TCEQ DOCKET NO. 2024-0670-MWD

APPLICATION BY MUNICIPAL OPERATIONS LLC FOR TPDES PERMIT NO. WQ0016171001	§ § § § §	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

GREATER EDWARDS AQUIFER ALLIANCE AND THE CITY OF GREY FOREST'S REPLY TO RESPONSES TO HEARING REQUESTS AND REQUESTS FOR RECONSIDERATION

TO THE HONORABLE COMMISSIONERS:

Greater Edwards Aquifer Alliance ("GEAA") and the City of Grey Forest ("Grey Forest" or the "City") (collectively, "Requesters") hereby submit this Reply to the Responses to Hearing Requests and Requests for Reconsideration by Municipal Operations, LLC ("Municipal Operations" or "Applicant"), the Executive Director, and the Office of Public Interest Counsel regarding the Application by Municipal Operations for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016171001. For the reasons given below, the Commission should find that GEAA and Grey Forest 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 for a hearing.

I. Introduction

GEAA and Grey Forest have met all legal requirements to have their hearing requests granted.

The Executive Director and Office of Public Interest Counsel ("OPIC") have properly found that GEAA is an affected person, due to the proximity of GEAA's members—Wade and Ward Saathoff, Chrystal Galm Woodcock, Shawn and Sam Galm, and Jane Sams—to the proposed facility. The Executive Director also properly found that Grey Forest is an affected person. This recommendation was appropriate due to: (1) the City's location a short distance downstream of the proposed facility; (2) the facility's discharge into Helotes Creek; (3) water quality impacts on the Grey Forest Water System; (4) the facility's impact on Scenic Loop Playground Club Park, which is owned by the City; and (5) the City's statutory authorities to abate nuisances, and to preserve and maintain park property. The Commission should find that Requesters are "affected persons" and should grant their request for a contested case hearing, for reasons provided below.

II. Hearing Requests on TPDES Permits are not subject to consideration of the merits of the underlying application.

While the Executive Director reaches the proper conclusion with regard to the affected person status of GEAA and Grey Forest, the Executive Director mischaracterizes the applicable law in a manner that warrants attention. The Executive Director asserts that GEAA and Grey Forest's requests are subject to the discretionary considerations of 30 Tex. Admin. Code § 55.203(d), including consideration of the merits of the underlying application. Any consideration of the merits of the Application in considering these hearing requests would be contrary to federal law. That is why the Texas Attorney General has represented to EPA that:

> TCEQ does not consider discretionary factors in 30 Tex. Admin. Code § 55.203(d) that may not be consistent with the determination of Article III standing, such as the merits of the underlying TPDES permit application, in evaluating whether a hearing requester is an affected person.[1]

Thus, the Executive Director's Response is mistaken in indicating that the Commission may consider the merits of the underlying application in considering the hearing requests of GEAA and Grey Forest.

This is important because the Applicant has effectively relied upon a consideration of the merits in recommending denial of both GEAA and Grey Forest's hearing requests, and OPIC has effectively relied upon a judgment of the merits of the underlying application in recommending denial of Grey Forest's hearing request.

III. GEAA is an affected person, and its hearing request should be granted.

Consistent with the recommendations of OPIC and the Executive Director, GEAA has shown itself to be an affected person by virtue of the proximity of GEAA's members to the proposed facility and the property rights of those members.

Applicant errs in asserting that GEAA does not qualify as an affected person. Applicant argues that "GEAA has submitted no evidence demonstrating that any of the aforementioned individuals are actually members of the group." Requesters are not required to produce evidence in a contested case hearing request. *See* 30 Tex. Admin. Code §§ 55.201, 55.251; Tex. Water Code § 5.115 (Notably, section 5.115(a) was revised to remove the evidentiary requirement for contested case hearing requests by Tex. H.B. 801,

[1] Statement of Legal Authority to Regulate Oil and Gas Discharges Under the Texas Pollutant Discharge Elimination System, Texas Attorney General Ken Paxton (September 18, 2020), at internal p. 22 (Excerpted at **Attachment A** to this Reply).

76th Leg., R.S. (1999)). Therefore, Requesters are not required to supply "evidence" at the hearing request stage. Similar to an original petition in a judicial matter, the initial hearing request is to be evaluated by TCEQ based upon the allegations contained therein.

While not required, GEAA has attached to this Reply as **Attachment B** a declaration of Annalisa Peace, Executive Director of GEAA, confirming that the listed persons are, in fact, members of GEAA.

Applicant further argues that GEAA did not "prove" that the interest of GEAA's members "are germane to GEAA's purpose." Certainly, participation in the hearing is germane to GEAA's purposes. Those purposes include seeking to protect and preserve the Edwards Aquifer and Trinity Aquifers, their springs, watersheds, and the Texas Hill Country that sustains these aquifers. In forwarding this purpose, GEAA seeks to ensure protection of the water quality in Hill Country streams. GEAA has an interest in protecting Helotes Creek, which will receive the proposed facility's discharge and which feeds directly into the Edwards Aquifer. This interest is germane to GEAA's stated purpose of protecting and preserving the Edwards Aquifer and the water quality of Hill Country streams. *See* ED's Response at 9 ("The issues GEAA raised in its hearing request are germane to GEAA's purpose.").

The interests of GEAA's members are also germane to the purposes of GEAA's participation. Each member identified uses property in the vicinity of the proposed facility and discharge. Many recreate within downstream waters. Each member identified desires the protection of the property they use from adverse impacts or contamination as a result of the discharge. Members named who recreate in downstream waters, including Chrystal

Woodcock, Shawn and Sam Galm, and Jane Sams, all have an interest in the protection of the water quality of waters downstream of – and potentially impacted by – the discharge.

Finally, Applicant argues that GEAA did not "prove . . . that the relief requested does not require the participations of its members." GEAA solely seeks prospective relief through participation in the hearing. Namely, denial of the application. Consideration of this request solely involves consideration of the adequacy of the application and draft permit. Thus, the relief requested does not require the participation of any individual member of GEAA.

IV. Grey Forest is an affected person, and its hearing request should be granted.

Consistent with the recommendation of the Executive Director, Grey Forest has shown itself to be an affected person.

Applicant and OPIC err in asserting that Grey Forest does not qualify as an affected person. Applicant also asserts that Grey Forest "has not shown that it has its statutory authority to address issues relevant to the discharge permit." However, the City has authority to abate nuisances pursuant to Texas Local Government Code § 217.002 (granting municipal government the authority to define and declare what constitutes a nuisance and abate any nuisance which may injure or affect the public health or comfort). This includes the authority to abate any nuisance that would result from the contamination of Helotes Creek by the proposed discharge. The ED's Response echoes this analysis in its recommendation that Grey Forest receive affected party status. The City also possesses authority to preserve and maintain parkland – such as the parkland owned by the City

downstream of the discharge point – pursuant to Texas Local Government Code § 331.001(a).

Both the Applicant and OPIC also argue that Grey Forest is too far downstream of the proposed facility to be considered an affected person. Again, the determination of whether a requester is an affected person is governed by the same standard as constitutional standing for a judicial action.[2] In this analysis, the person seeking standing need only raise a fact issue on a question that overlaps with the merits, and such a question of fact cannot be resolved against the person seeking standing absent conclusive evidence to the contrary.[3] This is particularly true for a TPDES permit application, on which the Commission has committed to the EPA that it will not consider the merits of the underlying application when considering a hearing request.

Grey Forest's allegations raise a fact issue as to whether the discharge will impact water quality at the distance of 2.25 miles downstream of the discharge. In fact, for a discharge of this size, TCEQ's Procedures to Implement the Texas Surface Water Quality Standards establish that potential impacts are to be evaluated up to three miles downstream of the discharge point.[4] Neither the Applicant nor OPIC have even attempted to present evidence conclusively demonstrating that the discharge will have no impact on water quality at the distance downstream at which Grey Forest has statutory authority to protect its citizens against nuisance conditions, and statutory authority to preserve and protect its

[2] *See Hooks v. Texas Dep't of Water Res.,* 611 S.W.2d 417, 419 (Tex. 1981).
[3] *See Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 227-228 (Tex. 2004).
[4] Texas Comm'n on Envt'l Quality, Water Quality Division, *Procedures to Implement the Texas Surface Water Quality Standards*, RG-194 (June 2010), at p. 47. (Excerpted at **Attachment C** to this Reply).

parkland. Rather, both the Applicant and OPIC oppose Grey Forest's request with no acknowledgement whatsoever of the applicable law and the proper standard for evaluating Grey Forest's request.

A relevant case for comparison is *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 182 (2000). *Laidlaw* involved standing with respect to a National Pollutant Discharge Elimination System ("NPDES") permit, much like the immediate case involves the question of whether Grey Forest has standing with respect to the TPDES permit sought by Municipal Operations. In *Laidlaw,* the plaintiffs alleged that a member lived half a mile from the facility, that he occasionally drove to the receiving river, that it looked and smelled polluted, and that he would like to fish, camp, swim and picnic in the area of the receiving river between *3 to 15 miles downstream* from the facility as he had as a child, but would not do so out of concern for the discharges at issue in the case.[5] The U.S. Supreme Court found concerns at such a distance to be sufficient allegations to support standing on an NPDES permit application.[6] Neither Applicant nor OPIC have shown why the same conclusion should not be reached with regard to Grey Forest, as is their burden in opposing standing on a TPDES permit when a question of fact presents an issue where standing and the merits overlap.

V. Conclusion

For the reasons stated above, GEAA and the City of Grey Forest respectfully request that the Commission grant their hearing requests.

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[5] *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 181 – 182 (2000).
[6] *Id.*

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on August 5, 2024 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 electronic mail and deposit in the U.S. mail.

/s/ Eric Allmon
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ATTACHMENT A

STATEMENT OF LEGAL AUTHORITY TO REGULATE OIL AND GAS DISCHARGES UNDER THE TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM

As Attorney General of the State of Texas, I certify, pursuant to section 402(b) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251-1388 (CWA), that in my opinion the laws of the State of Texas provide adequate authority for the Texas Commission on Environmental Quality (TCEQ) to regulate wastewater discharges into water in the state from facilities[1] associated with the exploration, development, and production of oil or gas or geothermal resources (oil and gas facilities).

This Statement of Legal Authority addresses the TCEQ's authority specific to its application to the United States Environmental Protection Agency (EPA) for authorization to permit discharges of produced water, hydrostatic test water, and gas plant effluent into surface water in the state resulting from certain oil and gas activities. The specific authorities discussed below are contained in lawfully enacted statutes or promulgated regulations, which are in effect as of the date of this Statement. Citations to the current Tex. Water Code § 26.131 apply to the TCEQ's authority to regulate oil and gas discharges both before and after the Railroad Commission of Texas (RRC) receives delegation of authority under the Resource Conservation and Recovery Act (RCRA). The RCRA delegation to the RRC will not impact the TCEQ's authority to regulate oil and gas discharges described by Tex. Water Code § 26.131(d) (pre-RCRA delegation) or Tex. Water Code § 26.131(c) (post-RCRA delegation).

Where provisions of the Code of Federal Regulations (C.F.R.) have been incorporated into the Texas Administrative Code (Tex. Admin. Code), they are characterized as adopted by reference; adopted by incorporation with full text (meaning that the exact language of the C.F.R. provision has been repeated in the applicable Texas Administrative Code section); or adopted with amendments (meaning that the language of the C.F.R. provision has been repeated in the applicable Texas Administrative Code section with some changes, generally explained in the "Remarks" section). Where no remarks are provided, the state and Federal statutes or regulations have identical or substantially the same language, which means there is no difference in meaning.

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[1] Under 30 Tex. Admin. Code § 305.2(14)(A), "facility" includes all contiguous land and fixtures, structures, or appurtenances used for storing, processing, treating, or disposing of waste, or for injection activities.

the TCEQ will refer the application directly to the State Office of Administrative Hearings (SOAH) for a contested case hearing. 30 Tex. Admin. Code § 55.210. If a contested case hearing is requested by an affected person, the TCEQ will consider the request at an open meeting. 30 Tex. Admin. Code § 55.209. The criteria regarding determination of affected persons in the TCEQ's rules comport with the standing requirements in Article III of the United States Constitution for judicial review under the state statutes applicable to federal permit programs being implemented by the TCEQ, including the TPDES program. There is no material difference between the TCEQ's standards and the standards the federal courts apply when deciding judicial standing, which are based on the United States Supreme Court decision in *Lujan v. Defenders of Wildlife, et al.*, 504 U.S. 555 (1992). The TCEQ is compliant with both federal and state laws regarding standing for citizen challenges of TPDES permit applications.

Contested case hearings are governed by the TCEQ's rules in 30 Tex. Admin. Code, Chapter 80 and SOAH's rules in 1 Tex. Admin. Code, Chapter 155. If there is a conflict between the two sets of rules, the TCEQ's rules control. 1 Tex. Admin. Code § 155.3(d).

After closing the record, SOAH's Administrative Law Judge (ALJ) presiding over the contested case hearing prepares a proposal for decision, which, if adverse to any party, must include a statement of the reasons for the proposal and findings of fact and conclusions of law that support the ALJ's proposal on any issue referred by the TCEQ or added by the ALJ. 30 Tex. Admin. Code § 80.252. The TCEQ may amend the ALJ's proposed findings of fact, conclusions of law, or ordering provisions only if the ALJ did not properly apply or interpret applicable law, agency rules, policies, or prior administrative decisions; the ALJ relied on a prior administrative decision that was incorrect; or there was a technical error. Tex. Gov't Code § 2001.058.

c. Judicial Review

Federal authority:

40 C.F.R. § 123.30 provides that "[A]ll States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review

that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit [*see* CWA § 509]. A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review). This requirement does not apply to Indian Tribes."

Lujan provides that the constitutional minimum of standing contains three elements:

1. The plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest, which is
    a. concrete and particularized; and
    b. actual or imminent, not conjectural or hypothetical; and

2. There must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly traceable" to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and

3. It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan provides that the burden is on the party seeking standing, and it must be supported in the same way as any other matter in which the plaintiff bears the burden of proof. When the suit is challenging government action or inaction regarding someone other than the plaintiff, causation and redressability ordinarily hinge on the response of the regulated third party to the government action or inaction, and perhaps on the responses of others as well. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily more difficult to establish.

State authority:

There is an established process for appealing the TCEQ's decisions on a TPDES permit application. Generally, affected persons have an opportunity to request a contested case hearing on a permit application. If they do so, and all

requests for hearing are denied and the permit is issued without conducting a contested case hearing, then requestors who filed a motion for rehearing may appeal the TCEQ's denial of their hearing requests. If the TCEQ's decision to deny the hearing request is reversed by a court, the court will also reverse the issuance of the permit and remand the application to the TCEQ to reconsider the hearing request. If appropriate, the court will also refer the application to a contested case hearing. Even a person who has not participated in the administrative process may file a motion for rehearing or motion to overturn and appeal the TCEQ's or the Executive Director's decision to issue the permit so long as that person has standing for judicial review, but only to the extent of the changes from the draft permit to the final permit decision. *See* 30 Tex. Admin. Code § 55.201(h).

If a contested case hearing was held, a party is entitled to judicial review under the authority and procedures of the Texas Administrative Procedure Act (APA). Tex. Gov't Code §§ 2001.001-.903. If a contested case hearing is not held, a person affected by a final ruling, order, or decision of the TCEQ may file a petition for judicial review under Tex. Water Code § 5.351 within 30 days after the decision becomes final and appealable.

A person seeking judicial review, whether under the APA or Tex. Water Code § 5.351, must have exhausted all available administrative remedies, including compliance with the TCEQ's rules regarding motions for rehearing or motions to overturn. *See* 30 Tex. Admin. Code §§ 50.119, 50.139, 55.201(g), and 80.272. Requesting or participating in a contested case hearing is not among the exhaustion requirements for judicial review of discharge permit actions under Tex. Water Code § 5.351, but the person must be affected by the action to request judicial review of it. *Sierra Club v. Tex. Comm'n on Envtl. Quality,* No. 03-14-00130-CV, 2016 WL 1304928 (Tex. App.—Austin Mar. 31, 2016, no pet.) (mem. op.). This includes a person who received a notice of the application but failed to file timely public comment, failed to file a timely hearing request, failed to participate in a public meeting, and failed to participate in a contested case hearing held under 30 Tex. Admin. Code, Chapter 80. The person may file a motion for rehearing to overturn the Executive Director's decision so long as the motion addresses only the changes from the draft permit to the final permit decision and thus, may exhaust the administrative remedies for purposes of seeking judicial review regarding those changes. 30 Tex. Admin. Code § 55.201(h).

A finding by an ALJ or the TCEQ concerning a person's status as an affected person would not bind a Texas district judge in considering that same person's

standing to seek judicial review of the TCEQ's action on a discharge permit application.[3] The "affected person" standard set out in Tex. Water Code § 5.115(a) and 30 Tex. Admin. Code § 55.203 comes into play only in a decision on entitlement to a contested case hearing, whereas the availability of Tex. Water Code § 5.351 in the discharge permit context, as noted above, does not depend on a contested case hearing having been requested or participated in. The Office of the Attorney General agrees that it will not rely on or refer to the conclusion of an ALJ or the TCEQ that a person is not an affected person as a basis to oppose participation by that person in subsequent judicial proceedings brought under Tex. Water Code § 5.351. The Office of the Attorney General may, however, rely on the facts underlying the conclusion in opposing a person's standing in court. Also, when an ALJ's or the TCEQ's conclusion about affected person status is challenged in the judicial proceeding, the Office of the Attorney General may defend that conclusion.

40 C.F.R. § 123.30 provides the legal standard for judicial review under a federally authorized program and examples under which a state will either meet or not meet the legal standard. A state will meet the standard if it allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court on a federally-issued NPDES permit. A state will not meet the standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits.

However, between those two extremes, a state may provide an opportunity for judicial review that is less than what is provided in federal court and still meet the legal standard for judicial review in 40 C.F.R. § 123.30. As the Ninth Circuit Court of Appeals explained in affirming the EPA's approval of the State of Alaska's NPDES program, a state is not required to provide the same amount of judicial review as that available in federal court if the opportunity for judicial review in state court is sufficient to provide for, encourage, and assist public participation in the permitting process. *Akiak Native Cmty. v. U.S. EPA*, 625 F.3d 1162 (9th Cir. 2010). In other words, a state meets the standard, as long as the state provides the opportunity for judicial review that is sufficient to provide for, encourage, and assist public participation in the permitting process.

[3] Although the Texas Supreme Court has not expressly adopted the federal standard for individual standing, numerous cases from lower courts of appeal indicate that the two standards are very similar.

Under Tex. Water Code § 5.115(a), in an administrative hearing held by or for the commission involving a contested case, an "affected person" means "a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest." As a matter of statutory interpretation, the definition of "affected person" embodies the constitutional principles of standing. *See Tex. Comm'n on Envtl. Quality v. City of Waco,* 413 S.W.3d 409, 417 (Tex. 2013). The court in *City of Waco* explained that those principles require a person to establish standing by showing they have a concrete and particularized injury that is: (1) actual or imminent; (2) fairly traceable to the issuance of the permit as proposed; and (3) likely to be redressed by a favorable decision on its complaint.[4] In a recent opinion, the Fifth Circuit Court of Appeals dismissed a petition for review of the TCEQ's denial of hearing requests and approval of Rio Grande LNG's air permit applications because the petitioners did not have Article III standing. *Shrimpers and Fishermen of the RGV v. Tex. Comm'n on Envtl. Quality,* 968 F.3d 419 (5th Cir. 2020) (per curiam).

Texas meets the legal standard in 40 C.F.R. § 123.30 by providing for judicial review under either: (1) Tex. Water Code § 5.351, which allows a person affected by a ruling, order, decision, or other act of the TCEQ to file a petition to review, modify, or set aside the act of the TCEQ; or (2) Tex. Gov't Code § 2001.171, which provides that a person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review.

A person must exhaust all available administrative remedies prior to challenging the merits of the TCEQ's approval of a permit application. *See, e.g., Sierra Club*, 2016 WL 1304928. The *Sierra Club* case, in which the Third Court of Appeals dismissed the appeal, illustrates that there is an established process for appealing the TCEQ's decisions. The appellants in *Sierra Club* short-circuited the process and failed to exhaust all administrative remedies by abandoning their challenge of the TCEQ's decision to deny their hearing requests. Instead, the

[4] In *City of Waco,* the Texas Supreme Court concluded that there was evidence in the record to support the TCEQ's determination that the proposed amended permit did not seek to significantly increase or materially change the authorized discharge of waste, or otherwise foreclose the TCEQ's discretion to consider the amended application at a regular meeting rather than after a contested case hearing. The TCEQ, therefore, did not abuse its discretion in denying the City's request for a contested case hearing on the application for an amended permit. *City of Waco*, 413 S.W.3d at 424-425.

appellants directly challenged the merits of the approval of the permit application. The court held that absent such exhaustion of remedies, the appellants were jurisdictionally barred from challenging the factual bases supporting the permit in district court.

The requirement that a person exhaust all administrative remedies available at an administrative agency with exclusive jurisdiction prior to seeking judicial review provides for, encourages, and assists public participation in the TCEQ's permitting process by incentivizing interested persons to avail themselves of all available avenues of public participation at the TCEQ. Each method of public participation (*e.g.*, public comment including public meetings, opportunity for contested case hearing) serves an important purpose in the TCEQ's permitting process, and the agency provides for and assists public participation. The TCEQ provides two notices of the permit application soliciting public participation and explaining how interested persons may participate in the permit application process. The first notice is provided when the application is administratively complete, and the second notice is provided when the application is technically complete. A public meeting, with another notice, is held on the permit application if there is a significant or substantial degree of public interest or if requested by a legislator who represents the local area. Parties to a contested case hearing are not required to hire an attorney and may seek to be aligned with other parties with similar interests. In addition, the TCEQ's Office of Public Interest Counsel is available to explain the hearing process.

The TCEQ is an administrative agency that has specialized scientific and legal expertise on issues within its exclusive jurisdiction. This allows the TCEQ to consider complex technical issues and make appropriate findings of fact and conclusions of law in a contested case, so that such issues are not required to be litigated *de novo* in a court of general jurisdiction, which will result in additional costs and delay to all parties. The TCEQ's public participation process is designed to maximize public participation in the permit application process in a manner that will result in a complete agency record on the permit application to facilitate judicial review under the appropriate standard of review.

Texas does not narrowly restrict the class of persons who may challenge the approval or denial of permits to only permittees, persons who can demonstrate injury to a pecuniary interest, or persons who have property interest in close proximity to a discharge or surface waters.

Standing requirements in Texas come from the Legislature which, in Tex. Water Code § 5.115(a-1), directs the TCEQ to "adopt rules specifying factors which must be considered in determining whether a person is an affected person." The TCEQ adopted these requirements in its rules, which are applicable to permit applications that implement federal permitting programs, including the TPDES.

The TCEQ's rules contain mandatory and discretionary factors for determining whether a person is an affected person. Mandatory factors are found in 30 Tex. Admin. Code § 55.203(c), and discretionary factors are found in 30 Tex. Admin. Code § 55.203(d). Mandatory factors must be considered by the TCEQ in determining whether a person is an affected person. However, a person is not required to meet each mandatory factor in order to be an affected person and may be determined by the TCEQ to be an affected person based on one or more factors.

The mandatory criteria, found in 30 Tex. Admin. Code § 55.203(a) and (c), are as follows (together with the analogous federal component of standing provided in parentheses):

> (a) The person's interest must not be common to members of the general public (relevant to whether the posited injury is particularized);
>
> . . .
>
> (c)(1) Whether the claimed interest is protected by the law applicable to the license (relevant to whether the posited injury is redressable in the agency proceeding);
>
> (c)(2) Distance or other limitations imposed by law on the affected interest (relevant to any factor, depending on the nature of the limitation);
>
> (c)(3) Whether there is a reasonable relationship between the requester's claimed interest and the activity to be regulated (relevant to whether the posited injury is fairly traceable to the proposed license; relevant to whether the posited injury is redressable in the agency proceeding);
>
> (c)(4) The likely impact on the requester's health, safety, and use of property (relevant to whether the posited injury is concrete, particularized, actual or imminent, rather than conjectural or hypothetical);

(c)(5) The likely impact of the regulated activity on the requester's use of the affected natural resource (relevant to whether the posited injury is concrete, particularized, actual or imminent, rather than conjectural or hypothetical);

(c)(6) Whether a hearing requestor timely submitted comments on the application that were not withdrawn (relevant to whether (1) the posited injury is fairly traceable to the proposed license, and (2) the posited injury is redressable in the agency proceeding); and

(c)(7) For governmental entities, their statutory authority over or interest in the issues relevant to the application (relevant to whether the posited injury is fairly traceable to the proposed license; relevant to whether the posited injury is redressable in the agency proceeding).

One of the mandatory factors that the TCEQ must consider in evaluating whether a hearing requester is an affected person under 30 Tex. Admin. Code § 55.203(c)(5) is the likely impact of the regulated activity on the use of the impacted natural resource by the person. Therefore, a recreational interest that can be distinguished from an interest common to the general public may establish that the hearing requester is an affected person consistent with Article III standing for judicial review.

Although 30 Tex. Admin. Code § 55.203(c)(2) requires the TCEQ to consider distance restrictions or other limitations imposed by law on the affected interest, there are no such distance restrictions or limitations in state statutes or the TCEQ's rules applicable to TPDES permit applications. In determining whether a person who submitted a hearing request on a TPDES permit application is an affected person, the requester's distance from the proposed facility or discharge is primarily relevant in order to evaluate the likelihood that the regulated activity will impact the requester's health and safety and use of their property under 30 Tex. Admin. Code § 55.203(c)(4). This is consistent with the Article III standing requirements for judicial review under which a plaintiff must have suffered an "injury in fact" that is "fairly traceable" to the challenged action.

To a lesser degree, distance may be relevant under 30 Tex. Admin. Code § 55.203(c)(3) to evaluate whether a reasonable relationship exists between the interest claimed and the activity regulated if it helps to demonstrate that the injury is fairly traceable to the permitted activity, which is also consistent with Article III. However, the TCEQ's evaluation of whether a reasonable relationship exists

between the interest claimed and the activity regulated under 30 Tex. Admin. Code § 55.203(c)(3) primarily depends on the type of interest claimed (*e.g.*, recreational interest, property interest, economic interest), the nature of the injury (*e.g.*, injury resulting from wastewater discharges, air emissions, solid waste disposal), and the type of activity being permitted (*e.g.*, discharge of wastewater, emission of air contaminants, disposal of solid waste), to ensure that the hearing requester's concerns are related to the permit application and may be addressed by the TCEQ in the pending application. This is consistent with the Article III standing requirements for judicial review under which it must be likely that the injury will be redressed by a favorable decision.

Procedural requirements for requesting a contested case hearing—such as requiring that the request is timely submitted, includes the person's name, address, and disputed issues of fact, and, under 30 Tex. Admin. Code § 55.203(c)(6), made by a person who timely submitted comments on the application—do not narrow the class of persons who may challenge the approval or denial of permits, but rather, are reasonable requirements for filing hearing requests that are analogous to judicial pleading and filing requirements that must be complied with when filing petitions for judicial review in federal court to avoid dismissal. A person has several options to submit timely comments with relevant and material issues to preserve the person's right to request a contested case hearing as an affected person and to seek a referral of those issues to SOAH. The person may submit timely comments in writing to the TCEQ by mail, fax, electronically, or orally at the public meeting, which is recorded. Relevant and material issues raised by other affected persons that are referred to SOAH are also considered at the contested case hearing. In addition, under 30 Tex. Admin. Code § 80.4(c)(4), an ALJ may consider additional issues beyond those referred by the TCEQ. Furthermore, under 30 Tex. Admin. Code § 55.211(e), if a contested case hearing request is granted and a permit application is referred to SOAH, the TCEQ's decision on the validity of hearing requests is an interlocutory decision that is not binding on the ALJ when the ALJ designates parties to the contested case hearing. Therefore, a person whose hearing request was denied may still seek to be named a party at the preliminary hearing even though the TCEQ denied the person's hearing request. An example of an ALJ exercising this authority is the application by the City of Dripping Springs for a new TPDES permit. The TCEQ denied the contested case hearing request by the Barton Springs/Edwards Aquifer Conservation District. In addition, the Hays Trinity Groundwater Conservation District did not request a hearing. Both entities made appearances at the preliminary hearing at SOAH and were designated as parties to the contested case hearing by the ALJ.

In summary, the above comparison of the Texas mandatory criteria with the criteria in *Lujan* demonstrates that the Texas criteria meet *Lujan* standards. The TCEQ's factors for determining "affected person" status parallel the standards the federal courts apply when deciding judicial standing.

Additional information the TCEQ may consider:

Senate Bill 709 (84th Tex. Leg. R.S., 2015) added Tex. Water Code § 5.115(a-1)(1) that lists other information the TCEQ may, at its discretion, consider when determining whether a hearing requestor is an affected person. That information is as follows:

a. the merits of the underlying application, including whether the application meets the requirements for permit issuance;

b. the likely impact of regulated activity on the health, safety, and use of the property of the hearing requestor;

c. the administrative record, including the permit application and any supporting documentation;

d. the analysis and opinions of the Executive Director; and

e. any other expert reports, affidavits, opinions, or data submitted by the Executive Director, the applicant, or a hearing requestor.

As explained in the TCEQ's 2015 rulemaking implementing Senate Bill 709, Tex. Water Code § 5.115(a-1)(1)(B) was already mandatory in the TCEQ's rule, and the rulemaking to implement Senate Bill 709 did not change that status.[5] Therefore, Tex. Water Code § 5.115(a-1)(1) (A), (C), (D) and (E) were adopted in 30 Tex. Admin. Code § 55.203(d) in the 2015 rulemaking as types of information the TCEQ may also consider, but these factors are limited by 30 Tex. Admin. Code § 55.203(e), which provides that consideration of these factors can be used "to the extent consistent with case law." As discussed above, the Texas Third Court of Appeals in the *City of Waco* case has concluded that the statutory definition of affected person embodies the constitutional principles of standing.

[5] *See* 40 Tex. Reg. 9660, 9668 (2015).

The TCEQ's rules implementing Senate Bill 709 in 30 Tex. Admin. Code § 55.203(d)(1) allow, but do not require, the TCEQ to consider the merits of the underlying application, including whether the application meets the requirements for permit issuance. However, the TCEQ's rules implementing Senate Bill 709, including those setting out discretionary factors, apply to all water quality permit applications, including state-only permits that are not subject to the EPA-authorized TPDES permitting program. Under Tex. Water Code § 5.551(b), the TCEQ must provide for an additional opportunity for hearing to the extent necessary to satisfy a requirement for the EPA's authorization of a state permit program. Tex. Water Code § 5.551(b) applies to all TPDES permit applications for which there is an opportunity to request a contested case hearing. Consistent with that statutory directive, the TCEQ does not consider discretionary factors in 30 Tex. Admin. Code § 55.203(d) that may not be consistent with the determination of Article III standing, such as the merits of the underlying TPDES permit application, in evaluating whether a hearing requester is an affected person. The TCEQ does consider the Executive Director's analysis and opinions on whether a hearing requester is an affected person as stated in the Executive Director's Response to Hearing Requests that is filed under the TCEQ's rules.

8. AUTHORITY TO PROVIDE ACCESS TO INFORMATION

State law provides authority to make information available to the public consistent with the requirements of the CWA and the EPA's guidelines, including the following:

a. The following information is available to the public for inspection and copying:
    (1) any TPDES permit, permit application, or form;
    (2) any public comments, testimony, or other documentation concerning a permit application; and
    (3) any information obtained under any monitoring, recording, reporting, or sampling requirements or as a result of sampling or other investigatory activities of the state.

b. The State may hold confidential any information (except effluent data, permits, and permit applications, including applicant's name and address) shown by any person to be information which, if made public, would divulge:

delegation of the NPDES authority. To fully implement this statute, the TCEQ amended 30 Tex. Admin. Code § 305.541, the Hydrostatic Test Waters General Permit (TXG670000), and the Memorandum of Understanding with the RRC.

The amended 30 Tex. Admin. Code § 305.541, effective June 11, 2020, adopted by reference EPA's effluent limitations guidelines for the oil and gas extraction point source category and the centralized waste treatment category (40 C.F.R. Parts 435 and 437); and added a definition of "produced water." As discussed in detail above, the TCEQ defined "produced water" to capture the intent of the bill.

The TCEQ amended the Hydrostatic Test Waters General Permit (TXG670000) to allow discharges of hydrostatic test water from new and existing vessels into water in the state from crude oil and natural gas exploration, development, and production operations to be eligible for authorization under the general permit after the TCEQ receives approval from the EPA to regulate these activities under the TPDES. Until such time, these entities would continue to be required to obtain authorization to discharge from both the EPA and the RRC.

The TCEQ also amended its Memorandum of Understanding with the RRC. To ensure the TCEQ complied with all *Texas Register* requirements and would be able to move forward with its timely submission to the EPA, the TCEQ repealed the then existing Memorandum of Understanding with the RRC found at 30 Tex. Admin. Code § 7.117 (which adopted by reference the Memorandum of Understanding between RRC and the TCEQ found at 16 Tex. Admin. Code § 3.30 and adopted the full text of the Memorandum of Understanding between the RRC and the TCEQ under the new 30 Tex. Admin. Code § 7.117 with changes regarding the transfer of responsibilities relating to certain oil and gas discharges from the RRC to the TCEQ, and another unrelated authorization). The current Memorandum of Understanding describes the transfer of the RRC's responsibilities to the TCEQ relating to the regulation of discharges into surface water in the state of produced water (as defined in 30 Tex. Admin. Code § 305.541), hydrostatic test water, and gas plant effluent resulting from the exploration, production, and development of oil, natural gas, or geothermal resources. This transfer will occur upon the EPA's approval of TCEQ's request to amend or supplement its TPDES program.

16. STATUS OF ATTORNEY GENERAL AS LEGAL COUNSEL

The undersigned Attorney General of the State of Texas has full authority to represent the TCEQ in court in all matters pertaining to the state program. The

Attorney General is authorized by the Texas Constitution, Article IV, Section 22, to "represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party . . . and perform such other duties as may be required by law." Interpretive commentary to this section states that the Attorney General is the "chief law officer of the state." As a matter of practice, all administrative enforcement is handled by the TCEQ. All civil litigation is handled by the undersigned and other attorneys under the Attorney General's supervision. Criminal investigation can be conducted by the Attorney General. In criminal litigation matters, upon request of the Attorney General, the local prosecuting authority moves the district judge to issue an order appointing the Attorney General as a special prosecutor.

All necessary authorities to support the state "Program Description" have been cited. Under authorities in effect at the time of this Statement, no outstanding permits issued by the State of Texas for the discharge of pollutants from oil and gas facilities are valid for the purpose of the NPDES created under the CWA. All persons presently in possession of a valid state permit for the discharge of pollutants are required to:

1. Comply with the application requirements specified in 40 C.F.R. Part 122, Subpart B and Part 124, Subpart A; and

2. Comply with permit terms, conditions, and requirements specified in 40 C.F.R. Part 122, Subparts B, C, and D.

09-18-2020
Date

By: Ken Paxton
Ken Paxton
Attorney General of Texas

ATTACHMENT B

TCEQ DOCKET NO. 2024-0670-MWD

APPLICATION BY MUNICIPAL OPERATIONS LLC FOR TPDES PERMIT NO. WQ0016171001	**§ § § § §**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

DECLARATION OF ANNALISA PEACE

1. My name is Annalisa Peace, my date of birth is August 30, 1956, and my address is 247 Army Blvd. San Antonio, Texas.

2. I am over eighteen (18) years of age and of sound mind and am otherwise competent and capable of making this declaration. The facts testified to in this declaration are within my personal knowledge and are true and correct.

3. I am the Executive Director of the Greater Edwards Aquifer Alliance.

4. The following persons are members of GEAA: Wade and Ward Saathoff, Chrystal Galm Woodcock, Shawn and Sam Galm, and Jane Sams.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Bexar County, State of Texas, on the 2nd day of August, 2024.

Annalisa Peace

Digitally signed by Annalisa Peace
DN: cn=Annalisa Peace, o=Greater Edwards Aquifer Alliance, ou=Executive Director, email=annalisa@aquiferalliance.org, c=US
Date: 2024.08.02 11:59:17 -05'00'

Annalisa Peace, Declarant

ATTACHMENT C

Procedures to Implement the Texas Surface Water Quality Standards

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Prepared by
Water Quality Division

RG-194
June 2010

Contents

Nutrient Screening for Streams and Rivers

General Approach

To assess local effects in streams and rivers from discharges under the narrative nutrient provisions of the Standards, the TCEQ first evaluates the discharge using the general guidelines. If the general guidelines in this section indicate that a TP limit should be considered, then the TCEQ conducts a more comprehensive review using site-specific screening factors. Eutrophication potential is rated as a low, moderate, or high level of concern for each factor. Some screening factors can be rated on either qualitative or quantitative information, depending on data availability. Not every factor is always appropriate or definable at a particular site.

Applicability

These screening procedures are primarily intended for freshwater streams and rivers. Perennial impoundments greater than 10 surface acres along streams can be individually evaluated using screening factors for reservoirs, as described in previous sections.

If a stream or river changes characteristics downstream of the discharge such that eutrophication impacts might be greater in downstream areas, then screening procedures are also applicable to those downstream reaches. As a rough guide, nutrient screening procedures are typically applied for the following permitted discharge sizes within the following distance of the discharge point:

Permitted flow (MGD)	Evaluation Distance (stream miles)
< 0.25	< 3
0.25 to < 1.0	< 7
≥ 1.0*	< 15

*** Very large discharges may be evaluated on a case-by-case basis.**

General Guidelines for Assigning TP Limits

TP limits are potentially indicated in the following situations:

- for new or expanding discharges with permitted flow ≥ 0.25 MGD to perennial, shallow, relatively clear streams with rocky bottoms or other substrates that promote the growth of attached vegetation;

- for new or expanding discharges with permitted flow ≥ 0.25 MGD to streams with long, shallow, relatively clear perennial impoundments; and