

Jon Niermann, *Chairman*
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Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 8, 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: **Undine Texas Environmental, LLC (Applicant)**
TCEQ Docket No. 2023-0163-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 cursive script that reads "Jennifer Jamison".

Jennifer Jamison, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-0163-MWD

APPLICATION BY UNDINE	§	BEFORE THE
TEXAS ENVIRONMENTAL, LLC	§	TEXAS COMMISSION ON
FOR TPDES PERMIT NO.	§	ENVIRONMENTAL
WQ0016046001	§	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 or Commission) 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

Before the Commission is an application by Undine Texas Environmental, LLC (Undine or Applicant) for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016046001. The Commission received timely comments and requests for a contested case hearing from 79 individuals, and from Brazoria County through Assistant District Attorney Mary Shrine. In addition, the Commission received 13 requests for reconsideration of the Executive Director’s (ED) decision under Title 30, Texas Administrative Code (TAC) § 55.201(e). For the reasons stated below, OPIC respectfully recommends the Commission find that the following requestors are affected persons in this matter: Ronnie Gene Augry, Jamie Ballaurd, Kevin Buchanan, Kathy Cagle, Michael W. and Stephanye Durham, and Brazoria County. OPIC respectfully recommends denial of all remaining requests for a contested case hearing. Finally, for the reasons stated below, OPIC recommends denial of all pending requests for reconsideration.

B. Background of Facility

Undine applied to the TCEQ for new TPDES Permit No. WQ0016046001. If issued, this permit would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.250 million gallons per day (MGD). The proposed plant site would be located approximately 2,900 feet southwest of the intersection of County Road 220 and Old Angleton Road, in Brazoria County. The proposed Wastewater Treatment Facility (WWTF) would serve the Reserve in Angleton.

If the permit is issued, the WWTF will be an activated sludge process plant operated in the complete mix mode. Treatment units in Interim I phase would include a bar screen, one aeration basin, one final clarifier, one sludge digester, and one chlorine contact chamber. Treatment units in Interim II phase would include a bar screen, two aeration basins, one final clarifier, two sludge digesters, and one chlorine contact chamber. Treatment units in the Final phase would include a bar screen, four aeration basins, one final clarifier, four sludge digesters and one chlorine contact chamber. The facility has not been constructed.

The draft permit would authorize a discharge of treated domestic wastewater at an Interim I volume not to exceed a daily average flow of 0.0625 MGD, an Interim II volume not to exceed a daily average flow of 0.125 MGD, and a final volume not to exceed a daily average flow of 0.250 MGD. The effluent limitations in all phases of the draft permit, based on a 30-day average, are 10 mg/l (milligrams per liter) five-day Carbonaceous Biochemical Oxygen Demand (CBOD₅), 15 mg/l Total Suspended Solids (TSS), 3 mg/l Ammonia-nitrogen (NH₃-N), 126 colony forming units (CFU) or most probable number (MPN) of E. coli per 100 ml, and 4.0 mg/l minimum Dissolved Oxygen (DO). The effluent shall contain a total chlorine residual of at least 1.0 mg/l and shall not

exceed a Total Chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow.

The draft permit includes a requirement for the permittee to obtain legal restrictions prohibiting residential structures within the part of the buffer zone not owned by the permittee according to 30 Texas Administrative Code (TAC) § 309.13(e)(3).

The treated effluent would be discharged via pipe to Angleton Drainage District Ditch 7, then to Angleton Drainage District Ditch 22, then to Bastrop Bayou Tidal in Segment No. 1105 of the San Jacinto-Brazos Coastal Basin. The unclassified receiving water uses are minimal aquatic life use for Angleton Drainage District Ditch 7 and Angleton Drainage District Ditch 22 (non-tidal) and high aquatic life use for Angleton Drainage District Ditch 22 (tidal). The designated uses for Segment No. 1105 are primary contact recreation and high aquatic life use.

C. Procedural Background

TCEQ received the application for a new permit on September 24, 2021, and declared it administratively complete on January 13, 2022. Undine published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English and Spanish on January 29-30, 2022, in *The Facts*. The application was determined technically complete on February 9, 2022. Undine published the Notice of Application and Preliminary Decision (NAPD) in English on March 24, 2022, in *The Facts*. The Notice of Public Meeting was published in on June 21, 2022 in *The Facts*. A Public Meeting was held in Angleton on July 28, 2022. The comment period for this application closed at the end of the public meeting. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on November 16, 2022. The deadline for filing requests for a contested case hearing was December 16, 2022.

II. APPLICABLE LAW

A. Requests for Hearing

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

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.

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.

B. Requests for Reconsideration

Any person may file a request for reconsideration of the ED's decision under Title 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.

III. ANALYSIS OF HEARING REQUESTS

A. Individual Affected Persons

The Commission received timely comments and hearing requests raising concerns within TCEQ's jurisdiction from the following individuals: Ronnie Gene Augry, Jamie Ballaurd, Kevin Buchanan, Kathy Cagle, and Michael and Stephanye Durham. For the reasons stated below, OPIC recommends the Commission grant the hearing requests of each of the above-mentioned individuals.

Michael and Stephanye Durham

The ED's map shows that Michael and Stephanye Durham's residence is located 2.8 miles from the proposed facility and discharge route. The Durhams raised concerns regarding water quality, human health and safety, and effects on wildlife. Further, the Durhams' hearing request states that 25% of their family's diet is derived from fish caught in the Bastrop Bayou, and that they recreate and work on the relevant waterway. Because the Durhams' request indicates that they live, work, and recreate in the relevant portion of Bastrop Bayou, OPIC finds that they are more likely to be affected in a manner not common to the general public despite the larger intervening distance between their residence and the proposed facility than other named individuals.

Other Individual Requestors within One Mile

Apart from the Durhams, the map prepared by the ED's staff confirms that each of the above-mentioned requestors' listed addresses is within a one-mile radius of the proposed facility. Generally, the each of these individual requestors raise concerns related to water quality, effects on wildlife, effects on human health and safety, effects on recreation and negative impacts on property value. While some of these interests are protected by the law under which this application will be considered, others fall outside the jurisdiction of the TCEQ. Given the individual requestors' close proximity to the proposed facility, and the fact that each of these individual's stated concerns regarding water quality, protection of wildlife, effects on human health, and negative impacts to recreation are protected by law under which this application will be considered, OPIC finds that each of the above-listed persons is more likely to be affected in a manner not common to the general public, and respectfully recommends the Commission grant their pending hearing requests.

B. Brazoria County

Brazoria County filed a timely hearing request on December 16, 2022. Brazoria County also filed timely comments accompanying a Public Meeting request on April 19, 2022 through its representative, Assistant District Attorney (ADA) Andrew Heston. The hearing request sufficiently establishes that Brazoria County has a justiciable interest in this permit, and that the County qualifies as an affected person under 30 TAC § 55.203. Specifically, the request states that Brazoria County is a governmental entity with statutory authority over or interest in the issues relevant to the application, such as operation and control of a boat dock which provides public access to the Bayou and connected water systems. The request represents that the dock and water access are maintained by Brazoria County as a governmental function.

Brazoria County expresses the concern that discharge of wastewater authorized under the draft permit will adversely impact the aquatic life use and the recreational use of Bastrop Bayou. Due to the statutory language of 30 TAC §55.201(d)(4) requiring issues raised in a hearing request to be based upon issues timely raised during the comment period, OPIC can only refer issues raised by Brazoria County that are echoed in the comments accompanying the public meeting request submitted by ADA Andrew Heston. Accordingly, issues pertaining to water quality, recreational interests, and adverse effects on wildlife and the environment are appropriate for referral. Given the contents of the County's request, OPIC finds that the Brazoria County has a unique interest related to a legal right, duty, privilege, power, or economic interest affected by the application that is not common to the general public. As such, OPIC recommends that the Commission find Brazoria County is an affected person in this matter and grant its pending hearing request.

C. Other Requestors within 3 miles of the Proposed Facility

The map prepared by the ED's staff indicates that the following requestors provided addresses that are located greater than one mile from the proposed facility, but less than three miles: John and Dana Sue Fitze, Edwin and Frances Keonitzer, Ernestina Mook, Debra Oliver, James and Shirley Phillips, James Wiegel, and Rodrigo Escalante. OPIC analyzed each of these requests, and ultimately found that they all failed to meet certain pertinent requirements of 30 TAC §55.201(d). For instance, many of these requests simply stated a desire to have a hearing, but failed to articulate any relevant and material issues that were raised by the requestor during the public comment period. Others expressed general concerns about brackish water and effects on the environment, but did not specify a personal justiciable interest that would distinguish the requestor from members of the general public. For these reasons, OPIC respectfully recommends denial of all above-mentioned persons located greater than one mile, but less than three miles from the proposed facility.

D. All Remaining Requestors

OPIC analyzed each of the remaining requests submitted by persons listed on Appendix A, attached hereto. The map prepared by the ED's staff shows that the locations of the addresses provided by these requestors range from 3 miles to 120 miles from the proposed facility. Given the large intervening distance between the property locations and the proposed facility, outfall, and discharge route, OPIC cannot find that these requestors are likely to be affected in a manner that is not common to the general public. Accordingly, OPIC respectfully recommends denial of the hearing requests submitted by persons listed in Appendix A.

E. Issues Raised in the Hearing Requests of Affected Persons

Affected persons raised the following issues:

1. Whether the draft permit is adequately protective of water quality;
2. Whether the proposed wastewater discharge will adversely affect the health and safety of persons on nearby property;
3. Whether the proposed discharge will adversely impact fish, wildlife, and the environment;
4. Whether the proposed discharge will adversely affect recreational activities;
5. Whether the proposed facility will negatively impact property values; and
6. Whether discharge from the proposed facility will increase the likelihood of flooding.

F. Issues Raised in the Hearing Requests Remain Disputed

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

G. 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. All issues raised by the affected persons are issues of fact.

H. Issues Were Raised by the Requestor During the Comment Period

Issues 1-6 in Section III. E. were specifically raised by affected persons during the public comment period.

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

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

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

The hearing requests raise some issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4)(B) and 55.211(c)(2)(A)(ii), and some that are not. To refer an issue to the State Office of Administrative Hearings (SOAH), the

Commission must find that the issue is relevant and material to the Commission's decision to issue or deny the permit. Relevant and material issues are those governed by the substantive law under which the permit is to be issued. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

Water Quality, Human Health and Safety, Animal Life, and Recreational Activities

Requestors raised concerns about adverse effects to water quality and the consequential impacts on human health, terrestrial life, aquatic life, and the environment. The Commission is responsible for the protection of water quality under Texas Water Code 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). Finally, 30 TAC § 307.4(e) requires that nutrients from permitted discharges or other controllable sources shall not cause excessive growth of aquatic vegetation which impairs an existing, designated, presumed, or attainable use. As Chapter 307 designates criteria for the regulation of water quality and the protection of human health and safety and terrestrial life, Issues No. 1-4 are relevant and material to the Commission's decision regarding this application and are appropriate for referral to SOAH.

Property Values and Flooding

Some requestors raised concerns regarding the proposed facility's impact on property values resulting from the facility's presence, as well as concerns about possible flooding due to the increased water volume caused by the proposed discharge. The TCEQ does not have jurisdiction under the Texas Water Code or its regulations to address or consider property values or the marketability of adjacent property in its determination of whether to issue a water quality permit. Likewise, the TCEQ's jurisdiction is established by statute and does not include authority to address flooding, the impact of an increase in water in the receiving waterbody, or dredging in the wastewater permitting process, unless there is an associated water quality concern. Accordingly, Issues No. 5-6 are not relevant and material to the Commission's decision on this application.

K. Issues Recommended for Referral

For the reasons stated above, OPIC recommends referral of the following issues to SOAH:

1. Whether the draft permit is adequately protective of water quality;
2. Whether the proposed wastewater discharge will adversely affect the health and safety of persons on nearby property;
3. Whether the proposed discharge will adversely impact fish, wildlife, and the environment; and
4. Whether the proposed discharge will adversely affect recreational activities;

L. 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

OPIC's Response to Requests for Hearing and Requests for Reconsideration

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. ANALYSIS OF REQUESTS FOR RECONSIDERATION

The Commission received timely submitted requests for reconsideration from several elected officials and concerned citizens. Specifically, requests for reconsideration of the ED's decision on this application were submitted by the following public officials; Mayes Middleton (Texas State Representative House District 23), Cody Thane Vasut (Texas State Representative House District 25), Ed Thompson (Texas State Representative House District 29), Hon. L.M. Matt Sebesta (Brazoria County Judge), Hon. Steven M. Boykin (Mayor, City of Richwood). In addition, the following concerned citizens submitted requests for reconsideration; Esterina Mook, Lawana J. Reynolds, Jimmie Silvers, Bruce Vincent, David Lee Durham, Michael and Karen Durham, Michael Wayne Durham, and Rodrigo Escalante. Generally, these requests express concerns regarding the accuracy and completeness of the application, adverse effects on the health, safety, and welfare of nearby residents, and whether the application is sufficiently protective of water quality and the environment. An evidentiary record on these issues 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 the development of an evidentiary record, OPIC cannot recommend reversal of the ED's decision or remand of the application to the ED.

V. CONCLUSION

Having found that the individuals listed in Section III. A, as well as Brazoria County, qualify as affected persons in this matter, OPIC respectfully recommends the Commission grant their hearing requests and refer Issue Nos. 1-4 specified in Section III. K. for a contested case hearing at SOAH with a maximum duration of 180 days. OPIC recommends denial of all remaining hearing requests. Finally, OPIC further recommends the Commission deny 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 March 8, 2023 the original of the Office of Public Interest Counsel's Response to Hearing Requests was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Jennifer Jamison

APPENDIX A

- **Misty Bays**
- **Lisa Brewer**
- **Deryll Mark Broaddus**
- **Sheryl Broaddus**
- **Brennan Browning**
- **Kristin Bulanek**
- **Evan W. Burris**
- **Jaqueline Dunn Cunningham**
- **Betsy David**
- **Glan David**
- **Ashlyne Davidson**
- **Aubree Davidson**
- **Jimmy Davidson**
- **Jerry Lee Davis, Jr.**
- **Justin Duke**
- **Michael Richard and Karen Durham**
- **Felicia Duval**
- **Sherrie Felder**
- **Sherri Fossati**
- **Garry Gann**
- **Rhonda and Stanley Harley**
- **Gregory Hawkins**
- **Lori and Greg Hawkins**
- **David Wayne and Stephanie Henson**
- **Cuthrell Shane Hicks**
- **Michael Lee Holt**
- **Monica Jones**
- **Richard L. Kerr Jr.**
- **Dr. Barbara Marino**
- **Colton Marino**
- **Paul Marino**
- **James A. Meyer**
- **James Arthur Meyer**
- **Lauren Millorn**
- **Gilner Murrell**
- **James W. and Mattie Moore Perouty**
- **James Pfeffer**
- **Emil E. Prihoda**

- **Melody Purnell**
- **Bob Purnell**
- **Robert Purnell**
- **Kenneth R. Purswell**
- **Barry T. Reynolds**
- **Lawana Reynolds**
- **Bill Joseph Russo**
- **Jennifer Russo**
- **Linda and Timothy Strickland**
- **Jane Tumlinson**
- **Janet Waite**
- **Donna Walker**
- **Carole J. Zieber**
- **Charles Zieber**
- **Chris Zieber**
- **Tammi Zieber**
- **Harper L. Ziebes**

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TCEQ DOCKET NO. 2023-0163-MWD

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FOR ALTERNATIVE DISPUTE
RESOLUTION

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REQUESTER(S):

See attached list.

PUBLIC OFFICIALS - REQUESTER(S)

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Aubree Davidson
1925 Fairway Dr
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Mr Jimmy Davidson
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