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Garrett T. Arthur, *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

January 12, 2024

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 BY CORIX UTILITIES (TEXAS) INC. FOR  
TPDES PERMIT NO. WQ0013977001  
TCEQ DOCKET NO. 2023-1591-MWD**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Requests and Requests 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. 2023-1591-MWD

APPLICATION BY CORIX  
UTILITIES (TEXAS) INC. FOR  
TPDES PERMIT NO.  
WQ0013977001

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BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

**OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE  
TO HEARING REQUESTS AND REQUESTS 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 requests 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 Environmental Stewardship's hearing request and refer the issues specified in Section III.G for a contested case hearing at the State Office of Administrative Hearings (SOAH) with a maximum duration of 180 days. Finally, OPIC respectfully recommends denial of Chapman Ambrose's hearing request<sup>1</sup> and all pending requests for reconsideration.

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<sup>1</sup> As provided by 30 TAC § 55.211(e), a person whose hearing request is denied may still seek to be admitted as a party under 30 TAC § 80.109 if any hearing request is granted on an application.

## **B. Description of Application and Facility**

Corix Utilities (Texas) Inc. (Applicant) applied to TCEQ for a major amendment to Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0013977001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 0.05 million gallons per day (MGD) to a daily average flow not to exceed 0.51 MGD. The draft permit would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.05 MGD in the Interim I phase, 0.25 MGD in the Interim II phase, and 0.51 MGD in the Final phase.

The plant site is located approximately 1,500 feet northeast of the intersection of Hyatt Lost Pines Road and State Highway 71 West, in Bastrop County 78612. The existing McKinney Roughs Wastewater Treatment Facility (the existing facility) is an activated sludge process plant operated in conventional mode. The proposed treatment facility (the proposed facility) will be a membrane bio-reactor (MBR) system activated sludge process plant operated in conventional mode. The treated effluent is discharged to an unnamed tributary, then to the Colorado River below Lady Bird Lake/Town Lake in Segment No. 1428 of the Colorado River Basin.

## **C. Procedural Background**

The TCEQ received the application for a major amendment July 29, 2022, and declared it administratively complete on August 31, 2022. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in the *Austin American-Statesman* on September 13, 2022. The Executive Director (ED)

completed the technical review of the application on December 16, 2022. The Notice of Application and Preliminary Decision (NAPD) was published in *Bastrop Advertiser* on April 26, 2023. The public meeting notice was published in *Bastrop Advertiser* on April 26, 2023. A public meeting was held on June 1, 2023, which was the end of the public comment period. The Chief Clerk mailed the ED's Decision and Response to Comments on August 7, 2023. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was September 6, 2023. The Commission received timely hearing requests from Environmental Stewardship and Chapman Ambrose. The Commission also received timely requests for reconsideration from Environmental Stewardship and Andrew Wier.

## **II. Applicable Law**

### **A. Requests for Hearing**

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.

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. Requests for Reconsideration**

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

### III. Analysis of Hearing Requests

#### A. Whether the requestors are affected persons

##### Environmental Stewardship

The Commission received a timely hearing request from Environmental Stewardship. The hearing request states that Environmental Stewardship strives to protect the use and quality of the Colorado River as an affiliate of the Waterkeeper Alliance. Environmental Stewardship's purposes include protection, conservation, restoration, and enhancement of the earth's natural resources. Environmental Stewardship focuses its efforts on the Colorado River from Longhorn Dam downstream to La Grange.

As required for group standing under 30 TAC § 55.205(b), Environmental Stewardship timely submitted comments; the interests Environmental Stewardship seeks to protect are germane to its purpose; neither the claim asserted nor the relief requested requires the participation of individual Environmental Stewardship members; and Environmental Stewardship's hearing request identifies, by name and address, a member who would otherwise have standing to request a hearing in his own right. The hearing request names Richard Martin as the group member and explains that Mr. Martin has fished in the area of the Colorado River from Webberville to Bastrop for more than 50 years. He fishes, approximately two to three times each month, in the area of the Colorado River which is little more than one mile downstream of the discharge point. Mr. Martin has observed that over the last 50 years, the number of large fish in the Colorado River has dropped significantly. He is concerned that the



proposed discharge would contain contaminants that would result in a further decline of fish populations in the area, which would adversely impact his ability to catch fish in the Wilbarger Bend area of the Colorado River. The hearing request states that Mr. Martin resides at approximately 10 miles from the proposed discharge. The ED's GIS map shows that Mr. Martin resides approximately 8.90 miles away from the existing facility.

The hearing request emphasized Mr. Martin's recreational interest that is protected by the law under which this application is considered, and a reasonable relationship exists between the interest and regulation of the facility. Though Mr. Martin resides over 8 miles away from the proposed discharge, the recreational use concerns raised in the hearing request are distinguishable in regularity and particularity from members of the general public, and therefore do establish a personal justiciable interest. *See* 30 TAC § 55.203(a). Because Environmental Stewardship member Mr. Martin would qualify as an affected person, OPIC finds that Environmental Stewardship meets the requirements for group standing and qualifies as an affected person.

*Chapman Ambrose*

The Commission received a timely hearing request and comments from Mr. Ambrose. Mr. Ambrose's hearing request explained that his daughter attends LCRA summer camp at the McKinney Roughs Park, which surrounds the facility, and mentioned that she attended a six-week camp during the summer of 2023. The hearing request raised concerns regarding potential impacts on the water quality of the river, as well as potential adverse effects on downstream residents,

businesses, park guests, and related activities. Mr. Ambrose's comments stated that he is a landowner downstream of the existing facility. The ED's GIS map shows that Mr. Ambrose resides approximately 3.36 miles away from the existing facility. The map also shows that he does not reside adjacent to the plant site. Though it is unclear whether he owns property or resides on the Colorado River, if he does, it appears to be beyond 1.5 miles downstream of the outfall. Based on his location, OPIC must find that Mr. Ambrose lacks the proximity needed to establish a personal justiciable interest. While Mr. Ambrose's hearing request and comments emphasized his family's recreational interest, the concerns raised in the hearing request are not distinguishable in regularity and particularity from members of the general public, and therefore do not establish a personal justiciable interest. *See* 30 TAC § 55.203(a). Therefore, OPIC cannot find that Mr. Ambrose qualifies as an affected person.

**B. Which issues raised in the hearing requests are disputed**

Environmental Stewardship raised the following disputed issues:

1. Whether the draft permit will adversely affect downstream water quality in violation of applicable requirements.
2. Whether the draft permit will adversely affect groundwater in violation of applicable requirements.
3. Whether the draft permit will adversely affect human health in violation of applicable requirements.
4. Whether the draft permit will prevent nuisance odor conditions in compliance with applicable requirements.

5. Whether issuance of the permit is consistent with the State's regionalization policy.
6. Whether the representations contained in the Application are accurate and complete.
7. Whether public notice was sufficient.
8. Whether the draft permit should be modified or denied in consideration of the Applicant's compliance history.
9. Whether the draft permit contains all appropriate and necessary conditions.
10. Whether the proposed location meets applicable location standards.
11. Whether the proposed discharge will cause excessive erosion.

**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 Environmental Stewardship 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 and Health Effects*

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. The 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). Therefore, Issue Nos. 1, 3, and 9 are relevant and material to the Commission's decision regarding this application.

### Location Standards and Groundwater

Title 30 TAC Chapter 309, Subchapter B rules contain the location standards for domestic wastewater treatment facilities. Section 309.10(b) states that the purpose of Chapter 309 is to condition issuance of a permit and/or approval of construction plans and specifications for new domestic wastewater treatment facilities on selection of a site that minimizes possible contamination of ground and surface water. Under 30 TAC § 309.13, a wastewater treatment plant must comply with site location restrictions and buffer zone requirements. Further, 30 TAC § 309.13(c) states that a wastewater treatment plant unit may not be located closer than 500 feet from a public water well, nor 250 feet from a private water well. Therefore, Issue Nos. 2 and 10 regarding groundwater protection and location standards 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. 4 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. 5 regarding regionalization is relevant and material to a decision on this application.

*Complete and Accurate Application*

TCEQ rules require that if an applicant becomes aware that it failed to submit relevant facts or submitted incorrect information in a permit application, the applicant is required to promptly submit such facts and information. 30 TAC § 305.125(19). Therefore, Issue no. 6 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

*Notice Requirements*

The TCEQ's Chapter 39 notice rules for a new permit require that the NORI and NAPD be mailed to landowners named on the application map and persons on the mailing list maintained by the Office of the Chief Clerk. Therefore, Issue No. 7 regarding notice requirements is relevant and material.

*Compliance History*

Texas Water Code § 26.0281 and 30 TAC § 60.1(c) require consideration of an applicant's compliance history in permitting decisions. Therefore, Issue No. 8 regarding compliance history is relevant and material to the Commission's decision on this application.

*Erosion*

The Commission has concluded in other proceedings that the issue of soil erosion is not within TCEQ's jurisdiction, therefore, Issue No. 11 regarding erosion is not relevant and material.

## **G. Issues Recommended for Referral**

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

1. Whether the draft permit will adversely affect downstream water quality in violation of applicable requirements.
2. Whether the draft permit will adversely affect groundwater in violation of applicable requirements.
3. Whether the draft permit will adversely affect human health in violation of applicable requirements.
4. Whether the draft permit will prevent nuisance odor conditions in compliance with applicable requirements.
5. Whether issuance of the permit is consistent with the State's regionalization policy.
6. Whether the representations contained in the Application are accurate and complete.
7. Whether public notice was sufficient.
8. Whether the draft permit should be modified or denied in consideration of the Applicant's compliance history.
9. Whether the draft permit contains all appropriate and necessary conditions.
10. Whether the proposed location meets applicable location standards.

#### **H. 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 timely filed request for reconsideration from Environmental Stewardship and Andrew Wier. Environmental Stewardship is urging a reconsideration of the application after a thorough review to ensure the proper assessment of Segment 1428 of the Colorado River Basin to determine whether the Segment is meeting the exceptional aquatic life, recreational, and drinking water standards assigned to the segment and can effectively receive and assimilate the proposed treated wastewater without impacting the water quality of the Segment. As an alternative, Environmental Stewardship is requesting a contested case hearing on the previously discussed issues. Mr. Wier's request for



reconsideration stated that Segment No. 1428 is not listed in the 303(d) list and the primary reason is that the sole study conducted on this segment in 2002 was inconclusive due to a lack of data. The request emphasized that such omission would prevent the ED from recognizing any potential threats to water quality in Segment No. 1428.

An evidentiary record would be necessary for OPIC to make a recommendation to the Commission on whether the ED's decision should be reconsidered. At this time, OPIC is recommending a contested case hearing to address issues discussed above in Section III.G, but prior to development of an evidentiary record, OPIC cannot recommend reversal of the ED's decision or remand of the application to the ED. Therefore, OPIC respectfully recommends denial of the requests for reconsideration submitted by Environmental Stewardship and Mr. Wier.

## **V. Conclusion**

For the reasons discussed above, OPIC recommends the Commission grant Environmental Stewardship's hearing request and refer the issues specified in Section III.G for a contested case hearing at SOAH with a maximum duration of 180 days. Finally, OPIC respectfully recommends denial of Mr. Ambrose's hearing request and all pending requests for reconsideration.

Respectfully submitted,

Garrett T. Arthur  
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2024, 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  
Pranjal M. Mehta

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**TCEQ DOCKET NO. 2023-1594-MWD**

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