Port Lavaca, Calhoun County, Texas and will serve the proposed Four Palms RV park, a new 250-slot RV park for recreation and temporary housing.

The effluent limitations in the Draft Permit, based on a 30-day average, are 20 milligrams per liter (mg/l) five-day biochemical oxygen demand, 20 mg/l total suspended solids, 126 colony forming units or most probable number of *Escherichia coli* per 100 milliliters, and 2 mg/l minimum dissolved oxygen. The effluent also must contain a chlorine residual of at least 1 mg/l and shall not exceed a chlorine residual of 4 mg/l after a detention time of at least 20 minutes based on peak flow.

If the Draft Permit is issued, the treated effluent will be discharged to an amenity lake, then to the County Road 305 roadside ditch, then to the County Road 314 roadside ditch (non-tidal), then to the County Road 314 roadside ditch (tidal), then to Carancahua Bay in Segment No. 2456. The unclassified receiving water uses are limited aquatic life use for the amenity lake, minimal aquatic life use for the County Roads 305 and 314 (non-tidal) roadside ditches, and exceptional aquatic life use for the County Road 314 roadside ditch (tidal). The designated uses for Segment No. 2456 are primary contact recreation, exceptional aquatic life use, and oyster waters.

## **B. Procedural Background**

The TCEQ received the application on March 11, 2019 and declared it administratively complete on May 15, 2019. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published on June 12, 2019 in the *Port Lavaca Wave*. The TCEQ Executive Director's (ED) staff completed the technical review of the application on July 25, 2019. A Combined NORI and Notice of Application

and Preliminary Decision (NAPD) was published on October 2, 2019 in the *Port Lavaca Wave*. The combined notice was issued to correct the discharge route and address of the proposed Facility that was stated in the NORI. The public comment period closed on November 1, 2019. The Chief Clerk mailed the ED's Decision and Response to Public Comment on April 23, 2020 and the deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was May 26, 2020. The TCEQ Chief Clerk's office received one timely hearing request, as discussed below.

## **II. APPLICABLE LAW**

### **A. Requests for Hearing**

The application was filed after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015).

Under Title 30, TAC § 55.201(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue raised solely in a public comment which has been withdrawn, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

Section 55.201(d) states that a 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;

- (4) list all relevant and material disputed issues of fact that were raised by the requestor 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 ED's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and
- (5) provide any other information specified in the public notice of application.

30 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. An interest common to members of the general public does not qualify as a personal justiciable interest. Relevant factors to be 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;
- (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.

30 TAC § 55.203(c).

Under § 55.203(d), to determine 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 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.

30 TAC § 55.203(d).

Under 30 TAC § 55.211(c)(2)(A)(ii), for an application filed on or after September 1, 2015, the Commission shall grant a hearing request made by an affected person if the request raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's RTC, and that are relevant and material to the Commission's decision on the application. Under § 55.211(c)(2)(B)–(D), the hearing request, to be granted, must also be timely filed with the Chief Clerk, pursuant to a right to hearing authorized by law, and comply with the requirements of § 55.201.

### **III. DISCUSSION**

#### **A. Determination of Affected Person Status**

Phylis L. Johnson timely submitted a combined comment and hearing request on September 3, 2019. In her submittal, Ms. Johnson states that she is opposed to the proposed Facility and that she believes that it will be a health hazard to the community and the Carancahua Bay. However, Ms. Johnson did not include any statements explaining how she believes she will be affected by the proposed Facility in a manner that differs from the

general public as required by 30 TAC § 55.201(d)(2). For instance, she does not state that she uses the Bay or describe how the discharge will affect her personally.

Additionally, according to the map provided by the ED's staff, Ms. Johnson's address is approximately two miles from the proposed Facility and the outfall. Therefore, due to the considerable intervening distance between Ms. Johnson's location and the proposed Facility, and in light of her generalized concerns that are shared with the general public, OPIC must conclude that Ms. Johnson's request does not establish that she is an affected person, and must respectfully recommend denial of her request. If the Commission disagrees, OPIC provides the following analysis of the issues raised in the request.

**B. Issues Raised in the Hearing Request**

Phylis Johnson raised the following issues:

1. Whether the proposed Facility and draft permit are adequately protective of human health; and
2. Whether the proposed Facility and draft permit are adequately protective of area wildlife.

**C. Issues Raised in the Hearing Request Remain Disputed**

There is no agreement between the hearing requestor and the ED on the issues raised in her hearing request, thus, they remain disputed.

**D. The Disputed Issues Are 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). All of the issues raised are issues of fact.

**E. Issues Were Raised by the Requestor During the Comment Period**

All of the issues were raised by Ms. Johnson during the public comment period.



**G. The Hearing Request is Based on Issues Raised in a Public Comment Which Has Not Been Withdrawn**

The hearing request is based on a timely comment that has not been withdrawn.

**H. Issues That are Relevant and Material to the Decision on the Application**

The hearing request raises issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4)(B) and 55.211(c)(2)(A)(ii). To refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Anderson v. Liberty Mutual, Inc.*, 477 U.S. 242, 248-51 (1986).

Ms. Johnson is concerned that operation of the proposed Facility will create a health hazard. Although stated in a very general fashion, this is essentially a concern about possible adverse effects to human health, and, presumably, wildlife living along the discharge route and in the Bay. TCEQ is responsible for requiring compliance with the Texas Surface Water Quality Standards, which, in part, require that water in the state be maintained to preclude adverse effects to aquatic and terrestrial life resulting from contact or consumption of water. 30 TAC § 307.6(b)(4). Additionally, surface waters must not be toxic to humans from ingestion, consumption of aquatic organisms, or contact with the skin. 30 TAC § 307.4(d). Therefore, should the Commission find that Ms. Johnson is an affected person and entitled to a hearing, Issue nos. 1 and 2 are relevant and material to the Commission's decision regarding this application and are appropriate for referral to SOAH.

**I. Maximum Expected Duration of Hearing**

Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date

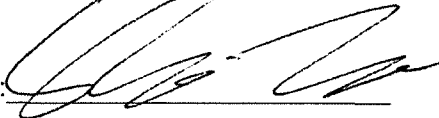
by which the administrative law judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 1, 2015, the judge must conclude the hearing and provide a proposal for decision by the 180th day after the first day of the preliminary hearing, or a date specified by the Commission, whichever is earlier. 30 TAC § 50.115(d)(2). To assist the Commission in setting 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, should a hearing be convened on this application, it's expected maximum duration would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

#### **IV. CONCLUSION**

For the reasons discussed above, OPIC finds Phylis L. Johnson has not demonstrated that she is an affected person, and, therefore, respectfully recommends denial of her hearing request. Should the Commission disagree, OPIC recommends referral of Issue nos. 1 and 2 for a hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,

Vic McWherter  
Public Interest Counsel

By: 

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 18, 2020 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing 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, electronic mail, or by deposit in the U.S. Mail.

A handwritten signature in black ink, appearing to read 'Sheldon P. Wayne', written over a horizontal line.

Sheldon P. Wayne



**MAILING LIST**  
**JW DEVELOPMENT PARTNERS, LP**  
**TCEQ DOCKET NO. 2020-0717-MWD**

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**FOR ALTERNATIVE DISPUTE  
RESOLUTION:**

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**FOR THE CHIEF CLERK:**

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**REQUESTER:**

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