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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 30, 2023

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: **IN THE MATTER OF THE APPLICATION BY SJWTX, INC. AND
MARY JANE CIELENCKI FOR PERMIT NO. WQ0016052001
TCEQ DOCKET NO. 2023-0120-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, appearing to read "Sheldon P. Wayne".

Sheldon P. Wayne, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-0120-MWD

APPLICATION BY	§	BEFORE THE
SJWTX, INC. AND	§	
MARY JANE CIELENCKI	§	TEXAS COMMISSION ON
FOR TPDES PERMIT NO.	§	
WQ0016052001	§	ENVIRONMENTAL QUALITY

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

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (“OPIC”) at the Texas Commission on Environmental Quality (“TCEQ”) files this Response to Requests for Hearing and Requests for Reconsideration in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Preliminarily, OPIC notes that the TCEQ Chief Clerk’s office received timely hearing requests from one group and 35 individual requestors. TCEQ also received three timely requests for reconsideration. As discussed herein, OPIC respectfully recommends granting the hearing requests of Neighbors of Spring Branch (“NSB”), Sid and Becky Atkinson, Robert Butler, Juanita Proffitt, Alejandro Ruiz, Ruth and Tony Taylor, and William and Kristen Wessale, and referring this application for a 180-day hearing at the State Office of Administrative Hearings (“SOAH”) on Issue nos. 1–4 contained in §III.C. OPIC further recommends the Commission deny all remaining hearing requests and all pending requests for reconsideration.

B. Background of Facility

SJWTX, Inc. and Mary Jane Cielencki (“Applicant” or “SJWTX”) applied to TCEQ for a new Texas Pollutant Discharge Elimination System (“TPDES”) Permit No. WQ0016052001 (the “proposed Permit”) to authorize the discharge of treated domestic effluent, otherwise known as

wastewater, at a daily average flow of 60,000 gallons per day in the Interim Phase I, at a daily average flow of 150,000 gallons per day in the Interim Phase II, and a Final Phase flow limit of 260,000 gallons per day. The proposed Permit authorizes sludge generated at the proposed Facility to be disposed of at any TCEQ-authorized land application site, co-disposal landfill, wastewater treatment facility, or facility that further processes sludge.

The Simmons Valley Wastewater Treatment Facility (the “proposed Facility”) would be located 0.25 miles northwest of the intersection of Rebecca Clark Road and U.S. Highway 281 North, in Comal County. If the draft permit is issued, the treated effluent would be discharged via pipe to Cypress Creek, then to the Guadalupe River Above Canyon Lake in Segment No. 1806 of the Guadalupe River Basin. The unclassified receiving water’s designated use is limited aquatic life use for Cypress Creek. The designated uses for Segment No. 1806 are primary contact recreation, public water supply, aquifer protection, and exceptional aquatic life use. The segment is currently listed on the State’s inventory of impaired and threatened waters as impaired for bacteria.

The proposed Facility will be a Membrane Bioreactor (“MBR”) facility. Treatment units throughout the three phases of the proposed permit include an ultra-violet disinfection chamber, a sludge press, multiple equalization and sludge holding tanks, and multiple MBR and Pre-Aeration skids. The effluent limitations in all phases of the proposed Permit are 5 milligrams per liter (“mg/L”) five-day carbonaceous biochemical oxygen demand, 2 mg/L ammonia nitrogen, and 4 mg/L dissolved oxygen, based on a 30-day average.

C. Procedural Background

TCEQ received the application on October 7, 2021. On December 14, 2021, the Executive Director (“ED”) declared the application administratively complete. The Notice of Receipt and

Intent to Obtain a Water Quality Permit (“NORI”) was published on January 9, 2022 in the *Herald Zeitung*. The ED completed the technical review of the application on April 13, 2022 and prepared the proposed Permit, which if approved, would establish the conditions under which the proposed Facility must operate. The Notice of Application and Preliminary Decision was published on May 31, 2022 in the *Herald Zeitung*. A public meeting was held on August 11, 2022, with the Notice of Public Meeting published July 6, 2022 in the *Herald Zeitung*. The public comment period ended on August 11, 2022 at the close of the public meeting. The Chief Clerk mailed the ED’s Decision and Response to Comments (“RTC”) on November 11, 2022. The deadline for filing requests for a contested case hearing and requests for reconsideration of the Executive Director’s decision was December 9, 2022.

The Commission received requests for a contested case hearing from The Neighbors of Spring Branch (“NSB”), Sid and Becky Atkinson, Jessica Bailey, “J.B.”, Marlin Brown, Robert Butler, Eric Cardenas, Linda and Mike Clark, Chris and Michelle Phelps, Juli Coen, Dirk Davidek, Robert Evans, Kasi Finley, Annette Gass, Ingrid Giral-Caanan, Ben Hudson, Colette Laine, Edward Lette, Susan Marder, Catherine Martin, Star McDonald, Linda Mohr, Lisa O’Sullivan, Owen Powell, Juanita Proffitt, Josephine Rosales, Alejandro Ruiz, Amanda Saunders, Nathan Segovia, Eva Silverfine, Tony and Ruth Taylor, and William and Kristen Wessale. The Commission also received requests for reconsideration of the ED’s decision by Ingrid Giral-Caanan, Marian Henderson, Michael and Marilyn Myers, and Owen Powell.

II. APPLICABLE LAW

A. Requests for Reconsideration

Any person may file a request for reconsideration of the ED’s decision under Title 30, Texas Administrative Code (“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. Requests for Hearing

This application was filed on or 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).

As provided by 30 TAC § 55.205(a), 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.

For applications filed on or after September 1, 2015, § 55.205(b) states that 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.

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. Requests for Reconsideration

The Commission received three timely requests for reconsideration by Marian Henderson, Michael and Marylin Myers, and Owen Powell.¹ These requests ask the ED to reconsider his decision that the permit application meets the requirements of applicable law on the basis that the permit is not adequately protective of water quality, human health, and animal life.

These issues are relevant and material to the Commission’s decision on this application. However, an evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the ED’s decision should be reconsidered. At this time, an evidentiary record does not exist, and therefore, OPIC cannot recommend that the requests for reconsideration be granted on these bases. As discussed below, OPIC is recommending a contested case hearing in this matter, and as discussed in Sections III.C and III.H, is recommending that issues which encompass these concerns be referred for hearing.

Reconsideration is also requested on the basis that the area has been in a drought and cannot support water usage associated with homes the developer plans to build. Projected water usage by a future development associated with a wastewater treatment plant is not relevant and material to the Commission’s decision on this proposed Facility. Therefore, OPIC cannot recommend that any

¹ OPIC notes that Ingrid Giral-Caanan also submitted a Request for Reconsideration. However, her request was untimely. It was filed December 10, 2022 and the Request for Reconsideration period ended December 9, 2022. Because the request is untimely, OPIC has not included its analysis in this brief.

of the requests for reconsideration be granted on this basis. Thus, OPIC respectfully recommends that the Commission deny the pending requests for reconsideration filed in this matter.

B. Determination of Affected Person Status

Group/Associational Requests

Neighbors of Spring Branch

Neighbors of Spring Branch (“NSB”) submitted a timely hearing request on December 8, 2022.² Additionally, through its identified members, NSB timely commented on the application as required by 30 TAC § 55.205(b)(1). At the public meeting both Robert Butler and the Atkinsons provided comments and notated on their registration forms that they were representing NSB. The Atkinsons questioned the structure and frequency of testing and commented on the danger of the discharge to human health, animal life, and the environment. Mr. Butler’s comments focused on TCEQ’s mission statement, area drought, the discharge route, and his open records request.

NSB’s hearing request raises issues about the effects of the discharge on human and animal life that were previously raised in comments.³ The request also states that NSB is concerned with odors and that the proposed Facility is prohibited by County Commissioners Court order, however those issues were not raised in comments. Issues raised in a group’s hearing request must also have been raised by that group in timely comment. 30 TAC § 55.205(b)(1). Therefore, OPIC finds that the issues regarding human and animal life are proper for referral to SOAH, however because the other issues were not raised in timely comment, they are not proper for referral.

² OPIC notes that multiple identical requests for a contested case hearing were submitted on behalf of NSB by various individuals (ex. Rita Acker, Robert Butler, Annette Gass). All were received after the close of the public comment period. Additionally, OPIC notes that should the Commission find NSB to be affected and refer the matter to SOAH for a hearing, the group requests that all communications to the group be directed to Robert Butler. Mr. Butler has provided the address of 381 Bent Oak Drive, Spring Branch, Texas, 78070.

³ OPIC recognizes that NSB’s request frames these concerns as personal to Annette Gass, however, a reasonable inference is that the group and its members also share these concerns, and that concerns voiced by the members in comment are intertwined with concerns that directly relate to Ms. Gass.

NSB states that it is a community-oriented organization dedicated to preserving the environmental quality of the Spring Branch area. As such, the interests the group or association seeks to protect are germane to the organization's purpose as required by 30 TAC § 55.205(b)(3). It identifies the following persons as group members who would otherwise have standing to request a hearing in their own right: Annette Gass, William and Kristen Wessale, Sid and Becky Atkinson, and Tony and Ruth Taylor. According to the map created by ED staff, all of these individuals own property within approximately one mile of the proposed Facility and the proposed outfall. Therefore, they have standing to request a hearing in their own right as required by 30 TAC § 55.205(b)(2). Further, neither the claim asserted nor the relief requested requires the participation of the individual members in the case in compliance with 30 TAC § 55.205(b)(4).

Therefore, because OPIC concludes that NSB has met all requirements for group standing, OPIC finds that it qualifies as an affected person and respectfully recommends that the Commission grant NSB's hearing request.

Individual Requests

Requestors Located Within One and a Half Miles of the Proposed Facility

Sid and Becky Atkinson

In addition to requesting a hearing on a group or associational basis, the NSB request also requested a hearing on behalf of Sid and Becky Atkinson as individuals. Sid and Becky Atkinson also submitted a timely individual hearing request on December 8, 2022 and formal written comments at the public meeting. In both timely comment and timely request, the Atkinsons stated concerns regarding the discharge's impact on human health and animal life. According to the map provided by the ED's staff, the Atkinsons' are located less than one mile from the proposed Facility.

To be granted a contested case hearing, the Atkinsons must show that they are “affected persons” who have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application, and they must distinguish that interest from an interest common to the general public. *See* 30 TAC § 55.203(a). Further, a reasonable relationship must exist between the interest claimed and the activity regulated. 30 TAC § 55.203(c)(3). Their interests in human health and animal life are protected by the law under which this application will be considered. 30 TAC § 55.203(c)(1). Also, as their property is near the proposed Facility, a reasonable relationship exists between their claimed interests and the proposed Facility’s regulated activity. 30 TAC § 55.203(c)(3). Moreover, their location increases any likelihood that the proposed Facility’s operations will impact their own health and use of property. 30 TAC § 55.203(c)(4). Finally, given their stated concerns and location relative to the proposed Facility, OPIC is able to conclude that they possess a personal justiciable interest in this matter that is not common to the general public. 30 TAC § 55.203(a). Therefore, OPIC finds that Sid and Becky Atkinson have successfully demonstrated that they qualify as affected persons and respectfully recommends granting their hearing request.

Robert Butler

In addition to his role with NSB, on June 2, 2022, Robert Butler also timely requested a hearing in his individual capacity. The request, which was submitted during the public comment period, expresses concerns regarding the proposed discharge’s effects on humans, animals, and the environment. According to the ED’s map, the address provided by Mr. Butler is less than one mile from the proposed Facility. Given that Mr. Butler’s interests about adverse effects to human health, animals, and the environment are protected by the law under which this application will be considered, and that his residence is near the regulated activity, OPIC concludes that he is likely

to be affected in a way not common to members of the general public. Further, a reasonable relationship exists between his concerns and the regulated activity. Therefore, OPIC finds that Robert Butler has shown he qualifies as an affected person and respectfully recommends granting his hearing request.

Juanita Proffitt

Juanita Proffitt submitted a timely hearing request during the public comment period. In her request, she states that the proposed Facility will affect the aquifer, her well, and her health. These interests are protected by the law under which this application will be considered. According to the ED's map, Ms. Proffitt's property is located less than one mile from the proposed Facility. Her residence's proximity to the regulated activity, combined with her stated interests, demonstrates that she is likely to be affected in a way not common to members of the general public, and thus possesses a personal justiciable interest in this matter. Consequently, OPIC finds that Juanita Proffitt qualifies as an affected person and respectfully recommends granting her hearing request.

Alejandro Ruiz

Alejandro Ruiz submitted a timely hearing request during the public comment period. In his request he recounts his previous experience living near a wastewater treatment facility and the health risks that it created. He also states his concern about the proposed discharge affecting wildlife and questions whether it will cut off the animals' access to his property. According to the ED's map, Mr. Ruiz's property is approximately one mile away from the proposed Facility.

OPIC finds that Mr. Ruiz's concerns about human health risks, while framed as his previous experience, may reasonably be read such that they also relate to the proposed Facility. Concerns about risk to human health and wildlife are protected by the law under which this

application will be considered. These concerns, taken in combination with his proximity to the proposed Facility, demonstrate that he is likely to be affected in a way not common to members of the general public, and therefore, possesses a personal justiciable interest in this matter. As a result, OPIC finds that Alejandro Ruiz qualifies as an affected person and respectfully recommends granting his hearing request.

Ruth and Tony Taylor

In addition to requesting a hearing on a group or associational basis, the NSB request submitted December 8, 2022, also requested a hearing on behalf of Ruth and Tony Taylor as individuals. The Taylors submitted timely public comments and additionally provided formal written comments at the public meeting. In both timely comment and timely request, the Taylors stated concerns regarding the discharge's impacts on water quality, human health, and animal life. According to the map provided by the ED's staff, the Taylors' are located less than one mile from the proposed Facility. Their concerns, taken in combination with their proximity to the proposed Facility, demonstrate that they are likely to be affected in a way not common to members of the general public, and therefore, possess a personal justiciable interest in this matter. Consequently, OPIC finds that Ruth and Tony Taylor qualify as affected persons and respectfully recommends granting their hearing request.

William and Kristen Wessale

In addition to requesting a hearing on a group or associational basis, the NSB request submitted December 8, 2022, requested a hearing on behalf of William and Kristen Wessale as individuals. The Wessales also submitted multiple comments, including formal written comments at the public meeting. According to the map provided by the ED's staff, the Wessales are located less than one mile from the proposed Facility. Their hearing request stated multiple concerns,

including those regarding odors and the discharge's impacts on human health and animal life, however of those concerns, only the odor issue was raised in a timely comment. The concern about odor is protected by the law under which this application will be considered. This concern, combined with their property's proximity to the proposed Facility increases any likelihood that they will be affected in a manner that differs from the general public. Therefore, OPIC finds that the Wessales has demonstrated that they possess a personal justiciable interest in this matter and qualifies as affected persons. Consequently, OPIC respectfully recommends granting the hearing request of William Wessale and Kristen Wessale.

Requestors Located Beyond One and a Half Miles From the Proposed Facility

The Commission received timely hearing requests from the following persons who have not shown they are close to the proposed Facility or the proposed outfall: Marlin Brown, Eric Cardenas, Linda and Mike Clark, Chris and Michelle Phelps, Dirk Davidek, Kasi Finley, Susan Marder, Catherine Martin, Star McDonald, Linda Mohr, Owen Powell, Josephine Rosales, and Eva Silverfine.

The map and appendix prepared by the ED's staff appears to locate these requestors at distances significantly greater than one and a half miles from the proposed Facility and proposed outfall. OPIC notes that there are no specific distance limitations applicable to who may be considered an affected person for purposes of this application; however, given the nature and volume of the proposed discharge to be permitted and considering these requestors' distances from the proposed Facility and proposed outfall, OPIC cannot find that these requestors are affected persons and respectfully recommends denial of their hearing requests.

Requestors with No Timely Filed Comments

Annette Gass

In addition to requesting a hearing on a group or associational basis, the timely NSB request also requested a hearing on behalf of Annette Gass as an individual. The request states that Mrs. Gass owns 215 acres of land used for hay production and cattle grazing, with Cypress Creek running through her property. Among other things, it voices concern about effects of the discharge on human health and her cattle. Mrs. Gass' property is within half a mile of the proposed Facility according to the ED's map. OPIC recognizes that Mrs. Gass' property is near the proposed Facility and her request has raised issues that are protected by the law under which this application will be considered. However, the NSB request was submitted on December 8, 2022, after the comment period closed in this matter, and Mrs. Gass did not file or otherwise provide formal oral comments on an individual basis during the public comment period. To be considered an affected person, a hearing requestor must have timely submitted comments on the application, and the request must be based only on that affected person's timely comments. TWC § 5.115(a)(a-1)(2)(B); 30 TAC § 55.201(c). Therefore, OPIC must respectfully recommend denial of Annette Gass' hearing request.

Requests that Contain Procedural Flaws or Failed to Raise Substantive Issues

The following requestors submitted timely hearing requests that contained only a request for a contested case hearing and did not discuss any substantive issues regarding the proposed Facility: Jessica Bailey, Ingrid Giral-Caanan,⁴ "J.B.", Robert Evans, Ben Hudson, Colette Laine, Edward Lette, Lisa O'Sullivan, and Amanda Saunders.

⁴ OPIC notes that Ingrid Giral-Caanan's hearing request was also untimely. It was submitted on December 10, 2022, after the hearing request period closed on December 9, 2022.

For example, the entirety of J.B.’s request is as follows: “request a public hearing on this proposed development.” Among other things, a hearing request must explain how and why a requestor believes that they will be adversely affected by a proposed facility in a manner not common to members of the general public. 30 TAC § 55.201(d)(2). These requests fail to do this, and because of the absence of this information, OPIC is unable to conclude that these requestors qualify as affected persons. Therefore, OPIC must respectfully recommend denial of their hearing requests.

Juli Coen

On August 11, 2022, Juli Coen submitted a timely hearing request at the public meeting which simply states, “requesting a contested case hearing.” As discussed above, a hearing request must contain an explanation by a requestor about how they believe they will be affected by the proposed Facility. However, submitted concurrently with her request is a document labeled “Formal Comment” and containing substantive discussion of several issues, including the need for an environmental impact statement and current availability of water resources. Because they were submitted with the hearing request, OPIC believes that these comments may reasonably be viewed as a part of the request itself, and thus fulfill the requirement contained in 30 TAC § 55.201(c) that a hearing request be based only on an affected person’s timely comments. Despite this, a greater barrier lies in the way of granting Ms. Coen’s request—she provided only a PO Box address—not the property address required by 30 TAC § 55.201(d)(1). The lack of a property address prevents the Commission from being able to assess the likelihood that she will be affected by the proposed Facility in a way that differs from the general public. Due to this deficiency, OPIC must respectfully recommend denial of Juli Coen’s hearing request.

Nathan Segovia

Nathan Segovia submitted a timely hearing request during the public comment period. Mr. Segovia states that the discharge will destroy life and that he is concerned about public health and safety. Mr. Segovia submitted his request by email and did not provide a property address. As discussed above, by TCEQ rule, a requestor must supply a property address to allow the Commission to assess whether they qualify as an affected person. Because Mr. Segovia did not provide a property address, OPIC must respectfully recommend denial of his hearing request.

C. Issues Raised in the Hearing Requests of Affected Persons

The affected persons discussed above raised the following issues in both comment and request:

1. Whether the proposed Facility and draft permit are adequately protective of human health and animal life? (Raised by: NSB, Sid and Becky Atkinson, Robert Butler, Juanita Proffitt, Alejandro Ruiz, and Ruth and Tony Taylor)
2. Whether the proposed Facility and draft permit are adequately protective of the environment? (Raised by: Robert Butler)
3. Whether the proposed Facility and draft permit are adequately protective of water quality, including groundwater quality? (Raised by: Juanita Proffitt and Ruth and Tony Taylor)
4. Whether the draft permit contains sufficient provisions to prevent the creation of nuisance odor conditions? (Raised by: William Wessale)
5. Whether the discharge from the proposed Facility will create a barrier for wildlife attempting to access requestor's property? (Raised by: Alejandro Ruiz)

D. Issues Raised in the Hearing Requests Remain Disputed

There is no agreement between the hearing requestors and the ED on the issues raised in the hearing requests; thus, 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 Were Raised by the Requestors During the Comment Period

Issue nos. 1–5 in Section III.C 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, Human Health, Animal Life, and the Environment

Requestors are concerned about adverse effects to water quality, human health, animal life, and the environment. 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 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. According to § 307.6(b)(4) of the Standards, “[w]ater in the state must be maintained to preclude adverse toxic effects on aquatic life, terrestrial life, livestock, or domestic animals, resulting from contact, consumption of aquatic organisms, consumption of water, or any combination of the three.” Additionally, “[s]urface waters must not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life.” 30 TAC § 307.4(d). As Chapter 307 and these Standards designate criteria for the protection of terrestrial life, including both humans and animal life, Issue nos. 1, 2, and 3 are relevant and material to the Commission’s decision regarding this application and are appropriate for referral to SOAH. The concern about the environment contained within Issue no. 1 is related to surface water quality and is therefore also relevant and material to the Commission’s decision on the application.

Additionally, Section 309.10(b) states, in part, that, “[t]he purpose of this chapter is to condition issuance of a permit and/or approval of construction plans and specifications for new domestic wastewater treatment facilities...on selection of a site that minimizes possible contamination of ground and surface waters...” *See also* 30 TAC § 309.12. Therefore, the concern about groundwater contamination contained in Issue no. 3 is relevant and material to the Commission’s decision regarding this application.

Nuisance Odor

Requestors are concerned that the proposed Facility will cause nuisance odor conditions. Odor is specifically addressed by 30 TAC § 309.13(e), which requires that nuisance odor be abated and controlled. Further, § 307.4 delineates general criteria that surface waters must meet, including aesthetic parameters which work, in part, to prevent nuisance conditions attributable to the

proposed Facility. Finally, one of Chapter 309's purposes is, "to minimize the possibility of exposing the public to nuisance conditions." 30 TAC § 309.10. Therefore, Issue no. 4 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Access to Property

Finally, one requestor has stated his concern that the proposed discharge will increase the flow of the watercourse that borders his property, creating a barrier which will prevent wildlife from accessing it. This concern may be viewed as a flooding concern, which is not within TCEQ's jurisdiction as it relates to the permitting process, unless there is a potential impact to water quality. *See* 30 TAC § 309.13(a) and TWC § 26.082(a). Further, this concern seems to be based on the requestor's assumption that the discharge route should be dry or contain such low flow that it can be crossed by wildlife at all times. However, OPIC cannot find that this is a concern that could be addressed under Chapter 309. Therefore, OPIC finds this issue is not relevant and material to the Commission's decision.

I. Issues Recommended for Referral

For the reasons discussed above, OPIC recommends referring Issue nos. 1–4 in Section III.C to SOAH for a contested case hearing.

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.

IV. CONCLUSION

OPIC recommends the Commission grant the hearing requests of Neighbors of Spring Branch (“NSB”), Sid and Becky Atkinson, Robert Butler, Juanita Proffitt, Alejandro Ruiz, Ruth and Tony Taylor, and William and Kristen Wessale. OPIC recommends denying the remaining hearing requests. OPIC further recommends that the Commission refer Issue nos. 1–4 specified in Section III.C for a contested case hearing at SOAH with a maximum duration of 180 days. Finally, OPIC recommends the Commission deny the pending requests for reconsideration.

Respectfully submitted,

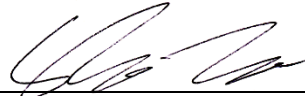
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CERTIFICATE OF SERVICE

I hereby certify that January 30, 2023, the original of the Office of Public Interest Counsel's Response to Requests for Hearing and Requests for Reconsideration was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via electronic mail, and/or by deposit in the U.S. Mail.



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