

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

June 6, 2022

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: City of Bryan (Applicant)
Docket No. 2022-0610-MWD

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2022-0610-MWD

**IN THE MATTER OF THE
APPLICATION BY CITY OF
BRYAN FOR WATER QUALITY
PERMIT NO. WQ0015930001**

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
REQUESTS FOR RECONSIDERATION AND REQUESTS 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 Requests for Reconsideration and Requests for Hearing in the above-referenced matter and respectfully shows the following.

I. Introduction

A. Summary of Position

Based on the information submitted in the requests and a review of the information available in the Chief Clerk's file on this application, OPIC recommends the Commission grant the hearing requests of Glynda Bricker, Anne Cecile Daleon, Kenneth Davis, Neil Ryan and Jenny Gallagher, David & Margaret Gail Hyden, Bobbie Meyer, and Mary Louise Sims. These requestors are affected persons based on their proximity to the proposed facility and outfall point. OPIC recommends the Commission deny the request of Georgianne Sims Ku, as the address she provided is not located near the proposed facility and it cannot therefore be determined she would be adversely affected by the proposed facility or activity in a manner not common to members of the general public. OPIC further recommends the Commission refer the issues listed in Section III.H. for a

contested case hearing at the State Office of Administrative Hearings (“SOAH”) with a maximum duration of 180 days.

Lastly, OPIC recommends the Commission deny the pending requests for reconsideration.

B. Description of Facility

The City of Bryan (Applicant or the City) has applied for a new Texas Pollutant Discharge Elimination System Permit (TPDES) No. WQ0015930001 to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 6,000,000 gallons per day in the Interim phase and an annual average flow not to exceed 12,000,000 gallons per day in the Final phase.

The facility will be located approximately 1,400 feet northeast of the intersection of Australia Lane and Cole Lane, in Brazos County, Texas 77845. The treated effluent will be discharged to Brushy Creek, thence to Wickson Creek, thence to the Navasota River Below Lake Limestone in Segment No. 1209 of the Brazos River Basin. The unclassified receiving water uses are limited aquatic life use for Brushy Creek and presumed high aquatic life use for Wickson Creek. The designated uses for Segment No. 1209 are primary contact recreation, public water supply, and high aquatic life use.

C. Procedural Background

TCEQ received the application for a new TPDES permit (Application) on September 25, 2020, and the Executive director (ED) declared it administratively complete on January 14, 2021. The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English on January 20, 2021, in *The Eagle*, and in Spanish on January 22, 2021, in *La Voz Hispana*. The Application was determined to be technically complete on May 21, 2021. The Applicant published the

Notice of Application and Preliminary Decision (NAPD) in English on September 9, 2021, in *The Eagle*, and in Spanish on September 10, 2021, in *La Voz Hispana*. A virtual public meeting was held on January 13, 2022. The public comment period ended on January 20, 2022. The Executive Director's Decision and Response to Comments was mailed on March 4, 2022. The hearing request period ended April 4, 2022.

Timely hearing requests were received from Glynda Bricker; Anne Cecile Daleon; Kenneth Davis; Adam Friedman, on behalf of David & Margaret Gail Hyden; Neil Ryan and Jenny Gallagher; Georgianne Sims Ku; Bobbie Meyer; and Mary Louise Sims. Timely requests for reconsideration were received from Jamie Overton and Mary Louise Sims.

II. REQUESTS FOR RECONSIDERATION

A. Applicable Law

Any person may file a request for reconsideration of the ED's decision under 30 TAC § 55.201(e). The request must be in writing and filed with the Chief Clerk no later than 30 days after the Chief Clerk mails the ED's decision and RTC. The request must expressly state that the person is requesting reconsideration of the ED's decision and give reasons why the decision should be reconsidered.

B. Discussion

Timely requests for reconsideration of the Executive Director's (ED) decision were filed by Jamie Overton and Mary Louise Sims. For the reasons discussed below, OPIC recommends that the Commission deny the requests.

Jamie Overton requests reconsideration of the ED's decision because of potential

environmental impacts, including negative impacts on wildlife and endangered species. Mary Louise Sims requests reconsideration of the ED's decision because no site visit was performed and therefore information provided by the Applicant was not properly vetted, as well as concerns related to potential impacts to wells and groundwater, potential erosion along the discharge route, and potential difficulties enforcing the terms of the permit. Mary Louise Sims also indicates the presentation by the Applicant at the public meeting was unhelpful and her concerns were not addressed.

Although OPIC is sympathetic to the issues raised by the requestors concerning the proposed application, without further development of the record demonstrating why the draft permit does not provide sufficient protections to address these issues, OPIC cannot recommend denial of the permit at this time. We note, however, in OPIC's analysis of the hearing requests addressed below, OPIC recommends referral to hearing of the relevant and material issues raised in these requests.

III. Requests for Hearing

A. Applicable Law

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 purposes 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(d).

B. Determination of Affected Person Status

1. Glynda Bricker

The Commission received a timely hearing request from Glynda Bricker. The request raises concerns that include odors, chemicals, negative impacts to the environment and wildlife, and potential damage to property. The requestor raises interests that are protected under the law under which the application will be considered.

The Executive Director has produced a map in these proceedings confirming the requestor's property is located within a mile of the proposed facility and outfall. Given the proximity of the property to Applicant's facility, outfall, and discharge route, OPIC finds that a reasonable relationship exists between the interests claimed and the activity regulated. Therefore, OPIC finds that Glynda Bricker is an affected person in accordance with 30 TAC § 55.203 and recommends the hearing request be granted.

2. Anne Cecile Daleon

The Commission received a timely hearing request from Anne Cecile Daleon. The request raises concerns related to odors, use and enjoyment of property, negative impacts to wildlife, and contamination of groundwater. The requestor raises interests that are protected under the law under which the application will be considered.

The Executive Director has produced a map in these proceedings confirming the requestor's property is located within a half mile of the proposed facility, outfall, and discharge route. Given the proximity of the property to the proposed facility, OPIC finds that a reasonable relationship exists between the interests claimed and the activity

regulated. Therefore, OPIC finds that Anne Cecile Daleon is an affected person in accordance with 30 TAC § 55.203 and recommends the hearing request be granted.

3. Kenneth Davis

The Commission received a timely hearing request from Kenneth Davis. The request raises concerns related to contamination of surface water, floodplain displacement, and water treatment methods. The requestor raises interests that are protected under the law under which the application will be considered.

The Executive Director has produced a map in these proceedings confirming the requestor's property is located approximately one mile of the proposed facility, outfall, and discharge route. Given the proximity of the property to the proposed facility, OPIC finds that a reasonable relationship exists between the interests claimed and the activity regulated. Therefore, OPIC finds that Kenneth Davis is an affected person in accordance with 30 TAC § 55.203 and recommends the hearing request be granted.

4. Neil Ryan and Jenny Gallagher

The Commission received a timely hearing request from Neil Ryan and Jenny Gallagher. The request raises concerns related to degradation of surface water and groundwater, impairment of the use and enjoyment of property, negative impacts on cattle operations, improper siting of the proposed facility in a floodplain, nuisance odors, impacts to wetlands, impacts to aquatic life, and need for the facility. The requestors raise interests that are protected under the law under which the application will be considered.

The Executive Director has produced a map in these proceedings confirming the Gallagher property is within a half mile of the proposed facility, outfall and discharge route. Given the proximity of the property to the proposed facility, OPIC finds that a reasonable relationship exists between the interests claimed and the activity regulated. Therefore, OPIC finds that Neil Ryan and Jenny Gallagher are affected persons in accordance with 30 TAC § 55.203 and recommends the hearing request be granted.

5. David & Margaret Gail Hyden

The Commission received a timely hearing request from Adam Friedman on behalf of David & Margaret Gail Hyden. The request raises concerns that include contamination of surface and groundwater, sufficiency of the antidegradation analysis performed, negative impacts to human health and wildlife, potential impacts on use and enjoyment of property and impact on their cattle operations, potential odor and vector nuisances, improper siting of facility in a floodplain, potential impacts to wetlands, and need for the facility. The requestors raise interests that are protected under the law under which the application will be considered.

The Executive Director has produced a map in these proceedings confirming the Hyden's property is adjacent to and downstream of the proposed facility and outfall. Additionally, the Updated Affected Landowners Map and List indicate that the Hydens' property lies adjacent to the Applicant's facility, outfall and discharge route. Given the proximity of the property to the proposed facility, OPIC finds that a reasonable relationship exists between the interests claimed and the activity regulated. Therefore,

OPIC finds that David & Margaret Gail Hyden are affected persons in accordance with 30 TAC § 55.203 and recommends the hearing request be granted.

6. Bobbie Meyer

The Commission received a timely hearing request from Bobbie Meyer. The request raises concerns related to impairment of use and enjoyment of property and potential odor nuisance. The requestor raises interests that are protected under the law under which the application will be considered.

The Executive Director has produced a map in these proceedings confirming the requestor's property is located approximately three-quarters of a mile from the proposed facility and outfall. Given the proximity of the property to Applicant's facility and outfall, OPIC finds that a reasonable relationship exists between the interests claimed and the activity regulated. Therefore, OPIC finds that Bobbie Meyer is an affected person in accordance with 30 TAC § 55.203 and recommends the hearing request be granted.

7. Mary Louise Sims

The Commission received a timely hearing request from Mary Louise Sims. The request raises concerns that include potential negative impacts to wetlands. The requestor raises interests that are protected by the law under which the application will be considered.

The Executive Director has produced a map in these proceedings confirming the requestor's property is within a half mile of the proposed facility and outfall. Additionally, the Updated Affected Landowners Map and List indicate that the Sims'

property lies adjacent to the Applicant's facility, outfall and discharge route. Given the proximity of the property to the proposed facility, OPIC finds that a reasonable relationship exists between the interests claimed and the activity regulated. Therefore, OPIC finds that Mary Louise Sims is an affected person in accordance with 30 TAC § 55.203 and recommends the hearing request be granted.

8. Georgieanne Sims Ku

The Commission received a timely hearing request from Georgieanne Sims Ku. The request raises concerns related to human health, impacts to livelihood, groundwater and surface water contamination, and negative impacts on terrestrial life. The requestor raises interests that are protected under the law under which the application will be considered.

The only address provided by the requestor was located in the city of Woodinville, Washington. Given the great distance between this address and the Applicant's facility and outfall, OPIC cannot find that the requestor would be adversely affected by the proposed facility or activity in a manner not common to members of the general public. Therefore, OPIC finds that Georgieanne Sims Ku is not an affected person in accordance with 30 TAC § 55.203 and recommends the Commission deny her request.

C. Issues Raised

The following issues have been raised in the hearing request:

1. Whether the proposed facility and permit will negatively impact surface water and groundwater? (David & Margaret, Gail Hyden, Anne Cecile Daleon, Kenneth Davis, Neil Ryan and Jenny Gallagher)
2. Whether required antidegradation analysis was adequately performed in compliance with Commission policy? (David & Margaret Gail Hyden)

3. Whether the proposed facility and permit will negatively impact human health? (David & Margaret Gail Hyden)
4. Whether the proposed facility and permit will impair the use and enjoyment of property? (Glynda Bricker, Anne Cecile Daleon, David & Margaret Gail Hyden, Neil Ryan and Jenny Gallagher, Bobbie Meyer)
5. Whether the proposed facility and permit will negative impact cattle and wildlife, including aquatic life? (Glynda Bricker, Anne Cecile Daleon, David & Margaret Gail Hyden, Neil Ryan and Jenny Gallagher)
6. Whether the proposed facility and permit improperly site the facility in a floodplain? (Kenneth Davis, David & Margaret Gail Hyden, Neil Ryan and Jenny Gallagher)
7. Whether the proposed facility and permit will result in nuisance odors or vectors? (Glynda Bricker, Anne Cecile Daleon, David & Margaret Gail Hyden, Neil Ryan and Jenny Gallagher, Bobbie Meyer)
8. Whether the proposed facility and permit will negatively impact wetlands? (David & Margaret Gail Hyden, Neil Ryan and Jenny Gallagher, Mary Louise Sims)
9. Whether there is a need for the facility? (David & Margaret Gail Hyden, Neil Ryan and Jenny Gallagher)
10. Whether the proposed facility and permit will result in erosion of the discharge route? (Glynda Bricker, David & Margaret Gail Hyden, Neil Ryan and Jenny Gallagher, Mary Louise Sims)
11. Whether the proposed facility and permit will degrade air quality? (David & Margaret Gail Hyden)
12. Whether the proposed facility and permit will result in flooding? (David & Margaret Gail Hyden, Mary Louise Sims)
13. Whether the proposed facility and permit will result in the need for additional water treatment methods that will affect the local tax rate? (Kenneth Davis)

D. 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 by the requestors are issues of fact.

E. Issues Were Raised by the Affected Persons During the Comment Period

All of the issues raised by the requestors were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

F. Disputed Issues

There is no agreement between the requestors and the ED on the issues raised in the hearing requests.

G. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order 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. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–251 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material . . . it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

The Commission is responsible for the protection of water quality under TWC Chapter 26 and 30 TAC Chapters 307 and 309. The Texas Surface Water Quality Standards (“Standards”) in 30 TAC Chapter 307 require that the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing

industries, and economic development of the state.” 30 TAC § 307.1. Therefore, the concerns raised relating to proper antidegradation analysis, groundwater and surface water contamination, impacts to human health, impacts to property, impacts to the environment, and negative impacts on cattle and wildlife are all relevant and material considerations in the Commission’s decision on this Application.

Likewise, Commission rules do not allow wastewater treatment facilities to be located within a 100-year floodplain unless the plant unit is protected from inundation and damage that may occur during that flood event.¹ The issues of vector and odor nuisance are addressed by § 309.13(e), which requires an applicant to abate nuisance odors, and the general prohibition on a permit holder creating or maintaining a nuisance that interferes with a landowner’s use and enjoyment of his or her property. Therefore, these issues are relevant and material to the Commission’s decision on the Application.

30 TAC § 309.13(b) prohibits a wastewater treatment plant from being located in the wetlands. Further, Tex. Water Code § 26.028 allows the Commission to deny or alter the terms and conditions of the proposed issuance of a permit to discharge waste based on consideration of need. Therefore, these issues are also relevant and material to the Commission’s decision on the Application.

The affected persons also question whether activities regulated under the proposed permit will cause erosion along the discharge route. Under 30 TAC § 309.12, “[t]he Commission may not issue a permit for a new facility or for the substantial change of an existing facility unless it finds that the proposed site, when evaluated in light of the

¹ 30 TAC §309.13(a).

proposed design, construction, or operational features, minimizes possible contamination of water in the state.” In making this determination under 30 TAC § 309.12(1), the Commission may consider active geologic processes and their impact on contamination. According to 30 TAC § 309.11(1), active geologic processes consist of any natural process which alters the surface and/or subsurface of the earth, including, but not limited to, erosion. Further, the Commission defines erosion as “the group of natural processes, including weathering, deterioration, detachment, dissolution, abrasion, corrosion, wearing away, and transportation by which earthen or rock material is removed from any part of the earth’s surface.” 30 TAC § 309.11(3). In briefing prior matters, OPIC has opined that erosion is a relevant and material issue when requestors have shown or alleged that serious erosion conditions already exist at or near a proposed plant site, such that the proposed site is unsuitable under the Commission’s Chapter 309 rules. In this matter, the hearing requests have not satisfied these criteria and OPIC cannot recommend referral of erosion as a separate issue at this time.

The requestors also raise issues that are not material the Commission’s decision. The Commission does not have jurisdiction over taxation concerns, air pollution or flooding when determining whether to grant a wastewater discharge permit application. These issues are therefore not proper for referral to a contested case hearing.

H. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether the proposed facility and permit will negatively impact surface water and groundwater?
2. Whether required antidegradation analysis was adequately performed in compliance with Commission policy?

3. Whether the proposed facility and permit will negatively impact human health?
4. Whether the proposed facility and permit will impair the use and enjoyment of property?
5. Whether the proposed facility and permit will negative impact wildlife, including cattle and aquatic life?
6. Whether the proposed facility and permit improperly site the facility in a floodplain?
7. Whether the proposed facility and permit will result in nuisance odors or vectors?
8. Whether the proposed facility and permit will negatively impact wetlands?
9. Whether there is a need for the facility?

I. Maximum Expected Duration of Hearing

Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 1, 2015, the administrative law 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 recommends that the duration of hearing on this application be stated in the Commission's order as 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

IV. Conclusion

OPIC recommends the Commission grant the hearing requests of Glynda Bricker, Anne Cecile Daleon, Kenneth Davis, Neil Ryan and Jenny Gallagher, David & Margaret Gail Hyden, Bobbie Meyer, and Mary Louise Sims, and deny the request of Georgianne Sims Ku. OPIC also recommends the Commission refer the issues listed in Section

III.H. for a contested case hearing at the State Office of Administrative Hearings (“SOAH”) with a maximum duration of 180 days.

Lastly, OPIC recommends the Commission deny the pending requests for reconsideration.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: *Eli Martinez*

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2022, the original of the Office of Public Interest Counsel’s Response to Requests for Reconsideration and Requests for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via U.S. mail or electronic mail.

Eli Martinez
Eli Martinez

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DOCKET NO. 2022-0610-MWD; PERMIT NO. WQ0015930001**

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REQUESTER(S) / INTERESTED
PERSON(S):

See attached list.

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