

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



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 24, 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: **GRAM VIKAS PARTNERS, INC.**
TCEQ DOCKET NO. 2022-1155-MWD

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in black ink that reads "Pranjal".

Pranjal M. Mehta, Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2022-1155-MWD

**APPLICATION BY
GRAM VIKAS PARTNERS, INC.
FOR TPDES PERMIT NO.
WQ0015990001**

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**BEFORE THE
TEXAS COMMISSION
ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE
TO REQUESTS FOR HEARING AND REQUESTS FOR RECONSIDERATION**

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 Hearing and Requests for Reconsideration in the above-referenced matter and respectfully submits the following.

I. Summary of Position

For the reasons detailed below, OPIC recommends the Commission grant the hearing requests of Greater Edwards Aquifer Alliance, Texas Rivers Protection Association, and Byron Evans. OPIC further recommends the Commission refer the issues specified in Section IV.I for a contested case hearing at the State Office of Administrative Hearings (SOAH) with a maximum duration of 180 days. Finally, OPIC recommends the Commission deny the hearing requests of Mary Allen, Patrick Flint, Michael and Rita Lingsio, and all pending requests for reconsideration.

II. Background

On May 10, 2021, Gram Vikas Partners, Inc. (Applicant) applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015990001 to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.20 million

gallons per day (MGD). The proposed wastewater treatment facility (facility) would be located approximately 0.3 miles south-southeast of the intersection of Farm-to-Market Road 1101 and Watson Lane, in Comal County. The treated effluent will be discharged to Mesquite Creek, then to York Creek, then to the Lower San Marcos River in Segment No. 1808 of the Guadalupe River Basin.

The TCEQ received the application on May 10, 2021, and declared it administratively complete on July 26, 2021. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on August 1, 2021, in the *Seguin Gazette*. The Notice of Application and Preliminary Decision (NAPD) was published on December 5, 2021 in the *Seguin Gazette*. A virtual public meeting was held on March 21, 2022, and a live, in person, public meeting was held on June 7, 2022. The public comment period for this application closed on June 7, 2022. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on August 19, 2022. The deadline for filing requests for a contested case hearing or reconsideration was September 19, 2022. The Commission received timely comments and timely hearing requests from: Greater Edwards Aquifer Alliance, Texas Rivers Protection Association, Mary Allen, Byron Evans, Patrick Flint, and Michael and Rita Lingensio. Also, the Commission received timely requests for reconsideration from Mary Allen, Sylvia and Tris Castaneda Jr., Drew Engelke, Karen Montgomery, Diane Scott, and James Seeger.

III. Applicable Law

A. Hearing Requests

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) (SB 709). For SB

709 applications, Texas Water Code (TWC) Section 5.115(a-1)(2)(B) provides the Commission may not find that a hearing requestor is an affected person unless the hearing requestor timely submitted comments on the application. Texas Government Code Section 2003.047(e-1) further provides that each issue referred by the Commission must have been raised by an affected person in a timely comment filed by that affected person. The Commission's Chapter 55 rules implement these statutory requirements and other provisions of SB 709.

Under Title 30 Texas Administrative Code (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.

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.

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.

Under 30 TAC § 55.205(b), a hearing request by a group or association may not be granted unless all of the following requirements are met:

- (1) comments on the application are timely submitted by the group or association;
- (2) the request identifies, by name and physical address, one or more members of the group or association that would otherwise have standing to request a hearing in their own right;
- (3) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (4) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

For an application filed on or after September 1, 2015, § 55.211(c)(2)(A)(ii) provides that a hearing request made by an affected person shall be granted 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 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.

B. Request for Reconsideration

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 decision and give reasons why the decision should be reconsidered.

IV. Analysis of Hearing Requests

A. Whether the requesters are affected persons

Greater Edwards Aquifer Alliance

The Greater Edwards Aquifer Alliance (GEAA) timely submitted comments and hearing requests.¹ GEAA is a non-profit organization that was formed to conserve and protect the natural resources of the Edwards Aquifer, its associated river basins, and the Texas Hill Country. GEAA's purposes include aiding and expanding public interest efforts in the field of sustainable water and land use practices and catalyzing investments into the preservation of the Edwards Aquifer.

As required for group standing under 30 TAC § 55.205(b), GEAA timely submitted comments; the interests GEAA seeks to protect are germane to its purpose; neither the claim asserted nor the relief requested requires the participation of individual GEAA members; and GEAA's hearing request identifies, by name and address, a member who would otherwise have standing to request a hearing in his own right. The hearing request names Charles Pfluger as the group member and explains that Mr. Pfluger lives on the property adjacent to the proposed facility and the proposed discharge route runs through a pond located on his property. The ED's map and Applicant's landowner's map confirm that Mr. Pfluger's property is adjacent to the proposed facility and the proposed discharge route runs through his property. Mr. Pfluger is concerned that the proposed discharge may potentially impact Mesquite Creek and the pond on his property that are the primary sources of water for his cattle that he raises on his property for ranching operations.

¹ The hearing requests dated March 17, 2022, and June 3, 2022 were submitted by Annalisa Peace, the GEAA Executive Director. On September 16, 2022, attorney, Bill Bunch submitted a combined hearing request for GEAA and Texas Rivers Protection Association.

He is also concerned about nuisance algae, odors, and potential impact on the recreational uses of the pond. These concerns are interests that are protected by the law under which this application is considered, and a reasonable relationship exists between those interests and regulation of the facility. Finally, the proximity of his property to the proposed facility and the discharge route increases the likelihood of impacts to his health, safety, and use of property. Based on Mr. Pfluger's interests and his proximity to the facility and discharge route, Mr. Pfluger has a personal justiciable interest in this matter which is not common to the members of the general public. Because GEAA member Mr. Pfluger would qualify as an affected person, OPIC finds that GEAA meets the requirements for group standing and qualifies as an affected person.

Texas Rivers Protection Association

Texas Rivers Protection Association (TRPA) timely submitted comments and hearing requests.² TRPA is a non-profit organization whose mission is to protect public access and preserve the water quality and natural beauty of the rivers of Texas, including the San Marcos and Guadalupe Rivers. TRPA sponsors river clean-ups and educates the public concerning preservation of water quality of Texas rivers and streams, and participates in wastewater permitting cases.

As required for group standing under 30 TAC § 55.205(b), TRPA timely submitted comments; the interests TRPA seeks to protect are germane to its purpose; neither the claim asserted nor the relief requested requires the participation of individual TRPA members; and TRPA's hearing request identifies, by name and address, a member, Charles Pfluger, who would otherwise have standing to request a hearing in his own right. As discussed above, Mr. Pfluger

² The hearing request dated March 21, 2022 was submitted by attorney Victoria Rose and David Price, the TRPA President. On September 16, 2022, attorney Bill Bunch submitted a combined hearing request for GEAA and TRPA.

would qualify as an affected person. Therefore, OPIC finds that TRPA has satisfied all group standing requirements and qualifies as an affected person.

Byron Evans

Byron Evans timely submitted a hearing request. Mr. Evans raised concerns about potential impact on aquatic and terrestrial wildlife, cattle, crops, grazing animals, and drinking waters for terrestrial wildlife and cattle. He also raised concerns about potential environmental damage and water contamination. These concerns are interests that are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and regulation of the facility. Mr. Evans is not included in the List of Affected Landowners submitted by the Applicant. The ED's map shows that Mr. Evans is within a half mile of the proposed facility. Based on Mr. Evans' environmental and water quality concerns, and his proximity to the proposed facility, OPIC finds that Mr. Evans has a personal justiciable interest in this matter which is not common to the members of the general public. Therefore, OPIC finds that Mr. Evans is an affected person in this matter.

Mary Allen

Mary Allen timely submitted comments and a hearing request. The hearing request raises concerns regarding nuisance odors and the discharge route. Ms. Allen is not included in the List of Affected Landowners submitted by the Applicant. The map prepared by the ED demonstrates that Ms. Allen is located approximately 1.78 miles from the proposed facility and 1.40 miles from proposed outfall. Therefore, based on Ms. Allen's location relative to the proposed facility, OPIC cannot find that Ms. Allen would be adversely affected in a manner not common to members of the general public. Therefore, OPIC cannot find that Ms. Allen qualifies as an affected person.

Patrick Flint

Patrick Flint timely submitted a hearing request stating only that he would like to attend a public hearing for the proposed facility. His hearing request identified no specific interest impacted by the proposed permit, as required by 30 TAC § 55.201(d)(2). Though the ED's map and Applicant's map show Mr. Flint's property adjacent to the proposed facility, Mr. Flint does not raise a personal justiciable interest protected by the law under which the application will be considered. 30 TAC §§ 55.203(a) & (d). Therefore, OPIC cannot find that Mr. Flint qualifies as an affected person.

Michael and Rita Lingsio

Michael and Rita Lingsio timely submitted separate hearing requests stating only that they are requesting a public hearing on this matter. Their hearing requests identified no specific interest impacted by the proposed permit, as required by 30 TAC § 55.201(d)(2). Though the ED's map and Applicant's map show the Lingsios' property adjacent to the proposed facility, the Lingsios do not raise a personal justiciable interest protected by the law under which the application will be considered. 30 TAC §§ 55.203(a) & (d). Therefore, OPIC cannot find that the Lingsios qualify as affected persons.

C. Issues Raised in the Hearing Requests of Affected Persons

The affected persons discussed above raised the following issues.

1. Whether the draft permit is protective of water quality, groundwater, and uses of the receiving waters under the applicable Texas Surface Water Quality Standards (GEAA, TRPA).
2. Whether the draft permit complies with applicable antidegradation requirements (TRPA).

3. Whether the draft permit includes adequate provisions to protect the health and safety of Mr. Pfluger's livestock, and aquatic and terrestrial wildlife in the area (GEAA, TRPA).
4. Whether the draft permit should include more stringent parameters and a total nitrogen limit (TRPA).
5. Whether the draft permit will maintain surface waters in aesthetically attractive condition (TRPA).
6. Whether the draft permit contains provisions sufficient to prevent nuisance odors, protect Mr. Pfluger's use and enjoyment of his property, and protect his recreational use of the receiving waters (TRPA).
7. Whether the Applicant has demonstrated a need for the proposed facility as required by Texas Water Code § 26.0282 (TRPA).
8. Whether the application is complete and accurate (TRPA).
9. Whether the draft permit should include provisions requiring re-use of effluent (GEAA, TRPA).

D. Issues Raised in the Hearing Requests Remain Disputed

There is no agreement between the hearing requesters and the ED on the issues raised in the hearing requests; therefore, they remain disputed.

E. Whether 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). The issues listed above are issues of fact.

F. Issues Raised by the Affected Persons During the Comment Period

All of the issues were raised by the affected persons during the public comment period.

G. The Hearing Requests are Based on Issues Raised in Public Comments Which Have Not Been Withdrawn

The hearing requests are all based on timely comments that have not been withdrawn.

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

The affected persons raise issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A), as well as issues that are not relevant and material. 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. The Commission can only consider issues within its jurisdiction. Therefore, relevant and material issues include those governed by the substantive law of the permit at issue. *Anderson v. Liberty Mutual, Inc.*, 477 U.S. 242, 248-51 (1986).

Water Quality, Antidegradation Review, Health Effects, and Protection of Wildlife

The Commission is responsible for the protection of water quality under Texas Water Code Chapter 26 and 30 TAC Chapters 307 and 309. These responsibilities include ensuring compliance with the Texas Surface Water Quality Standards. The purpose of these standards is to “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. Also, “[a] permit must contain effluent limitations that protect existing uses and preclude degradation of existing water quality.” 30 TAC § 307.2(d)(5)(D). 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). As explained by

the ED's RTC, 30 TAC § 307.5 requires the ED to conduct an antidegradation review of new discharge permit applications. Therefore, Issue Nos. 1, 2, 3, 4, and 5 are relevant and material to the Commission's decision regarding this application and are appropriate for referral to SOAH.

Nuisance Odors and Use and Enjoyment of Property

Nuisance odor is specifically addressed by TCEQ regulations concerning the siting of domestic wastewater plants. 30 TAC § 309.13. The Commission's rules require domestic wastewater treatment facilities to meet buffer zone requirements for the abatement and control of nuisance odors prior to construction. 30 TAC § 309.13(e). Furthermore, the wastewater permit does not allow the permit holder to create or maintain a nuisance that interferes with a landowner's use and enjoyment of their property. Therefore, Issue No. 6 is relevant and material.

Need for the Facility

Under TWC § 26.0282, while considering the issuance, amendment, or renewal of a permit to discharge waste, the commission may deny or alter the terms and conditions of the proposed permit, amendment, or renewal based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order. Therefore, Issue No. 7 is relevant and material to a decision on this application.

Complete and Accurate Application

The affected persons question whether the application contains any inaccuracies and errors. The Commission's Chapter 281 and Chapter 305 rules require applicants for TPDES permits to certify the accuracy of the information provided to TCEQ and to supplement or correct the application if an error is later discovered. Also, representations in the application become permit

conditions. Therefore, Issue No. 8 regarding the accuracy and completeness of the application is relevant and material.

Beneficial Reuse of Effluent

The Commission rules regarding beneficial reuse authorizations are covered under 30 TAC Chapter 210. There is a separate process under those rules, and it is not to be covered under the current application or the proposed draft permit. Therefore, the issue regarding requiring reuse of effluent under the draft permit is not relevant and material.

I. Issues Recommended for Referral

For the reasons stated above, OPIC recommends referral of the following issues.

1. Whether the draft permit is protective of water quality, groundwater, and uses of the receiving waters under the applicable Texas Surface Water Quality Standards.
2. Whether the draft permit complies with applicable antidegradation requirements.
3. Whether the draft permit includes adequate provisions to protect the health of Mr. Pfluger, his livestock, and aquatic and terrestrial wildlife in the area.
4. Whether the draft permit should include more stringent parameters and a total nitrogen limit.
5. Whether the draft permit will maintain surface waters in aesthetically attractive condition.
6. Whether the draft permit contains provisions sufficient to prevent nuisance odors, protect Mr. Pfluger's use and enjoyment of his property, and protect his recreational use of the receiving waters.

7. Whether the Applicant has demonstrated a need for the proposed facility, as required by Texas Water Code § 26.0282.

8. Whether the application is complete and accurate.

J. 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 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 estimates that the maximum expected duration of a hearing on this application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

V. Analysis of Requests for Reconsideration

The Commission received timely-filed requests for reconsideration from Mary Allen, Sylvia and Tris Castaneda Jr., Drew Engleke, Karen Montgomery, Diane Scott, and James Seeger. These requests raise concerns regarding nuisance odors, water quality, health and safety of livestock, environmental impacts, use and enjoyment of property, property values, and flooding. The issues of property value and flooding cannot support a request for reconsideration because the Commission lacks authority to consider these issues in a decision on this application. The request for reconsideration submitted by the Castanedas stated that both Comal and Guadalupe Counties have significant Hispanic populations and local school districts offer bilingual education, however,

Applicant and TCEQ didn't consider this while issuing notice of this application. The Applicant indicated in the application that it is exempt from alternative language notice requirements because there is no bilingual education program required by the Texas Education Code at the elementary or middle school nearest to the proposed facility. *See* 30 TAC § 39.426.

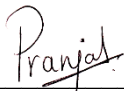
An evidentiary record would be necessary for OPIC to make a recommendation to the Commission on whether the ED's decision should be reconsidered. At this time, OPIC is recommending a hearing, but prior to development of an evidentiary record, OPIC cannot recommend reversal of the ED's decision or remand of the application to the ED. Therefore, OPIC respectfully recommends denial of all pending requests for reconsideration.

VI. CONCLUSION

OPIC recommends the Commission grant the hearing requests of Greater Edwards Aquifer Alliance, Texas Rivers Protection Association, and Byron Evans. OPIC further recommends the Commission refer the issues specified in Section IV.I for a contested case hearing at SOAH with a maximum duration of 180 days. Finally, OPIC recommends the Commission deny all other hearing requests and all pending requests for reconsideration.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By:  _____

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2022, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.



Pranjal M. Mehta

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TCEQ DOCKET NO. 2022-1155-MWD

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