TCEQ DOCKET NO. 2023-0955-MWD

APPLICATION BY SOUTH CENTRAL WATER COMPANY FOR TPDES PERMIT NO. WQ0016060001	§ § § § §	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

GREATER EDWARDS AQUIFER ALLIANCE AND BULVERDE NEIGHBORHOOD ALLIANCE'S REPLY TO RESPONSES TO HEARING REQUESTS AND REQUESTS FOR RECONSIDERATION

TO THE HONORABLE COMMISSIONERS:

Greater Edwards Aquifer Alliance ("GEAA") and Bulverde Neighborhood Alliance ("BNA") (collectively, the "Associations") hereby submit this Reply to the Responses to Hearing Requests and Requests for Reconsideration by South Central Water Company ("Applicant"), the Executive Director ("ED"), and the Office of Public Interest Counsel ("OPIC") regarding the Application by South Central Water Company for TPDES Permit No. WQ0016060001. For the reasons given below, the Commission should find that GEAA and BNA are "affected persons" and should grant their hearing requests. The Commission should refer the issues raised in the requests by those organizations to the State Office of Administrative Hearings ("SOAH") for a hearing.

I. Introduction

GEAA and BNA have met all legal requirements to have their hearing requests granted. This has been recognized by TCEQ's Public Interest Counsel, and is not challenged by the Applicant. The ED has recommended denial of the hearing requests by these organizations based upon the imposition of an inapplicable and inefficient procedural requirement that the named members of GEAA and BNA have previously *individually* commented, in addition to the comments submitted by GEAA and BNA. This requirement is contrary to the governing law, and,

thus, the Commission should not adopt the Executive Director's recommendation of denial of GEAA and BNA's hearing requests.

II. BNA and GEAA have satisfied all requirements to warrant granting their hearing requests.

a. GEAA and BNA are hearing requestors and, as such, the requirement of submitting comments falls to them – not their members.

The Executive Director invites the Commission to adopt an unprecedented misreading of the evaluation of whether an organization has adequately identified a member to qualify as an "affected person." The Executive Director attempts to impose upon the members identified by BNA and GEAA a condition precedent that solely applies to BNA and GEAA, since it is the organizations that are the hearing requestors.

The Executive Director contends that in order to meet the requirement to name "one or more members of the group or association that would otherwise have standing to request a hearing in their own right," an association must name a person who, as an individual, filed comments on the application *in addition to* the comments submitted by the organization.[1] The Executive Director's position, however, does not account for the identity of the requestor. In this case, BNA and GEAA are the hearing requestors. Thus, BNA and GEAA – not their members - were required by 30 TAC 55.201(d)(4)(B) to have submitted comments. The organizations did so.

The ED misconstrues the term "standing" in requiring that the member identified by BNA and GEAA to have separately commented himself or herself. Standing limits the persons who may pursue an action to only those persons whose legal rights have been breached.[2] This inquiry is separate from whether the plaintiff has met all conditions precedent to the pursuit of an action.

[1] ED Response at p. 8, 9.
[2] *Nootsie, Ltd. v. Williamson Cnty Appraisal Dist.,* 925 S.W.2d 659, 661 (Tex. 1996).

A condition precedent is an event that must happen or be performed before a right can accrue.[3] In the immediate case, the filing of comments is a condition precedent that must be met in order for a person to obtain a hearing. It is something that must be *performed* (a condition precedent), rather than a controversy that *exists* (standing).

b. The members identified by GEAA and BNA would be affected persons had they individually taken the steps followed by GEAA and BNA.

The Executive Director's proposed requirement is inconsistent with the governing statute. The Water Code requires that an association's hearing request identify a member "who *would be* an affected person in the person's own *right*."[4] The members identified by GEAA and BNA are impacted in a manner not common with the general public, and, thus, hold rights such that they *would be* affected persons had they individually taken the steps followed by GEAA and BNA. That is all that the statute, and Commission rules, require.

The immediate case is analogous to the circumstances presented under the Clean Water Act when an organization seeks to pursue judicial appeal of the issuance of a federal permit, or pursue a citizen suit. An organization must file comments in order to pursue judicial review of the issuance of a federal permit, and the demonstration of associational standing requires that an organization have a member who would have standing themselves. But, the member identified as having standing need not have individually met the condition precedent of having commented. Likewise, an organization seeking to pursue a citizen suit to enforce the Clean Water Act must send a notice letter indicating the organization's intent to sue, and when filing suit must demonstrate associational standing by having a member that would have standing in that person's

[3] *Solar Applications Eng'g, Inc. v. T.A. Operating Corp.,* 327 S.W.3d 104, 108 (Tex. 2010).
[4] Tex. Water Code § 5.115(a-1)(2)

own right. But, the association need not demonstrate that the member identified for judicial appeal had separately met the condition precedent of separately sending a notice of the intent to sue.

c. Imposition of the Executive Director's needless requirement to be granted standing would violate due process rights.

Furthermore, imposition of the needless and duplicative requirement which the Executive Director forwards would violate BNA and GEAA's due process rights, as it would impose a requirement which the agency has provided no notice of. In that respect, this case is analogous to the situation presented in *United Copper Industries, Inc. v. Grissom.*[5] In that case, Joe Grissom filed a hearing request regarding a permit application by United Copper Industries, Inc. in which he expressed concern as to the impact that the proposed air emissions would have on his health, and the health of his sons – all of whom had asthma.[6] The Executive Director of the TNRCC recommended denial of the hearing request, even though the Executive Director conceded that Grissom met the agency standard to be considered an "affected person."[7] There, the Executive Director contended that Grissom's request should be denied because he had not also presented "competent evidence" to demonstrate that his hearing request was "reasonable."[8] The Office of Public Interest Counsel had recommended granting Grissom's request, reasoning that imposing a requirement that Grissom present evidence in support of his request would violate Grissom's due process, since no notice of such a requirement had been provided.[9] The Commission followed the Executive Director's recommendation, and denied Grissom's request.[10] On judicial appeal, the Austin Court of Appeals found that TNRCC's notices related to the application had not clearly stated that a hearing requestor was required to submit competent evidence in support of their

[5] 17 S.W.3d 797 (Tex. App. – Austin 2000, pet. dism'd).
[6] *Id.* at 799.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 800.
[10] *Id.* at 800.

hearing request.[11] In light of this lack of notice, the Court found that it would be a violation of Grissom's due process rights to impose such an obligation. The Court, thus, reversed the Commission's denial of Grissom's hearing request.[12]

In the immediate case, the Executive Director again asks that the Commission impose a hearing request requirement not found in any notice issued in association with the application at issue. With regard to the contents of a hearing request by an association, the notice issued in relationship to the permit application solely states:

> If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; **identify by name and physical address an individual member of the group who would be adversely affected by the proposed facility or activity**; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose.[13]

This notice says nothing to indicate that the individual member of the group identified must have also commented. The published and mailed notice only apprises an association that it must identify a person who would be adversely impacted. GEAA and BNA provided all information requested in this notice.

The Executive Director's attempt to impose a hearing request requirement that goes beyond the requirements set forth in the notices for the application would violate due process in this case, just as the Executive Director's recommendation to apply such a requirement resulted in the violation of due process in the *Grissom* matter.

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[11] *Id.* at 805-806.
[12] *Id.* at 806.
[13] Combined Notice of Receipt of Application and Intent to Obtain Water Quality Permit and Notice of Application and Preliminary Decision. (relative emphasis added).

d. In addition to being contrary to applicable law, the Executive Director's proposed interpretation of 30 TAC § 55.205(b) is contrary to important policy objectives.

Effective public participation is a key element of a valid wastewater permitting program. To this end, associational standing should be encouraged as it enables and encourages public participation. The federal and state Courts have noted that, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[14] Further, a primary practical impact of a denial of GEAA's hearing request will be to severely hamper efforts at settlement by locking these organizations out of participation in the alternative dispute resolution process. With GEAA and BNA denied the ability to participate in settlement discussions, such discussions will be much less efficient. A denial of GEAA and BNA's requests thus makes the commencement of a formal hearing *more* likely. No policy objective is forward by imposition of the extra-legal requirement proposed by the ED – the requirement adds no notice of the issues involved that did not occur. Instead, the ED's proposed extra-legal requirement merely adds additional complication to the process with no corresponding benefit.

e. BNA and GEAA's hearing requests meet the requirements of 30 TAC § 55.205(b)(2).

For these reasons, BNA and GEAA were solely required to identify a member who would properly be considered an "affected person." They did so. As the Executive Director concedes, Joyce Lux – identified as a member of BNA in the associations' hearing requests – is included in the affected landowners list accompanying the application. As noted in BNA and GEAA's hearing request, Ms. Lux is concerned about excessive odors coming from the facility, and its effect on her ability to gather outdoors with her family on the ranch, an activity she does often and enjoys. Further, she keeps cattle on her property who drink water from the wells on her property, which she is concerned could be contaminated by the discharge. The proposed discharge will potentially

[14] *Zaatari v. City of Austin,* 615 S.W.3d 172, 194 (Tex. App. – Austin 2019, pet. denied) (quoting approvingly *NAACP v. State of Ala. ex rel. Patterson,* 357 U.S. 449, 460 (1958)).

have adverse impacts on the use and enjoyment of the property by Ms. Lux. Since Ms. Lux has property rights affected by the Application, and thus would have standing, the identification of Ms. Lux as a member of BNA satisfied the requirement of 30 TAC § 55.205(b)(2).

As noted in the Associations' hearing request, GEAA's membership includes Asa Dunn, who is also identified on the affected landowners list included in the Application. As noted in the associations' hearing request, Mr. Dunn leases his property for cattle raising, and for hay production. Much of this property is within a floodplain, and Mr. Dunn is concerned about the potential impact of contaminants upon his hay crop, which is used to feed the cattle raised on his property. Since Mr. Dunn has property rights affected by the Application, and thus would have standing, the identification of Mr. Dunn as a member of GEAA satisfied the requirement of 30 TAC § 55.205(b)(2).

Accordingly, BNA and GEAA have met the requirements of 30 TAC § 55.205(b)(2), that they identify one or more members that would have standing to request a contested case hearing in their own right, and the hearing request by these organizations should be granted.

III. Conclusion

For the reasons stated above, GEAA and BNA respectfully request that the Commission grant their hearing requests.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on October 30, 2023 a true and correct copy of the Reply to Responses to Hearing Requests was electronically filed with the Chief Clerk of TCEQ, and that copies were served upon the ED, OPIC, and the Applicant pursuant to 30 Tex. Admin. Code §§1.10-11 and § 55.209(g) via deposit in the U.S. mail.