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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 3, 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: **SWWC Utilities, Inc. (Applicant)**
TCEQ Docket No. 2023-0370-MWD

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing 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. 2023-0370-MWD

**APPLICATION BY SWWC
UTILITIES, INC. FOR PERMIT
NO. WQ0016022001**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

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

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 the Commission) files this Response to Requests for Hearing in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is an application by SWWC Utilities, Inc., (SWWC or Applicant) for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016022001. The Commission received timely comments and requests for a contested case hearing from Anne Brockenbrough, Marilyn Kelinske, Jon Beall, and the Wilbarger Creek Conservation Alliance (WCCA). For the reasons stated herein, OPIC respectfully recommends the Commission deny all pending hearing requests.

B. Background of Facility

On July 28, 2021, SWWC applied to the TCEQ for new TPDES permit WQ0015264001 to authorize the discharge of treated domestic wastewater. If issued, this permit would authorize discharge at a daily average flow not to exceed 200,000 gallons per day (gpd) in the Interim I phase, 500,000 gpd in the Interim II phase, 800,000 gpd in the Final phase.

The proposed plant site is located approximately 0.42 miles southwest of the intersection of Bella Parkway and Old Texas Highway 20, in Travis County. The treated effluent would be discharged via pipe to Wilbarger Creek, then to the Colorado River above La Grange in Segment No. 1434 of the Colorado River Basin. The unclassified receiving water use is high aquatic life use for Wilbarger Creek. The designated uses for Segment No. 1434 are primary contact recreation, public water supply, and exceptional aquatic life use.

C. Procedural Background

TCEQ received the application for a new permit on July 28, 2021, and declared it administratively complete on November 17, 2021. Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) on December 16, 2021, in the *Austin American Statesman*. Applicant published the Notice of Application and Preliminary Decision (NAPD) on June 30, 2022, in the *Austin American Statesman* newspaper. The comment period for the application closed on August 1, 2022. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on October 26, 2022, and the deadline for filing a request for a contested case hearing was November 28, 2022.

II. APPLICABLE LAW

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

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 § 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.

III. ANALYSIS OF HEARING REQUESTS

A. Determination of Affected Person Status

Anne Brockenbrough

Anne Brockenbrough filed timely comments and a hearing request on June 29, 2022, as well as comments combined with a hearing request in the joint letter submitted on behalf of Wilbarger Creek Conservation Alliance on November 28, 2022. Ms. Brockenbrough's stated interests include concerns about flooding, water quality, and property damage. While issues pertaining to flooding and property damage fall outside of TCEQ's jurisdiction, Ms. Brockenbrough's concerns regarding water quality are protected by the law under which this application will be considered.

Ms. Brockenbrough listed her property's address as 11318 Jones Road, Manor, and according to her comments her property is located on Wilbarger Creek. The map prepared by the ED's staff shows that the property is located 3.21 miles downstream from the outfall. The joint request signed by Ms. Brockenbrough states that even though requestors' properties are located

nearly 5 miles from the proposed Wastewater Treatment Facility (WWTF), the fact that the creek flows at 100% effluent most of the year means their properties will be impacted. Accordingly, Ms. Brockenbrough stated that TCEQ should test the water in Wilbarger Creek downstream from the proposed WWTF before approving the permit. The ED's Response to Comments addressed this concern, stating that TCEQ has water quality information that is collected at an active Surface Water Quality Monitoring (SWQM) Station approximately 2.25 miles downstream of the Majestic Manor WWTF. In addition, there are other active SWQM stations further upstream and downstream on Wilbarger Creek in which current water quality data are being collected.

Given the intervening distance of over three miles between Ms. Brockenbrough's property and the proposed outfall, OPIC finds that she lacks the proximity needed to establish a personal justiciable interest which is distinct from interests common to the general public. Without a personal justiciable interest, a hearing requestor cannot qualify as an affected person. Further, the intervening distance diminishes any likelihood that the regulated activity will impact her health, safety, or use of property. Therefore, OPIC finds that Anne Brockenbrough does not qualify as an affected person.

Marilyn Kelinske

Marilyn Kelinske filed timely combined comments and a hearing request on June 30, 2022, in addition to comments combined with a hearing request in the joint letter submitted on behalf of Wilbarger Creek Conservation Alliance on November 28, 2022. Ms. Kelinske's request expresses concern about flooding, water quality, effects on wildlife, effects on domestic animals, and effects on livestock. Marilyn Kelinske listed her property's address as 6805 Ladera Norte, Austin, which according to the map prepared by the ED's staff, is located 2.89 miles from the outfall.

Given the distance between Ms. Kelenske's property and the proposed outfall, OPIC finds that she lacks the proximity needed to establish a personal justiciable interest which is distinct from interests common to the general public. Without a personal justiciable interest, a hearing requestor cannot qualify as an affected person. Further, the intervening distance diminishes any likelihood that the regulated activity will impact her health, safety, or use of property. Therefore, OPIC finds that Marilyn Kelinske does not qualify as an affected person.

Jon Beall

Jon Beall filed timely comments on July 5, 2022, as well as comments combined with a hearing request in the joint letter submitted on behalf of Wilbarger Creek Conservation Alliance on November 28, 2022. Mr. Beall's stated interests include concerns about flooding, water quality, effects on health and safety, and potential mechanical malfunctions. Concerns about water quality and effects on health and safety are interests protected by the law under which this application will be considered, while the others fall outside the jurisdiction of the TCEQ. Mr. Beall listed his property's address as 2503 Flora Cv., Austin., and the map prepared by the ED's staff shows that the property is located approximately 15.65 miles from the outfall.

Given the distance between Mr. Beall's property and the proposed outfall, OPIC finds that he lacks the proximity needed to establish a personal justiciable interest which is distinct from interests common to the general public. Without a personal justiciable interest, a hearing requestor cannot qualify as an affected person. Further, the intervening distance diminishes any likelihood that the regulated activity will impact his health, safety, or use of property. Therefore, OPIC finds that Jon Beall does not qualify as an affected person.

Wilbarger Creek Conservation Alliance

Jon Beall submitted timely comments on behalf of WCCA, as well as a timely hearing request on November 28, 2022. All prior requestors are also listed on the request letter for WCCA. Pursuant to 30 TAC § 55.205(b)(2), a request by a group or association must identify at least one member that would otherwise have standing to request a hearing in their own right. Given that OPIC has determined that none of the individual members listed on the WCCA request qualify as affected persons, OPIC cannot find that WCCA is an affected association in this matter.

B. Issues Raised

Should the Commission find that any requestors are affected persons, the following issues were raised:

1. Whether the draft permit is adequately protective of human health and safety (*Beal, WCCA*);
2. Whether the draft permit is adequately protective of livestock, wildlife including aquatic life, and the environment (*Kelinske, WCCA*);
3. Whether the draft permit is adequately protective of water quality (*Beal, Kelinske, Brockenbrough, WCCA*); and
4. Whether the draft permit adequately protects against flooding and erosion (*Beal, Kelinske, Brockenbrough, WCCA*).

C. 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.

D. 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). All issues raised by affected persons are issues of fact.

E. Issues Were Raised by the Requestors During the Comment Period

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

F. 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.

G. 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 the Environment

Requestors raised concerns about adverse effects to water quality and the consequential impacts on human health, animal life, including 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). As Chapter 307 designates criteria for the regulation of water quality and the protection of human health and safety and terrestrial life, Issue nos. 1– 3 are relevant and material to the Commission’s decision regarding this application and are appropriate for referral to SOAH.

Flooding and Erosion

Requestors raised concerns regarding an increased risk of flooding and erosion resulting from the proposed discharge. The TCEQ does not have jurisdiction to consider general concerns about flooding, nor does it have jurisdiction to address erosion. With respect to this application, TCEQ has jurisdiction over issues related to water quality under the Commission’s Chapter 307 rules and site suitability under the Commission’s Chapter 309 rules. These rules have not been interpreted to address concerns that a permitted discharge of treated wastewater effluent could cause an increased risk of flooding. In this matter, OPIC cannot find that the stated concerns can be distinguished from general concerns about an increased risk of flooding.

Similarly, with respect to erosion, under 30 TAC § 309.12, “[t]he Commission may not issue a permit for a new facility or for the substantial change of an existing facility unless it finds that the proposed site, when evaluated in light of the proposed design, construction, or operational features, minimizes possible contamination of water in the state.” In making this determination under 30 TAC § 309.12(1), the Commission may consider active geologic processes and their impact on groundwater contamination. According to 30 TAC § 309.11(1), active geologic processes consist of any natural process which alters the surface and/or subsurface of the earth, including, but not limited to, erosion. Although Chapter 309 authorizes consideration of “active geological processes,” OPIC interprets these regulatory provisions as being limited to specific existing conditions associated with a proposed site location, rather than potential erosion.

Therefore, OPIC finds that the issue of potential erosion is not relevant and material to the Commission's decision on this Application. Accordingly, OPIC cannot find that the requestors' concerns pertaining to flooding or erosion are relevant and material to the Commission's decision on this application.

H. Issues Recommended for Referral

Should the Commission find any requestors to be an affected person, OPIC recommends referral of the following issues to SOAH:

1. Whether the draft permit is adequately protective of human health and safety;
2. Whether the draft permit is adequately protective of livestock, wildlife including aquatic life, and the environment; and
3. Whether the draft permit is adequately protective of water quality;

I. 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. CONCLUSION

Having found that no requestors are affected persons in this matter, OPIC respectfully recommends the Commission deny all pending hearing requests. However, should the Commission find that any requestor is an affected person, Issue Nos. 1-3 specified in Section III. H. could be appropriately referred for a contested case hearing at SOAH.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By:  _____

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2023 the Office of Public Interest Counsel's Response to Requests for Hearing and Request for Reconsideration 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

**MAILING LIST
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TCEQ DOCKET NO. 2023-0370-MWD**

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