

TCEQ DOCKET NO. 2019-1640-MWD

APPLICATION BY	§	BEFORE THE
DTB INVESTMENTS, L.P.	§	TEXAS COMMISSION ON
FOR TPDES PERMIT NO. WQ0015092001	§	ENVIRONMENTAL QUALITY

**BULVERDE NEIGHBORHOODS FOR CLEAN WATER, ET AL.’S REPLY
TO THE RESPONSES TO HEARING REQUESTS**

TO THE HONORABLE COMMISSIONERS:

The Commission should find that the organization Bulverde Neighborhoods for Clean Water (“BNCW”), as well as individual requestors, Dr. Linzy Fitzsimons, Julie Goss, Richard Crow, Steven Harper and Nancy McKee, Joseph and Margie Brockman, and James and Ingrid Lingle (collectively, “Individual Requestors”) are “affected persons” and should grant BNCW’s and each individual requestor’s requests for a contested case hearing. The Commission should also find that several other requestors are affected persons and should grant those requests for a contested case hearing. The Commission should refer 18 issues, described fully below, to SOAH.

I. AFFECTED PERSON STATUS

A. Reply to the ED’s, OPIC’s, and Applicant’s Responses to BNCW’s Hearing Request.

BNCW agrees with the ED’s and OPIC’s analysis of the associational standing requirements, and their recommendations that the Commission grant its hearing request.

BNCW disagrees with the Applicant’s analysis of its hearing request, because it has no basis in law. Applicant objects to BNCW’s hearing request on the sole assertion that “BNCW did not exist until April 17, 2019,” but cites no authority to support its assertion that BNCW did not “exist” or could not otherwise request a contested case hearing.¹ BNCW acknowledges that it did

¹ Applicant’s Response to Hearing Requests, p. 5.

not file its Certificate of Formation with the Secretary of State in order to incorporate as a Texas non-profit corporation until April 17, 2019, but an organization does not have to be incorporated in order to “exist” or participate in proceedings such as the one before the Commission now. Chapter 252 of the Texas Business Organizations Code expressly allows for “unincorporated nonprofit associations” to “institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding. . . .” Tex. Bus. Code § 252.007. Counsel retained by BNCW submitted comments on February 7, 2019, and represented in the comments that the comments were submitted on behalf of BNCW. Furthermore, no less than eighteen individual commenters represented in individual comments submitted on or before February 7, 2019 that they were, at the time of their comments, members of BNCW.²

The record demonstrates that BNCW was in existence as an unincorporated association at the time comments were timely filed, and was, and still is, authorized by state law and the plain language of 30 Tex. Admin. Code § 55.205 to participate in this administrative proceeding. Therefore, the Commission should determine that BNCW has satisfied the requirements of associational standing and grant its hearing request.

The Applicant also raises the assertion, without citation to any legal authority, that if BNCW is granted party status, there is no need to grant individual requestors party status if they are also BNCW members.³ There is no legal authority or TCEQ rule prohibiting individuals from being named affected persons simply because an organization is also granted associational standing. In fact, to deny individual hearing requests on that basis would be contrary to the

² See public comments filed by Adrah Lea Anzalotta, Joe and Margie Brockman, David Bullock, John Courtney, Tim and Tammy Hermann, John and Ann Lavin, Annette Lewis, James and Ingrid Lingle, Mary Lou Jenkins, Charles Melton, Lori Melton, Michelle Molina, John Nguyen, Stacie Nguyen, Kara Noble, Lizabeth Noble, Shannon Scott, and Brent and Lori Winkler.

³ Applicant’s Response to Hearing Request, pp. 13-16, and footnotes 15, 16, 19, 20, 21, 24, 28, 46, and 47.

Commission's ruling in similar, recent cases. For example, in the matter involving the City of Dripping Springs's application for a TPDES permit, the Commission granted the hearing requests of Protect Our Water and Save Barton Creek Association, as well as several individuals who were members of POW and/or SBCA.⁴ In the matter involving the City of Blanco's application for an amendment to its TPDES permit, the Commission granted the hearing requests of Protect Our Blanco, Save Our Springs Alliance, and Wimberley Valley Watershed Association, as well as several individuals who were members of POB, SOS, and WVWA.⁵ Thus, the Commission should refuse to deny any BNCW members' individual hearing requests on that basis.

A. Reply to the ED's, OPIC's, and Applicant's Responses to Greater Edward Aquifer Alliance's Hearing Request.

The Applicant, the ED, and OPIC all responded to the hearing request of the Greater Edwards Aquifer Alliance ("GEAA") with a similar objection—that GEAA failed, pursuant to associational standing requirements, to identify one or more members that would otherwise have standing to request a hearing in their own right.⁶ The ED and OPIC also determined that GEAA had otherwise met the remaining three associational standing requirements. BNCW is a member of GEAA who has otherwise demonstrated standing on its own. And many of BNCW's individual members are also members of GEAA, a complete list of whom GEAA included in its Reply filed on March 25, 2020. As OPIC notes, if GEAA provides an explanation of how it meets requirements of 30 Tex. Admin. Code § 55.205(b) in a timely filed reply, it would reconsider its recommendation.⁷ Because GEAA has timely identified by name and physical address, one or

⁴ See Interim Order, concerning the application by the City of Dripping Springs for new TPDES Permit No. WQ0014488003; TCEQ Docket No. 2017-1749-MWD.

⁵ See Interim Order, concerning the application by the City of Blanco for amendment of TPDES Permit No. WQ0010549002; TCEQ Docket No. 2019-1342-MWD.

⁶ Applicant's Response to Hearing Requests, p. 4; the ED's Response to Hearing Requests, p. 21; and OPIC's Response to Requests for Hearing and Requests for Reconsideration, pp. 10-11.

⁷ OPIC's Response to Requests for Hearing and Requests for Reconsideration, p. 11.

more members that would otherwise have standing to a request hearing, GEAA has met the associational standing requirements, and the Commission should grant its hearing request.

B. Reply to the ED’s and OPIC’s Responses to Individual Requestors’ Hearing Requests and Other Hearing Requests.

i. The hearing requests of Dr. Linzy Fitzsimons, Julie Goss, Richard Crow, Steven Harper and Nancy McKee, Joseph and Margie Brockman, and James and Ingrid Lingle (collectively “Individual Requestors”).

BNCW and Individual Requestors agree with the ED’s and OPIC’s analysis of the affected person requirements, and their recommendations that the Commission grant the hearing requests of Dr. Linzy Fitzsimons, Julie Goss, Richard Crow, Steven Harper and Nancy McKee, Joseph and Margie Brockman, and James and Ingrid Lingle (collectively, “Individual Requestors”). OPIC correctly notes that there are no specific distance limitations applicable to who may be considered an affected person for purposes of this application.⁸

ii. The hearing requests of Scott Barnes, Benno Lux, Jr., and James, Elizabeth, and Agnes Klar.

The ED’s Response has mapped three of the individual requestors’ property locations in error, and it would seem the ED’s recommendations denying these three hearing requests were based on those simple errors: (1) Scott Barnes; (2) Benno Lux, Jr.; and (3) James, Elizabeth “Betty,” and Agnes Klar.

Scott Barnes’s timely filed February 7, 2019 comments lists the property he owns at 1563, 1555, and 1571 East Ammann Road, and himself as the Managing Partner of Full Force Ranch Co LLC.⁹ The nearest of the three properties is less than 0.7 miles from the WWTP as shown on the Applicant’s map.

⁸ The Office of Public Interest Counsel’s Response to Requests for Hearing and Requests for Reconsideration, p. 12.

⁹ The Comal County Appraisal District lists the owner of these three properties as Full Force Ranch Co LLC.

Benno Lux, Jr.'s timely filed February 7, 2019 comments lists his physical property address as 1137 Obst Road. Although Obst Road is at the southern end of Mr. Lux's property, his northern property line borders Ammann Road for approximately 0.25 miles, and is directly across Ammann Road from the Applicant's property, such that the proposed discharge route flows from the Applicant's property across Ammann Road and onto Mr. Lux's property for approximately 0.5 miles.

James Klar, Elizabeth "Betty" Klar, and Agnes Klar timely submitted comments and hearing requests, received by the Chief Clerk on February 3, February 4, and February 6, 2019, respectively. In their comments and hearing requests, James and Elizabeth "Betty" Klar listed their address as 1410 E. Ammann Road, Bulverde, Texas 78163, while in Agnes Klar's comments and hearing request, although mailed with a return address elsewhere, she says expressly that she co-owns the property with James and Elizabeth "Betty" Klar. The Klar property is approximately 800 feet east of the Applicant's property, as measured directly east down Ammann Road. The discharge route leaves the Lux property and traverses the Klar property for nearly 0.80 miles.

Considering their comments and hearing requests demonstrate a personal justiciable interest and that these properties are in close proximity to the site of the proposed WWTP, using these correct locations, it would be consistent with the ED's and OPIC's other recommendations for the Commission to grant the hearing requests of Scott Barnes, Benno Lux, Jr., and Elizabeth "Betty", James and Agnes Klar.

C. Reply to the Applicant's Responses to Individual Requestors' Hearing Requests and Other Hearing Requests.

iii. The standing criteria are distinct from notice requirements.

The Applicant incorrectly attempts to conflate notice requirements with the standing test by asserting in several places that individual requests should be denied simply because they are

either not along the discharge route or are not adjacent to the WWTP.¹⁰ But the notice requirements for TPDES permits, found in 30 Tex. Admin. Code § 39.151(c) and in TCEQ's *Instructions for Completing Domestic Wastewater Permit Applications*, require notice be provided to the landowners of the properties surrounding the discharge point and on both sides of the discharge route for one full stream mile downstream of the discharge point; while the affected person criteria, found in a completely separate rule, 30 Tex. Admin. Code § 55.203, do not mention notice as being one of several factors the Commission shall consider. Therefore, the Commission should reject the Applicant's attempt to apply the notice rule in place of the standing criteria.

iv. Requestors adjacent to the site on which the proposed WWTP would be built are at elevated risk of harm.

Even after the Applicant cashed his chips, he attempts to play another hand by arguing that even those adjacent to the site of the proposed WWTP do not have standing. Again, the Applicant misstates the standing test. The standing test is not whether the Requestors will, in fact, be harmed by the WWTP and the consequences of its discharge but, rather, whether Requestors are at elevated risk, compared to members of the general public, of such harms. The Applicant ignores that those whose property is adjacent to the site of the WWTP are at elevated risk relative to the general public because they would share a property line with the site of the future wastewater treatment plant. The Applicant also ignores the risks associated not just with the plant, but with the discharge point and the discharge route, a point of major contention with neighbors. Therefore, the Commission should determine that Joe Brockman; Richard Crow; Julie Goss; Steven Harper;

¹⁰ Applicant's Response to Hearing Requests, p. 3 (arguing notice to adjacent landowners and those one mile downstream is critical to what distance restrictions or other limitations are imposed); *see also*, p. 9 (arguing that hearing requests of Adrah Lea Anzalotta, David Bullock, and Annette and Peter Lewis (Table 1) should be denied solely because they are not along the discharge route or adjacent to the WWTP); arguing the same, in part for those requestors on pp. 9-10 (Table 2), pp. 11-12 (Table 3), pp. 12-13 (Table 4), pp. 13-14 (Table 5), pp. 14-15 (Table 6), and pp. 16-18 (Table 8). (As a point of clarification, Applicant states that Adrah Lea Anzalotta's property is 0.8 miles from the WWTP, but this is based on only one parcel. Ms. Anzalotta owns a second contiguous property to the south making her property line approximately 0.68 miles from the WWTP as indicated on the Applicant's map.)

Ingrid and James Lingle have shown that due to their location adjacent to the WWTP site and in close proximity to the plant, discharge point, and discharge route, put their property at elevated risk of harm, as compared to members of the general public, and they are affected persons whose hearing requests should be granted.

v. TCEQ Rule 55.201 governing the content of hearing requests requires only substantial compliance.

The Commission should also reject the Applicant's attempt to apply overly rigid specifications to those individual hearing requests that otherwise *substantially* comply with the information requested under 30 Tex. Admin. Code § 55.201(d) (expressly reads that a "hearing request must *substantially* comply with the following. . ."). The information requested in Rule 55.201(d) is what would help the ED in identifying the individuals affected, determining whether their intent is to request a contested case hearing, determining whether the individual has a personal justiciable interest affected by the application, and identifying the specific disputed issues raised. The ED has been able to identify certain individuals with personal justiciable interests and who raised at least one disputed issue; thus, the hearing requests for the following individuals, all of which were recommended by the ED, substantially complied with Rule 55.201(d): Andy and Mary Danhof; Ann Lynette and John Levin; Kara and Lizbeth Noble; Robert and Laura Pegues; Shannon Scott; Brent and Lori Winkler; John Courtney; Patti Dawson; Scott Kutac; Steve and Veronica Hawk; Michelle Molina; Mary Lou Jenkins; Charles and Lori Melton; and Jon and Olive Stacie Nguyen.

To apply the requirements in the Applicant's manner, would be inconsistent with the Commission's prior practice and would be inconsistent with basic principles of law that afford all people, even those without legal representation, access to justice.

II. ISSUES TO REFER TO SOAH

A. Reply to ED and OPIC on Issues to Refer to SOAH.

BNCW and Individual Requestors agree with all of the issues the ED recommends referring to SOAH (Issues 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, and 12). We disagree with the ED's recommendation on the following issues and ask that the Commission refer the following issues to SOAH.

Issue 14. Whether the ED should have considered cumulative effects of multiple permits in the same geographical area. (RTC 6). The ED recommended against referring the issue to SOAH because, in the ED's opinion, it was not relevant or material to issuance of the draft permit. We disagree. The issue of cumulative effects of multiple permits is relevant to water quality impacts when multiple permits are pending at the same time, such that discharges into the same watershed are not otherwise modeled or considered by the Applicant or the TCEQ staff.

Issue 15. Whether the discharge would negatively impact vegetation. (RTC 7, 34). The ED recommended against referring the issue to SOAH because, in the ED's opinion, it was not raised by a person with a justiciable interest. It was raised by James and Ingrid Lingle, who expressed concern over the impact of the discharge on flora and fauna.¹¹

Issue 16. Whether the discharge of residual wastewater treatment facility process chemicals will negatively impact the stormwater system. (RTC 9). The ED recommended against referring the issue to SOAH because, in the ED's opinion, it is not relevant and material to the issuance of the draft permit. Where the stormwater system has been identified here to also be a part of the Applicant's proposed discharge route, this issue relates to whether the draft permit is protective of water quality; thus, the impact on the stormwater system is relevant and material.

¹¹ See Comments submitted by James and Ingrid Lingle (Feb. 7, 2019) (whose hearing request was recommended by the ED); *see also* Executive Director's Response to Public Comments, p. 18 (Sept. 24, 2019) (Comment 34).

Issue 20. Whether the discharge will contain pharmaceuticals and personal care products. (RTC 24). The ED recommends against referring the issue to SOAH because, in the ED's opinion, this issue is not relevant and material to the issuance of the draft permit. This issue relates to whether the draft permit is protective of water quality, human health, and the environment which is relevant and material.

Issue 21. Whether the discharge will create vector issues. (RTC 21). The ED recommended against referring the issue to SOAH because, in the ED's opinion, it was not raised by a person with a personal justiciable interest. BNCW raised the issue of pooling water and mosquito breeding in its written comments timely filed on February 7, 2019.

Issues 26. Whether the permit will cause an increase in lights and traffic in the area. (RTC 85). The ED recommended against referring the issue to SOAH because, in the ED's opinion, it is not relevant and material to the issuance of the draft permit. Lights, traffic, and noise are relevant issues because the TCEQ rules state that the WWTP should not be operated in a way that would create a nuisance.

Issue 29. Whether the permit, if issued, will cause or contribute to flooding, flow onto private property or a public right of way, or cause erosion. (RTCs 3, 4, 66, 82, 84, and 86). The ED recommends against referring the issue to SOAH because, in the ED's opinion, it is not relevant and material to issuance of the draft permit. However, flooding and erosion are relevant issues because the TCEQ rules state that the WWTP should not be operated in a way that would create a nuisance, nor should a facility be located in an area determined to be unsuitable or inappropriate.

B. Reply to the Applicant on Issues to Refer to SOAH.

With its Response, the Applicant attempts to resolve the issues, at least partially, on the merits. These issues are disputes of fact and all issues that are relevant and material merit a hearing.

III. CONCLUSION AND PRAYER

For the reasons stated above, Bulverde Neighborhoods for Clean Water and Individual Requestors continue to ask that the Commission grant their request for a contested case hearing, as well as those of the Greater Edwards Aquifer Alliance and the additional individuals listed above. Bulverde Neighborhoods for Clean Water and Individual Requestors request the Commission refer to SOAH the issues recommended by the ED and OPIC, as well as those issues BNCW includes in this reply. The Commission should reject the Applicant's request to improperly limit standing and preclude hearing the issues on the merits of the application.

Dated: March 30, 2020

Respectfully submitted,



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CERTIFICATE OF SERVICE

By my signature, below, I certify that on March 30, 2020, a true and correct copy of the Bulverde Neighborhood, et al.'s Reply to Responses to Hearing Requests was electronically filed with the Chief Clerk, and that copies were served upon the following Mailing List via deposit in the U.S. mail.

Lauren Ice

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