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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 2, 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: **WALTON TEXAS, LP (APPLICANT)**
TCEQ DOCKET NO. 2023-0564-MWD

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Requests and Request for Reconsideration in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Pranjal".

Pranjal M. Mehta, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-0564-MWD

APPLICATION BY WALTON
TEXAS, LP FOR NEW TPDES
PERMIT NO. WQ0015918001

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

**OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO HEARING REQUESTS AND REQUEST FOR RECONSIDERATION**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this response to hearing requests and request for reconsideration in the above-referenced matter.

I. Introduction

A. Summary of Position

Based on the information submitted in the requests and a review of the information available in the Chief Clerk's file on this application, OPIC recommends the Commission grant the hearing requests of Martindale Water Supply Corporation (MWSC), San Marcos River Foundation (SMRF), and Texas Rivers Protection Association (TRPA). OPIC further recommends the Commission refer the issues specified in Section III.B for a contested case hearing at the State Office of Administrative Hearings (SOAH) with a maximum duration of 180 days. Finally, OPIC recommends the Commission deny hearing requests submitted by Humphrey's Cemetery Association (HCA), Greater Edwards Aquifer Alliance (GEAA), John Jennings, and the request for reconsideration submitted by Robert Deviney.

B. Description of Application and Facility

Walton Texas, LP (Applicant) applied to TCEQ for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015918001 to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.0525 million gallons per day (MGD) in the Interim I phase, a daily average flow not to exceed 0.21 MGD in the Interim II phase, and a daily average flow not to exceed 0.42 MGD in the Final phase. The wastewater treatment facility (the facility) would be located approximately 2,100 feet northeast of the intersection of State Highway 80 and State Highway 142 in Caldwell County. The treated effluent would be discharged to Hemphill Creek, then to Morrison Creek, then to the Lower San Marcos River in Segment No. 1808 of the Guadalupe River Basin.

C. Procedural Background

The TCEQ received the application on September 8, 2020, and declared it administratively complete on December 23, 2020. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in the *Austin American Statesman* on January 11, 2021, and a Spanish language notice was published in *El Mundo Newspaper* on January 14, 2021. The Executive Director (ED) completed the technical review of the application on June 22, 2021. A combined NORI and the Notice of Application and Preliminary Decision (NAPD) was published in the *Austin American Statesmen* on October 4, 2021, and a Spanish language notice was published in *El Mundo Newspaper* on September 30,

2021.¹ A public meeting was held on April 11, 2022, via webcast. The public comment period ended on April 11, 2022. The Chief Clerk mailed the ED's Decision and Response to Comments on March 3, 2023. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was April 3, 2023. The Commission received timely hearing requests from Martindale Water Supply Corporation, San Marcos River Foundation, Texas Rivers Protection Association, Humphrey's Cemetery Association, Greater Edwards Aquifer Alliance, and John Jennings. The Commission also received a timely request for reconsideration from Robert Deviney.

II. Applicable Law

A. Hearing Requests

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 Title 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.

¹ A combined NORI and NAPD was published to reflect changes in contact information.

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).

Under 30 TAC § 55.205(b), 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 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. Request for Reconsideration

Any person may file a request for reconsideration of the ED's decision under 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 decision and give reasons why the decision should be reconsidered.

III. Analysis of Hearing Requests

A. Whether the requestors are affected persons

MWSC

The Commission received a timely hearing request from MWSC during the public comment period. The hearing request states that MWSC holds a Certificate of Convenience and Necessity (CCN) and supplies water within its boundaries, which include the City of Martindale and the surrounding area. The hearing request explains that the source of raw water for MWSC's water purification facility is the recent alluvium, a shallow water-bearing formation. MWSC is concerned about any inadequately treated wastewater being discharged into Hemphill Creek, which would quickly migrate into the alluvium and potentially contaminate MWSC's raw water source. MWSC's concerns regarding groundwater contamination are interests protected by the law under which this application is considered, and a reasonable relationship exists between those interests and regulation of the facility. Given the location of the facility and the proposed discharge into Hemphill Creek, and considering that MWSC is a regional water supplier within its CCN area surrounding the facility and the discharge route, OPIC finds that MWSC has a personal justiciable interest in this matter and qualifies as an affected person under 30 TAC § 55.203(c).

SMRF

The Commission received timely comments and a hearing request on behalf of SMRF.² SMRF indicates that it is a nonprofit organization established to preserve and protect public access to the San Marcos River. To accomplish this mission, SMRF works towards safeguarding the flow of aquifer-fed springs into the San Marcos River, improving the river's water quality, and preserving the natural beauty of the river and the surrounding parks. A significant aspect of SMRF's work involves water quality monitoring and conducting scientific studies aimed at improving the quality of effluent discharged from wastewater facilities. SMRF's hearing request raises concerns regarding water quality, nuisance odors, human health and aquatic health, and regionalization.

As required for group standing under 30 TAC § 55.205(b), SMRF timely submitted comments, the interests SMRF seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires the participation of individual SMRF members. SMRF's hearing request additionally identifies Frank Caldwell, by name and address, as a member who would otherwise have standing to request a hearing in his own right. SMRF's hearing request explains that Mr. Caldwell owns real property adjacent to the facility, and the outfall is located approximately 500 feet away from Mr. Caldwell's property. The ED's map and Applicant's landowners map confirm that Mr. Caldwell's property is adjacent to the facility and in close proximity to the outfall and

² Save Our Springs Alliance submitted a combined hearing request on behalf of SMRF and TRPA.

discharge route. Mr. Caldwell is concerned that the effluent authorized under the draft permit may potentially contaminate a water well on his property. He is further concerned that his economic, property, aesthetic, recreational, and personal health and safety interests would be impacted by operations authorized under the draft permit. These interests are protected by the law under which this application is considered, and a reasonable relationship exists between those interests and regulation of the facility. Finally, the close proximity of his property to the proposed facility and the discharge route increases the likelihood of impacts to his health, safety, and use of property. Based on Mr. Caldwell's interests and his proximity to the facility and discharge route, Mr. Caldwell has a personal justiciable interest in this matter which is not common to members of the general public. Because SMRF member Mr. Caldwell would qualify as an affected person, OPIC finds that SMRF meets the requirements for group standing and qualifies as an affected person.

TRPA

The Commission received timely comments and a hearing request on behalf of TRPA.³ TRPA is a non-profit organization with a mission to protect public access and preserve the flow, water quality, and natural beauty of Texas rivers, including the lower San Marcos River. TRPA sponsors river clean-ups and engages in public outreach and education for its members and the general public,

³ As explained earlier, Save Our Springs Alliance submitted a combined hearing request on behalf of SMRF and TRPA.

emphasizing the importance of preserving water quality in Texas rivers and streams. TRPA's hearing request raises concerns regarding water quality, nuisance odors, human health and aquatic health, and regionalization. As required for group standing under 30 TAC § 55.205(b), TRPA timely submitted comments, the interests TRPA seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires the participation of individual TRPA members. TRPA's hearing request identifies, by name and address, Frank Caldwell as a member who would otherwise have standing to request a hearing in his own right. As discussed above, Mr. Caldwell qualifies as an affected person. Therefore, OPIC finds that TRPA has satisfied all group standing requirements and qualifies as an affected person.

HCA

Robert Deviney, a board president for HCA, submitted a timely hearing request on behalf of HCA. The hearing request raises concerns about the potential for accidents or incidents occurring at the facility, which could have a detrimental impact on Morrison Creek and pose a threat to the preservation of historical gravesites within HCA. In addition, the hearing request highlights an upcoming development concerning the implementation of a collection system linked to the San Marcos regional wastewater treatment facility, which falls within a three-mile radius of the facility. The hearing request states that the Applicant should carefully consider the possibility of utilizing the alternative facility in accordance with the Commission's regionalization policy. Mr. Deviney

submitted timely comments on behalf of the City of Martindale. These comments express that the City of Martindale had not yet received any application for review and requested clarification regarding the discharge limits being sought in the permit.

Under 30 TAC § 55.201(c), a hearing request must be based on the requestor's timely comments. While OPIC recognizes that Mr. Deviney submitted timely comments, it appears that those comments were submitted on behalf of the City of Martindale rather than on behalf of HCA. As no timely comments have been received on behalf of HCA, OPIC cannot find that HCA qualifies as an affected person.⁴

GEAA

GEAA submitted timely comments and a hearing request during the public comment period. GEAA is a 501(c)(3) nonprofit organization that is dedicated to promoting effective and broad-based advocacy for the protection and preservation of the Edwards Aquifer, including its springs, watersheds, and the Texas Hill Country.

As required for group standing under 30 TAC § 55.205(b), GEAA timely submitted comments, and the interests GEAA seeks to protect are germane to its purpose. GEAA's hearing request states that GEAA has numerous members who would be adversely affected by the actions authorized under the draft permit,

⁴ OPIC notes that under 30 TAC § 55.211(e), a person whose hearing request is denied may still seek to be admitted as a party under § 80.109 if any hearing request is granted on an application.

and GEAA's members have serious concerns regarding the potential impact on Hemphill Creek, Morrison Creek and the Lower San Marcos River. However, GEAA's hearing request did not identify a member, by name and physical address, who would otherwise have standing to request a hearing in their own right as required under 30 TAC § 55.205(b)(2). In the absence of the identification of any group member in its hearing request, OPIC cannot find that GEAA's hearing request meets the requirements for group standing. Therefore, OPIC cannot find that GEAA qualifies as an affected person.⁵

John William Jennings

John Jennings timely submitted comments and a hearing request. The hearing request explains that Mr. Jennings resides near Caldwell County Road 103, which crosses Morrison Creek to the east of his home via a shallow bridge. The hearing request further explains the essentiality of crossing Morrison Creek for Mr. Jennings to access the side of his farm that is adjacent to state Highway 80 from his residence. Mr. Jennings also expresses concerns regarding the potential impact of the proposed facility on the use of his property, the risk of water contamination, and possible consequences on a shallow well on his property which he uses as his source of drinking water.

The ED's map shows that Mr. Jennings is located more than 1.5 miles away from the facility and outfall. Based on this distance, Mr. Jennings lacks the

⁵ Under 30 TAC § 55.205(c), OPIC requests that GEAA, if able, provide an explanation of how the group meets the requirements of § 55.205(b).

proximity necessary 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 Mr. Jennings' health, safety, or use of property. Therefore, OPIC finds that Mr. Jennings does not qualify as an affected person.

B. Which issues raised in the hearing requests are disputed

The affected persons discussed above raised the following disputed issues:

1. Whether the draft permit would cause nuisance odor. (SMRF, TRPA)
2. Whether the draft permit is protective of human health and aquatic and terrestrial wildlife. (SMRF, TRPA)
3. Whether the draft permit complies with applicable antidegradation rules and is protective of existing instream uses and aquatic life uses. (SMRF, TRPA)
4. Whether the total phosphorous limit in the draft permit is protective of water quality. (SMRF, TRPA)
5. Whether the draft permit is protective of groundwater. (SMRF, TRPA, MWSC)
6. Whether the draft permit complies with TCEQ's regionalization policy. (SMRF, TRPA)

C. Whether the dispute involves questions of fact or of law

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.

D. Whether the issues were raised during the public comment period

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

E. Whether the hearing request is based on issues raised solely in a withdrawn public comment

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

F. Whether the issues are relevant and material to the decision on the application

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 a permit. The Commission can only consider issues within its jurisdiction. Therefore, relevant and material issues include those governed by the substantive law relating to the permit at issue. *Anderson v. Liberty Mutual, Inc.*, 477 U.S. 242, 248-51 (1986).

Water Quality, Antidegradation Review, Health Effects, and Protection of Wildlife

The Commission is responsible for the protection of water quality under Texas Water Code (TWC) Chapter 26 and 30 TAC Chapters 307 and 309. Texas

Surface Water Quality Standards (TSWQS) 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. TSWQS also require that "[a] permit must contain effluent limitations that protect existing uses and preclude degradation of existing water quality." 30 TAC § 307.2(d)(5)(D). Additionally, surface waters must not be toxic to humans from ingestion, consumption of aquatic organisms, or contact with the skin. 30 TAC § 307(4)(d). Furthermore, 30 TAC § 307.4(1) provides that "[e]xisting, designated, presumed, and attainable uses of aquatic recreation must be maintained, as determined by criteria that indicate the potential presence of pathogens." Finally, 30 TAC § 307.5 requires the ED to conduct an antidegradation review of new discharge permit applications. Therefore, Issue Nos. 2, 3, 4, and 5 are relevant and material to the Commission's decision regarding this application.

Nuisance Odors

Nuisance odor is specifically addressed by TCEQ regulations concerning the siting of domestic wastewater plants. 30 TAC § 309.13. The Commission's rules require domestic wastewater treatment facilities to meet buffer zone requirements for the abatement and control of nuisance odors prior to construction. 30 TAC § 309.13(e). Therefore, Issue No. 1 regarding odor prevention is relevant and material.

Regionalization

It is state policy to encourage regionalization, and TCEQ must consider regionalization when deciding whether to issue a discharge permit. TWC §§ 26.081(a), 26.0282. Therefore, Issue No. 6 regarding regionalization is relevant and material to the Commission's decision on this application.

F. Maximum expected duration for the contested case 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. Request for Reconsideration

The Commission received one timely filed request for reconsideration from Robert Deviney. The request for reconsideration states that there is no need for the facility due to the availability of another regional facility that has ample


capacity and is conveniently accessible. An evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the Application should be denied based on the issue of regionalization. As discussed above in Section III.B, OPIC is recommending a contested case hearing to address issues including regionalization. Therefore, OPIC recommends denial of Mr. Deviney's request for reconsideration.

V. Conclusion

For the reasons discussed above, OPIC recommends the Commission grant the hearing requests of MWSC, SMRF, and TRPA. OPIC further recommends the Commission refer the issues specified in Section III.B for a contested case hearing at SOAH with a maximum duration of 180 days. Finally, OPIC recommends the Commission deny the hearing requests submitted by HCA, GEAA, John Jennings, and the request for reconsideration submitted by Robert Deviney.

Respectfully submitted,

Garrett T. Arthur
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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2023, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Pranjal M. Mehta

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See attached list.

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