

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Kelly Keel, *Interim Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 20, 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: **IN THE MATTER OF THE APPLICATION BY THE CITY OF KYLE
FOR TPDES PERMIT NO. WQ0011041002
TCEQ DOCKET NO. 2023-1268-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 "Jessica M. Anderson".

Jessica M. Anderson, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-1268-MWD

APPLICATION BY CITY OF	§	BEFORE THE
KYLE FOR A MAJOR	§	
AMENDMENT TO TEXAS	§	TEXAS COMMISSION ON
POLLUTANT DISCHARGE	§	
ELIMINATION SYSTEM PERMIT	§	ENVIRONMENTAL QUALITY
NO. WQ0011041002	§	

**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) files this Response to Request for Hearing on the application in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is an application by the City of Kyle (City or Applicant) for an amendment of the existing permit to authorize an increase in the discharge of treated domestic wastewater. The Commission received timely hearing requests from Annalisa Peace and Nathan Glavy on behalf of the Greater Edwards Aquifer Alliance (GEAA), and from Victoria Rose on behalf of the San Marcos River Foundation (SMRF). For the reasons stated herein, OPIC respectfully recommends the Commission find that SMRF is an affected person in this matter, and further recommends granting their hearing request.

B. Description of Application and Facility

The City of Kyle applied for an amendment of the existing permit to authorize an increase in the discharge of treated domestic wastewater from an annual average flow limit not to exceed 4.5 million gallons per day (MGD) to an annual average flow limit not to exceed 12.0 MGD. The facility is located at 941 New Bridge Drive, Hays County. The treated effluent is discharged directly to Plum Creek in Segment No. 1810 of the Guadalupe River Basin. The designated uses for Segment No. 1810 are primary contact recreation, aquifer protection, and high aquatic life use.

The City of Kyle Wastewater Treatment Facility is an activated sludge process plant operated in the complete mix mode with nitrification. Treatment units in the Interim I phase include two fine screens, four lift stations, four aeration basins, four final clarifiers, two post aeration basins, four aerobic sludge digesters, and two ultraviolet light disinfection systems. Treatment units in the Interim II phase will include four fine screens, six lift stations, ten aeration basins, nine final clarifiers, four post aeration basins, four aerobic sludge digesters, and three ultraviolet light disinfection systems. Treatment units in the Final phase will include six fine screens, twelve aeration basins, six lift stations, twelve final clarifiers, four tertiary filters, ten post aeration basins, six aerobic sludge digesters, and four ultraviolet light disinfection systems. The facility is currently operating in the Interim I phase. Additionally, the draft permit authorizes the disposal of sludge at a TCEQ-authorized land application site, co-

disposal landfill, wastewater treatment facility, or facility that further processes sludge.

C. Procedural Background

The City of Kyle's application was received on March 11, 2022, and declared administratively complete on April 28, 2022. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published on May 11, 2022, in the *Hays Free Press News-Dispatch*. The Executive Director (ED) completed the technical review of the application on August 22, 2022. The Notice of Application and Preliminary Decision was published in the *Hays Free Press News-Dispatch* on September 21, 2022. The Notice of the Public Meeting was published in the *Hays Free Press News-Dispatch* on February 22, 2023. A public meeting was held on March 30, 2023. The public comment period ended at the conclusion of the public meeting. The ED's Response to Comments was filed on July 17, 2023, and the hearing request period ended on August 17, 2023.

A. 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) § 55.21(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.

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 must 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. ANALYSIS OF HEARING REQUESTS

A. Whether the requestors are affected persons

San Marcos River Foundation

Victoria Rose, of the Save Our Springs Alliance, submitted timely comments and hearing requests on behalf of San Marcos River Foundation. SMRF is a non-profit organization that was established to protect public access to and to preserve the San Marcos River. SMRF seeks to carry out this mission by

protecting the flow of aquifer fed springs into the San Marcos River, improving the water quality of the river, protecting the beauty of the river and nearby parks, and protecting streams flowing into the San Marcos River. For these reasons OPIC finds that SMRF's stated purpose is germane to the interests it seeks to protect.

Furthermore, in order for an association's hearing request to be granted, the request must identify one or more members, by name and physical address, that would otherwise have standing in their own right. Here, SMRF identified Chelsea Collie as a member who resides at 490 Holly Grove, Kyle, which is less than a quarter mile from the discharge point and adjacent to the facility.

The hearing request raises concerns about the degradation of Plum Creek, water quality, discharge volume and effluent limits, excessive nutrient levels, excessive levels of *E. coli*, human health, adverse effects on wildlife, aquatic recreation, and past noncompliance.

While the concerns raised on behalf of the SMRF are protected by the law under which the application will be considered, a reasonable relationship must exist between those interests and the regulation of wastewater discharges under the permit. As required for group standing under 30 TAC § 55.205, SMRF timely submitted comments; the interests the group seeks to protect are germane to its purpose; neither the claim asserted nor the relief requested requires the participation of individual members; and SMRF's hearing request identifies, by name and address, a member of the group that would otherwise have standing to request a hearing in her own right. Given Ms. Collie's proximity to the facility, the fact that SMRF's concerns are specific and protected by the law under which

this application is considered, and a reasonable relationship exists between their concerns and the regulation of this facility, OPIC finds that SMRF has a personal justiciable interest in this matter and qualifies as an affected person.

Greater Edwards Aquifer Alliance

Annalisa Peace and Nathan Glavy submitted timely comments and hearing requests on behalf of the Greater Edwards Aquifer Alliance. In order for an association's hearing request to be granted, the request must identify one or more members, by name and physical address, that would otherwise have standing in their own right. Here, no specific individuals were identified by name and address, rather, requestors reference nonspecific members who are landowners living adjacent to the facility in question.

The hearing request raises general opposition to the proposed amendment, as well as concerns about the degradation of Plum Creek, effluent limits, water quality, excessive nutrient levels, excessive levels of *E. coli*, the presence of pharmaceuticals, and past noncompliance.

While the concerns raised on behalf of the GEAA are protected by the law under which the application will be considered, GEAA failed to identify any member who would have standing in their own right to request this contested case hearing. Because GEAA has not offered a member of the association who would have standing in their own right, the group cannot qualify as an affected person under 30 TAC § 55.205(b).

B. Which issues raised in the hearing requests are disputed

The affected requestor raised the following disputed issues:

1. Whether the draft permit complies with antidegradation requirements.
2. Whether the draft permit is adequately protective of water quality, including against excessive effluent limits, discharge volume, and nutrient, *E. coli*, and pharmaceutical levels.
3. Whether the draft permit is adequately protective of human health.
4. Whether the draft permit is adequately protective of wildlife.
5. Whether the draft permit is adequately protective of aquatic recreation.
6. Whether the draft permit is adequately protective given Applicant's past noncompliance.

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. The issues raised in the requests are issues of fact.

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

Issues 1-6 in Section III.B. were specifically raised during the public comment period.

E. Whether the hearing requests are based on issues raised solely in a withdrawn public comment

No public comments were withdrawn in this matter. Therefore, the hearing requests are not based on issues raised in withdrawn public comments.

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

The hearing requests raise 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).

Antidegradation

Antidegradation reviews are governed by 30 TAC § 307.5, which establishes the Commission's antidegradation policy and contains provisions for implementation of the policy. As part of the ED's antidegradation review, the existing uses of a waterbody are determined, and the draft permit is designed to protect those uses. Therefore, Issue No. 1 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Water Quality, Recreation, Human Health, and Animal Life

Requestors raised concerns about adverse effects to water quality and the consequential impacts on human health, animal life, and the environment. The Commission is responsible for the protection of water quality under Texas Water Code (TWC) 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....”¹ According to § 307.6(b)(4) of the Standards, “Water 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.”² 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, the protection of human health and safety, and the protection of animal life, Issues No. 2-5 are relevant and material to the Commission’s decision regarding this application.

Past Noncompliance

Requestors raised several concerns regarding the Applicant’s past noncompliance. Evidence of competency is required by 30 TAC § 330.593(f), thus rendering requestor’s concerns regarding compliance history relevant and material to the Commission’s decision on this application. Further, pursuant to 30 TAC § 60.1(a)(1)(A), TCEQ is required to utilize an applicant’s compliance

¹ 30 TAC § 307.1.

² 30 TAC § 307.4(d).

history when making decisions regarding an amendment of a permit. Accordingly, Issue No. 6 is appropriate for referral to SOAH.

G. Maximum expected duration for the contested case hearing

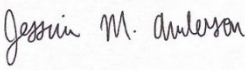
Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 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. 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 should be 180 days from the first day of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

Having found that the San Marcos River Foundation qualifies as an affected person in this matter, OPIC respectfully recommends that the Commission grant their hearing request and refer Issue Nos. 1-6 specified in Section III.B for a contested case hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,

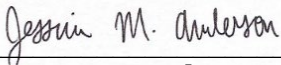
Garrett T. Arthur
Public Interest Counsel

By: 

Jessica M. Anderson
Assistant Public Interest Counsel
State Bar No. 24131226
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-6823

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2023, the original of the Office of Public Interest Counsel's Response to Request for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Jessica M. Anderson

**MAILING LIST
CITY OF KYLE
TCEQ DOCKET NO. 2023-1268-MWD**

FOR THE APPLICANT

via electronic mail:

Yvonne Gil-Valleho, Project Manager
City of Kyle
100 West Center Street
Kyle, Texas 78640
ygilvallejo@cityofkyle.com

Timothy Samford, Division Manager of
Treatment Operations
City of Kyle
100 West Center Street
Kyle, Texas 78640
tsamford@cityofkyle.com

FOR THE EXECUTIVE DIRECTOR

via electronic mail:

Kathy Humphreys, Staff Attorney
Texas Commission on Environmental
Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606
kathy.humphreys@tceq.texas.gov

Sonia Bhuiya, Technical Staff
Texas Commission on Environmental
Quality
Water Quality Division MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-1205 Fax: 512/239-4430
sonia.bhuiya@tceq.texas.gov

Ryan Vise, Director
Texas Commission on Environmental
Quality
External Relations Division
Public Education Program MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678
pep@tceq.texas.gov

FOR ALTERNATIVE DISPUTE

RESOLUTION

via electronic mail:

Kyle Lucas, Attorney
Texas Commission on Environmental
Quality
Alternative Dispute Resolution MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0687 Fax: 512/239-4015
kyle.lucas@tceq.texas.gov

FOR THE CHIEF CLERK

via eFiling:

Docket Clerk
Texas Commission on Environmental
Quality
Office of Chief Clerk MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311
<https://www14.tceq.texas.gov/epic/eFiling/>

REQUESTER(S):

Annalisa Peace & Nathan M. Glavy
Greater Edwards Aquifer Alliance
1809 Blanco Road
San Antonio, Texas 78212-2616

Annalisa Peace & Nathan M. Glavy
Greater Edwards Aquifer Alliance
P.O. Box 15618
San Antonio, Texas 78212-8818

Victoria Rose
Save Our Springs Alliance
4701 West Gate Boulevard, Suite D401
Austin, Texas 78745-1479