

DOCKET NO. 2023-0163-MWD

**APPLICATION OF UNDINE
TEXAS ENVIRONMENTAL, LLC
FOR NEW TPDES PERMIT NO.
WQ0016046001**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL
QUALITY**

APPLICANT’S RESPONSE TO HEARING REQUEST

Undine Texas Environmental, LLC (the “Applicant”) files this Response to Hearing Request pursuant to 30 Tex. Admin. Code § 55.209 on the application by Undine Texas Environmental, LLC for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016046001 (the “Application”). As discussed below, the Applicant asserts that the hearing requests and requests for rehearing should be denied.

I. Review Standard

For the Commission to grant a contested case hearing, the Commission must determine that a requestor is an affected person. An affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. 30 TAC § 55.203(a). An interest common to members of the general public does not qualify as a personal justiciable interest. *Id.*

In determining whether a person is an affected person, the Commission is to consider all factors, including, but not limited to, the following:

- whether the interest claimed is one protected by the law under which the application will be considered;
- distance restrictions or other limitations imposed by law on the affected interest;
- whether a reasonable relationship exists between the interest claimed and the activity regulated;
- likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- likely impact of the regulated activity on use of the impacted natural resource by the person; and
- whether the requester timely submitted comments on the application which were not withdrawn.

30 TAC § 55.203(c).

Further, a request for a contested case hearing by an affected person must be in writing and filed with the chief clerk within the time provided. 30 Tex. Admin. Code 55.201(d). The request must also substantially comply with the following:

- give the name, address, daytime telephone number, and where possible, fax number of the person who files the request;
- identify the person's 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 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 facility or activity in a manner not common to members of the general public;
- request a contested case hearing; and
- 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.

II. Evaluation of Hearing Requests

The Commission received one hundred hearing requests. With two exceptions, Brazos County and the City of Richwood, all of those hearing requests are from individual property owners. None of those individual property owners is an affected person. The attached **Exhibit A** identifies the location of the individual property owner protestants.¹ As indicated in Exhibit A, none of property of those property owners that owns property along the discharge route is located within three miles downstream of the discharge point. The vast majority of the property owner protestants are located substantially more than three miles downstream of the discharge point. Further, none of the property owners owns property in the immediate vicinity of the wastewater treatment plant such that those protestants could be impacted by the operation of the plant. Similarly, the City of Richwood city limits are located several miles from the facility (and not on the discharge route), and therefore they are not properly an affected person.

Regarding the Brazos County request, the County submitted a resolution requesting a public

¹ The map does not identify the location of James Pfeffer or James Wiegel, because their hearing requests were submitted after Commission Staff's issuance of the response to comments with neither individual having previously submitted timely comments. Accordingly, those individuals did not submit timely hearing requests as required under the TCEQ rules.

meeting on the application. Other than the public meeting request, the County did not submit comments or request a contested case hearing until December 16, 2022. That contested case hearing is not valid or timely. Pursuant to 30 Tex. Admin. Code § 55.201(d) any hearing request must be based on the requester's timely comments and must “list all relevant and material disputed issues of fact that were raised by the requestor during the comment period and that are the basis of the hearing request.” 30 Tex. Admin. Code § 55.201(d)(4)(B). The County did not submit timely comments, and it did not base its December 16, 2022 hearing request on timely comments or list in its request all relevant and material issues of fact supporting the hearing request. As such, the County’s hearing request was not timely submitted and is not valid and should be rejected by the Commission.

The Applicant separately asserts that the County’s request for hearing should be denied because the County’s basis for the request is an interest common to the general public and not a personal justiciable interest. A personal justiciable interest is necessary to confer standing pursuant to 30 TAC § 55.203(a). In the absence of a personal justiciable interest, which the County has not established, the County is not an affected person.

Finally, there was a request submitted online by Ronnie Gene Augry. The Applicant did not identify a property owner by that name. The Applicant did identify a Mr. Aubry, located at 6138 County Road 288. The Chief Clerk identified the “Augry” request as a hearing request. However, that request simply stated the potential for a future hearing request: “We and our numerous neighbors need more information and the possibility for a meeting/hearing to protest this business.” (emphasis added). The identification of the possibility of requesting a hearing at some point in the future is not a valid hearing request as required under the rules. Accordingly, because the request improperly identified the individual making the request and did not request a contested case hearing, the Commission should not consider that request to be a valid hearing request on behalf of the person located at the address at 6138 County Road 288.

III. Evaluation of Request for Rehearing

On December 15 and 16, 2022, the Commission received requests for rehearing from Michael and Karen Durham, Michael Wayne Durham, David Lee Durham, Rodrigo Escalante, Ernestina Mook, Lawana J. Reynolds, Bill Joseph Russo, Jimmie Silvers, and Bruce Vincent.

Each of the concerns identified by the requesters were raised in comments on the application and were properly evaluated by the Commission as set forth and discussed in the Commission's Response to Comments to the extent those concerns are subject to the jurisdiction of the TCEQ. The identified requests for rehearing did not identify any new issues that would support reconsideration of the recommendation. Accordingly, the applicant asserts those requests for rehearing should be denied.

IV. Other Considerations

The Applicant asserts this matter should not be referred to SOAH for hearing because there is no hearing requestor that is an affected person. The Applicant provides the following responses addressing 30 Tex. Admin. Code § 55.209 to the extent the Commission decides to refer this case to SOAH.

- *which issues raised in the hearing request are disputed;*

The Applicant disputes all issues raised in the hearing requests, none of which the Applicant asserts supports referral to SOAH for a contested case hearing. To the extent the Commission determines there are one or more valid hearing requests, the Applicant asserts there is a single issue in dispute that should be adjudicated at SOAH: Whether the discharge from the facility will adversely affect the receiving stream.

- *whether the dispute involves questions of fact or of law;*

The Applicant does not believe there are any disputed issues, based on the absence of a valid hearing request.

- *whether the issues were raised during the public comment period;*

The Applicant does not believe there are any disputed issues that were properly raised during the public comment period.

- *whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment;*

The Applicant does not believe there are any disputed issues that were properly raised during the public comment period.

- *whether the issues are relevant and material to the decision on the application; and*

The Applicant does not believe there are any disputed issues that were properly raised during the public comment period.

- *a maximum expected duration for the contested case hearing.*

If the Commission decides to refer this case to SOAH, then the applicant recommends that the maximum duration of the hearing be 150 days.

V. Conclusion

For the reasons set forth above, the Applicant asserts that none of the hearing requests submitted in this docket support a referral for a contested case hearing. The Applicant further asserts that the requests for rehearing have no basis and should be denied. The Applicant therefore requests that the hearing request and the request for rehearing be denied and that a final permit be issued.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature above, I certify that on March 8, 2023 the foregoing document was serviced via first class mail and/or email to the parties of record in the docket.

EXHIBIT A

