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Erin E. Chancellor, *Interim Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

## 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: **Aqua Utilities, Inc. (Applicant)**  
**TCEQ Docket No. 2023-0384-IWD**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request 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. 2023-0384-IWD**

<b>APPLICATION BY AQUA UTILITIES INC. FOR NEW TPDES PERMIT NO. WQ0005206000</b>	<b>§ § § §</b>	<b>BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</b>
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**THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE  
TO REQUEST 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 Commission) files this Response to Request 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 Aqua Utilities Inc. for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0005206000. The Commission received timely comments and a request for a contested case hearing from Craig Blanchette, President of Aqua Utilities Inc. (Applicant or Aqua Texas). For the reasons stated herein, OPIC respectfully recommends the Commission find that Aqua Texas is an affected person in this matter and grant its pending hearing request.

**B. Background of Facility**

Aqua Texas, which owns a water treatment plant using reverse osmosis to produce portable water for distribution, has applied to the TCEQ for proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0005206000. If issued, this permit would authorize the existing discharge of treated wastewater at a daily average flow not to exceed 55,000 gallons

per day via Outfall 001. The facility is located on Country Scene Road, approximately two miles north of Park Road 37 and 2.5 miles north of State Highway 16, northeast of the city of Helotes.

The effluent is discharged to an unnamed tributary of San Geronimo Creek, then to San Geronimo Creek, then to Medina River below the Medina Diversion Lake in Segment No. 1903 of the San Antonio River Basin. The unclassified receiving water uses are minimal aquatic life use for the unnamed tributary of Geronimo Creek (upstream of Indian Mound Springs) and limited aquatic life use for the unnamed tributary of Geronimo Creek (downstream of Indian Mound Springs). The designated uses for Segment No. 1903 are primary contact recreation, public water supply, aquifer protection, and high aquatic life use.

### **C. Procedural Background**

The TCEQ received the application on August 3, 2016, and declared it administratively complete on September 26, 2016. The Executive Director (ED) completed the technical review of the application on February 1, 2020, and prepared the proposed permit, which if approved, would establish the conditions under which the facility must operate. The Applicant originally published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English in the *Hondo Anvil Herald* on October 13, 2016, and in Spanish in the *Hondo Anvil Herald* on October 27, 2016.

Applicant later expressed to the ED that the draft permit contained effluent limits that were too stringent and thus unachievable, and requested changes be made to the draft permit. ED staff responded that they were unable to make the changes requested because the proposed daily average and daily maximum effluent limitations for total dissolved solids (TDS) and sulfate are necessary to ensure the discharge is protective of water quality and will not cause a violation of the criteria for Segment No. 1903. This stalemate prevented the movement of the draft permit to public notice.

In June 2021, the ED sent Applicant a letter stating that its objection to the draft permit had been filed with the Chief Clerk's Office. The ED's letter also instructed the Applicant on how it could request a Contested Case Hearing on the ED's decision or file a Motion for Reconsideration. Upon receiving the ED's letter, Applicant published the Notice of Application and Preliminary Decision (NAPD) in English in the *Hondo Anvil Herald* on August 5, 2021. The public comment period for this application closed on September 7, 2021. As required by 30 Texas Administrative Code (TAC) § 39.551(c)(2)(B), the ED then requested an updated mailing list. On October 7, 2022 the Office of Chief Clerk mailed the NAPD to the updated mailing list provided by Aqua Texas and extended the comment period to November 7, 2022. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on December 12, 2022. The deadline for filing a request for a contested case hearing was January 11, 2023.

The Commission received timely comments and a request for a contested case hearing from Craig Blanchette on behalf of Applicant.

## **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 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.

### **III. DISCUSSION**

#### **A. Determination of Affected Person Status**

##### *Aqua Texas*

Applicant timely filed a hearing request on January 11, 2023, and prior public comments on May 12, 2021, and February 11, 2020. Aqua Texas' comments and hearing request state that

the proposed effluent limitations in the draft permit are unachievable, and are lower than the natural groundwater that the company proposes to treat. Specifically, Aqua Texas challenges whether the calculations in the draft permit are complete and accurate with respect to effluent limitations for total dissolved solids (TDS) and sulfate, the presence of perennial pools, and geographic locations of water quality data used in the draft permit. Further, Aqua Texas states that it operates the Country View Estates Potable Water Treatment Plant (WTP) and that it has a justiciable interest because its operations are directly affected by the terms of the proposed permit.

Pursuant to 30 TAC § 55.201(b)(3), an applicant may request a contested case hearing so long as it demonstrates that it has a personal justiciable interest affected by the permit application under 30 TAC § 55.201(d)(2). Given Aqua Texas' demonstrated ownership and operation of the facility, Applicant possesses a unique and personal justiciable interest in this matter and may be affected in a manner not common to members of the general public. For these reasons, OPIC finds that Aqua Texas qualifies as an affected person.

**B. Issues Raised in the Hearing Request of Affected Person**

Aqua Texas raised the following issues:

1. Whether the effluent limitations for TDS and sulfate were properly calculated;
2. Whether the draft permit correctly identifies the of the presence of perennial pools;  
and
3. Whether the geographic locations of water quality data utilized in the permit limits calculations are consistent with applicable TCEQ rules and guidance.

**C. Issues Raised in the Hearing Request Remain Disputed**

There is no agreement between the affected person and the ED on the issues raised in the hearing request. 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. All issues raised by Aqua Texas are issues of fact.

**E. Issues Were Raised by the Requestor During the Comment Period**

Issues 1-3 in Section III. B. were specifically raised by Applicant during the public comment period.

**F. The Hearing Request is Based on Issues Raised in Public Comments Which Have Not Been Withdrawn**

The hearing request is based on timely comments that have not been withdrawn.

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

Aqua Texas' hearing request raises 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). 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*

Aqua Texas raised concerns about whether the effluent limitations in the draft permit were properly calculated, and whether they exceed criteria set forth in the Texas Surface Water Quality Standards. Further, Aqua Texas' concerns regarding the presence of perennial pools and geographic locations of water quality data utilized in the permit are issues pertaining to water quality. 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.” 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, Issues No. 1-3 are relevant and material to the Commission’s decision regarding this application and are appropriate for referral to SOAH.

#### **H. Issues Recommended for Referral**

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

1. Whether the effluent limitations for TDS and sulfate were properly calculated;
2. Whether the draft permit correctly identifies the of the presence of perennial pools; and
3. Whether the geographic locations of water quality data utilized in the permit limits calculations are consistent with applicable TCEQ rules and guidance.

#### **I. 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

Having found that Aqua Texas qualifies as an affected person in this matter, OPIC respectfully recommends the Commission grant its hearing request and refer Issue Nos. 1-3 specified in Section III. H. for a contested case hearing at SOAH with a maximum duration of 180 days.

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 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

**MAILING LIST  
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TCEQ DOCKET NO. 2023-0384-IWD**

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