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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 8, 2020

Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: CHERRYVILLE GP, INC. / CHERRYVILLE #5, LTD.
TCEQ DOCKET NO. 2020-0308-MWD**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing and Requests for Reconsideration in the above-entitled matter.

Sincerely,


Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2020-0308-MWD

**IN THE MATTER OF THE
APPLICATION BY CHERRYVILLE
GP, INC./CHERRYVILLE #5,
LTD., FOR WATER QUALITY
PERMIT NO. WQ0015738001**

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
REQUESTS FOR HEARING AND REQUEST FOR RECONSIDERATION**

To the Honorable 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 Requests for Hearing and Request for Reconsideration in the above-referenced matter and respectfully shows the following.

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 the hearing requests of Ben O Corp, Michael and Nancy Ohlendorf, the San Marcos River Foundation (SMRF), and the Texas Rivers Protection Association (TRPA). Each of these requestors are affected persons based on their mission statement where applicable, their stated concerns, and the location of their business, residence, or the residence of their identified members within a mile of the proposed facility and outfall point. OPIC further recommends the Commission refer the issues listed in Section III.H. for a contested case hearing at the State Office of Administrative Hearings ("SOAH") with a maximum duration of 180 days.

Lastly, OPIC recommends the Commission deny all other hearing requests and the pending request for reconsideration. If a timely reply is filed by Tri-Community Water Supply Corporation, OPIC may reconsider its recommendation regarding this requestor's affected person status.

B. Description of Facility

Cherryville GP Inc. / Cherryville #5, Ltd. has applied to the TCEQ for a new permit, proposed TPDES Permit No. WQ0015738001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.038 million gallons per day (MGD) in the Interim I phase, a daily average flow not to exceed 0.072 MGD in the Interim II phase, and a daily average flow not to exceed 0.16 MGD in the Final phase. The proposed wastewater treatment facility will serve the proposed Cherryville Municipal Utility District (MUD) service area, which will consist primarily of family residential subdivisions with commercial developments.

If the draft permit is issued, the proposed Cherryville Wastewater Treatment Facility (Facility) will be a membrane bioreactor (MBR) system. Treatment units in the Interim I phase will include two fine screens, an equalization basin, two MBR basins, a sludge digester, and three ultraviolet light (UV) disinfection units. Treatment units in the Interim II phase will include two fine screens, an anoxic basin, three MBR basins, a sludge digester, and four UV disinfection units. Treatment units in the Final phase will include two fine screens, an anoxic basin, three MBR basins, sludge digester, and five UV disinfection units. The Facility has not been constructed.

The Facility site will be located approximately 600 feet south of the intersection of Dickerson Road and State highway 80, east of State highway 80, in Caldwell County, Texas 78655. If the draft permit is issued, the treated effluent will be discharged to

Dickerson Creek, thence to Lower San Marcos River in Segment No. 1808 of the Guadalupe River Basin. The unclassified receiving water use is limited aquatic life use for Dickerson Creek. The designated uses for Segment No. 1808 are primary contact recreation, public water supply and high aquatic life use.

The effluent limitations in the Interim I, Interim II, and Final phases of the draft permit, at Outfall 001, based on a 30-day average, are 10 mg/l five-day carbonaceous biochemical oxygen demand (CBOD₅), 15 mg/l total suspended solids (TSS), 3.0 mg/l ammonia nitrogen (NH₃-N), 126 colony forming units (CFU) or most probable number (MPN) of *Escherichia coli* per 100 ml, and 4.0 mg/l minimum dissolved oxygen (DO). The draft permit requires permittee to utilize an UV system for disinfection purposes and not exceed a daily average *E. coli* limit of 126 CFU or MPN per 100 ml.

The draft permit includes a requirement for the permittee to comply with the requirements of 30 TAC §309.13(a) through (d) and, by ownership of the required buffer zone area, the requirements of 30 TAC §309.13(e). The proposed draft permit includes Sludge Provisions according to the requirements of 30 TAC Chapter 312, Sludge Use, Disposal, and Transportation. Sludge generated from the facility would be hauled by a registered transporter and disposed of at a TCEQ-permitted landfill, Austin Wastewater Processing Facility, Permit No. 2384, in Travis County. The proposed draft permit also authorizes the disposal of sludge at a TCEQ-authorized land application site, co-disposal landfill, wastewater treatment facility, or facility that further processes sludge.

C. Procedural Background

The Executive Director (ED) received the permit application on November 5, 2018 and declared it administratively complete on December 27, 2018. The Notice of Receipt of Application and Intent to Obtain Permit (NORI) was published on January 24, 2019 in the *Lockhart Post-Register*, Caldwell County, Texas. The Combined Notice of Public Meeting and the Notice of Application and Preliminary Decision (NAPD) was published in the *Lockhart Post-Register* on June 13, 2019, Caldwell County, Texas. The comment period for this application ended on July 16, 2019 at the conclusion of the public meeting which was held at Prairie Lea Independent School District Auditorium in Prairie Lea, Texas. The ED's decision and response to comments (RTC) was mailed on January 13, 2020. The hearing request period ended February 12, 2020.

A timely request for reconsideration was filed by Cristen Andrews. Timely hearing requests were filed by Cristen Andrews, David Baker (Wimberley Valley Watershed Association), Dr. James Keith Baker, Donald Barkmeyer, Janet Barkmeyer, Janie Barrientos, Randy Bunker, Melanie Caldwell, Dana Coble, Concerned Citizen (illegible name), Cheri & Mark Courtney, Cheri Courtney, Brian Davila, Simona Davila, Kelly Davis (on behalf of Michael and Nancy Ohlendorf, the San Marcos River Foundation, and the Texas Rivers Protection Association), Kori Dunaway, Lacey Ellis, Lillie Gifford, Nora Gonzales, Ynocencio Gonzales, Madonna Gorner, Tom Goynes (President, Texas Rivers Protection Association), Robert Grantham (President, Tri-Community Water Supply Corporation), Miguel Guerra, The Honorable Hoppy Haden, Ed Hensley, Linda Hinkle, Elaine Irish, Marie Mackey, Robert Mackey, Keith Maddox, Monica Maddox, Delane & Wayne Mayfield, Jack Mercer, Larry Milka, Tony Miller, Jim & Layne Ober, Michael Ohlendorf (Ben O Corp), Annalisa Peace (Greater Edwards

Aquifer Alliance), Rodney Purswell, Dale Ryder, Rick Salisbury, Rachel Sanborn, Barbara Shelton, Sharan Smith, Pat Gunn Spencer, Holly & Terry Taylor, Randall Terrell, Billy Turner, Amy & Robert Vasquez, Mike & Suzi Vordenbaum, Dianne Wassenich (San Marcos River Foundation), Linda Webb-Mercer, Elizabeth & Joseph Weeks, and Annie Williams.

II. REQUEST FOR RECONSIDERATION

A. Applicable Law

Any person may file a request for reconsideration of the ED's decision under 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.

B. Discussion

Cristen Andrews filed a timely request for reconsideration raising issues concerning potential flooding, negative impacts on business revenue, potential impacts on food and farming operations, and potential damage to the local ecosystem, including aquatic life and wildlife. Although OPIC is sympathetic to some of the issues raised in the request, without further development of the record, OPIC cannot make a recommendation at this time as to whether the draft permit should be issued or denied. As discussed below, OPIC is recommending that the application be referred to hearing so the record can be developed on specific relevant and material issues raised by affected persons.

III. Requests for Hearing

A. Applicable Law

The application was filed after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015). Under Title 30, 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 purposes 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).

As provided by 30 TAC § 55.205(a), a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

For applications filed on or after September 1, 2015, § 55.205(b) states that 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 ED's RTC, and that are relevant and material to the Commission's decision on the application. Under § 55.211(c)(2)(B)–(D), the hearing

request, to be granted, must also be timely filed with the Chief Clerk, pursuant to a right to hearing authorized by law, and comply with the requirements of § 55.201(d).

B. Determination of Affected Person Status

1. The Honorable Hoppy Haden

The Commission received a hearing request from the Honorable Hoppy Haden, Caldwell County Judge, filed on behalf of the Caldwell County Commissioners Court and the citizens of Caldwell County. OPIC notes that, pursuant to Texas Health and Safety Code § 121.003(a), the commissioners court of a county may enforce any law that is reasonably necessary to protect the public health. However, this request for hearing is general and states no specific interest or concern that could be adversely affected by the proposed permit. Based on the failure to state interests or concerns as required by 30 TAC § 55.201(d)(2), OPIC must respectfully recommend the Commission deny this request.

2. Individual Requestors Residing Over a Mile from the Outfall and Facility

Timely individual hearing requests were submitted by Cristen Andrews, Dr. James Keith Baker, Melanie Caldwell, Cheri Courtney, Lacey Ellis, Miguel Guerra, Jim & Layne Ober, Dale Ryder, Rachel Sanborn, Randall Terrell, and Robert Vasquez. None of these requestors were listed in the adjacent landowner's map included in the application. Additionally, the ED has produced a map in these proceedings demonstrating that each of these requestors resides well over a mile from the Facility. Given the distance between these requestors and the Facility and the proposed

discharge route, OPIC cannot find that a reasonable relationship exists between the interests claimed in these requests and the activity to be regulated under the proposed permit.¹ Additionally, OPIC cannot find that there would be a likely impact from the regulated activity on the health, safety, or use of property of these requestors given their relative distance from the proposed activity.² Therefore, OPIC recommends finding that these requestors are not affected persons and denying each of these hearing requests.

3. Wimberley Valley Watershed Association

The Office of the Chief Clerk received timely-filed comments and a hearing request from David Baker on behalf of the Wimberley Valley Watershed Association (WVWA). The request states that WVWA is a 501(c)(3) nonprofit organization that advocates for watershed health and protection across the Hill Country.

WVWA raises concerns relating to more ecologically sustainable alternatives, potential negative impacts on groundwater and local water wells, potential negative impacts on surface water, aquatic life, and recreational use of Dickerson Creek and the San Marcos River. These interests are protected under the law under which the application will be considered. Additionally, the interests WVWA seeks to protect are germane to the organization's purpose as described in its request.³

However, WVWA fails to identify by name and physical address, one or more members of the group or association that would otherwise have standing to request a

¹ 30 TAC § 203(a)(3).

² 30 TAC § 203(a)(4).

³ 30 TAC § 55.205(b)(3).

hearing in their own right.⁴ Without this information, OPIC cannot determine that WVWA is an affected person and must recommend denial of this request.

4. Greater Edwards Aquifer Alliance

The Office of the Chief Clerk received timely filed comments and a hearing request from Annalisa Peace on behalf of the Greater Edwards Aquifer Alliance (GEAA). The request states that GEAA is a 501(c)(3) nonprofit organization that promotes effective broad-based advocacy for protection and preservation of the Edwards Aquifer, its springs, watersheds, and the Texas Hill Country that sustains it.

GEAA raises concerns relating to potential adverse impacts to surface water, groundwater, the water supply, crops, aquatic life, and recreational use of Dickerson Creek and the San Marcos River. These interests are protected under the law under which the application will be considered. Additionally, the interests GEAA seeks to protect are germane to the organization's purpose as described in its request.⁵

However, GEAA fails to identify 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.⁶ Although potential impacts to the water wells of Tri-Community Water Supply Corporation are discussed within the request, this WSC is not identified as a member of GEAA, nor listed as a member organization on GEAA's letterhead. Without identification of a member who would have standing to request a hearing in their own right, OPIC cannot determine that GEAA is an affected person and must recommend that their hearing request be denied.

⁴ 30 TAC § 55.205(b)(2).

⁵ 30 TAC § 55.205(b)(3).

⁶ 30 TAC § 55.205(b)(2).

5. Tri-Community Water Supply Corporation

The Office of the Chief Clerk received a timely-filed hearing request from Robert Grantham on behalf of Tri-Community Water Supply Corporation (Tr-Community). The request raises the issues of potential negative impacts on surface water quality and increased costs of potable water treatment due to the proposed discharge. While the request indicates that Tri-Community owns wells that could potentially be impacted, the request does not specifically show or describe where these wells are located in relation to the outfall or Facility. Tri-Community is not located on the adjacent landowner's map included in the application and the ED's mapping of its return address⁷, presumably the WSC's office, shows a location approximately 4 miles away from the outfall. The ED's map does not show the location of the requestor's wells; as stated above, Tri-Community's request did not provide this information. While GEAA's request did discuss the location of Tri-Community's wells, OPIC cannot rely solely on information from another requestor to make a determination that Tri-Community is an affected person. Without more information provided directly from Tri-Community regarding the location of its water wells, OPIC cannot find that a reasonable relationship exists between the interests claimed in the request and the activity to be regulated under the proposed permit.⁸ For that reason, at this time, OPIC must recommend denial of the request.

However, OPIC notes that Tri-Community may file and serve a written reply on or before June 22, 2020 in accordance with the instructions provided with the Chief

⁷ 92 Ward Street, Fentress, Texas 78622

⁸ 30 TAC § 203(a)(3).

Clerk's agenda setting letter dated May 27, 2020. If Tri-Community files a timely reply with more specific information about the location of its water wells in relation to activities regulated under the draft permit, OPIC's position may change.

6. Petitioners

Tri-Community's hearing request included a petition signed by a group of "concerned citizens." The heading of the petition states that the petitioners are adding their names to the list of citizens requesting a hearing. This group consists of James K. Baker, Donald Barkmeyer, Janet Barkmeyer, Janie Barrientos, Randy Bunker, Melanie Caldwell, Dana Coble, Concerned Citizen (illegible name), Mark & Cheri Courtney, Brian Davila, Simona Davila, Kori Dunaway, Lillie Gifford, Nora Gonzales, Ynocencio Gonzalez, Madonna Gorner, Ed Hensley, Linda Hinkle, Elaine Irish, Marie Mackey, Robert Mackey, Keith Maddox, Monica Maddox, Wayne & Delane Mayfield, Jack Mercer, Larry Milka, Tony Miller, Rodney Purswell, Rick Salisbury, Barbara Shelton, Sharan Smith, Pat Gunn Spencer, Holly & Terry Taylor, Billy Turner, Robert & Amy Vasquez, Mike & Suzi Vordenbaum, Linda Webb-Mercer, Elizabeth & Joseph Weeks, and Annie Williams.

It is unclear whether the intent of the petition is to relate petitioners' interests with those of Tr-Community; however, for the reasons already cited above, OPIC finds that Tri-Community failed to establish affected person status. In addition, Tri-Community's request provides no other basis for finding the petitioners are affected persons. Furthermore, the petition itself states no information about the specific concerns and interests of any of the petitioners that would allow OPIC to find they are

affected persons. For these reasons, OPIC recommends denial of the petitioners' hearing request.

7. Michael Ohlendorf and Ben O Corp

The Commission received a hearing request from Michael Ohlendorf on behalf of Ben O Corp. The request raises concerns related to the accuracy of the discharge route indicated in the application, potential adverse impacts on the use and enjoyment of property, and potential negative impacts on recreational use of property and Dickerson Creek. These interests are protected under the law under which the application will be considered.

The Adjacent & Downstream Landowners Map—Attachment C in Cherryville MUD's application—indicates that Ben O Corp is an adjacent landowner, identified as Property Nos. 7 and 8. These properties are within a mile of the proposed Facility and outfall. Additionally, the ED has produced a map in these proceedings confirming the property of Ben O Corp is located in close proximity to the proposed Facility and outfall, and the discharge route runs directly through the property. Given the proximity of the property to the Facility, outfall, and discharge route, OPIC finds that a reasonable relationship exists between the interests claimed and the activity regulated. Therefore, OPIC finds that Michael Ohlendorf and Ben O Corp are affected persons in accordance with 30 TAC § 55.203 and recommends the hearing request be granted.

8. Michael and Nancy Ohlendorf, San Marcos River Foundation, and Texas Rivers Protection Association

The Office of the Chief Clerk received a timely filed hearing request from Kelly Davis on behalf of Michael and Nancy Ohlendorf, the San Marcos River Foundation

(SMRF) and the Texas Rivers Protection Association (TRPA). As discussed in Section III.B.7., Michael Ohlendorf filed a separate hearing request on behalf of Ben O Corp. Separate hearing requests were also filed by SMRF (through its Executive Director Dianne Wassenich), and by TRPA (through its President Tom Goynes).

The requestors raise concerns relating to compliance with the Texas Surface Water Quality Standards, including whether the proposed discharge will cause algae blooms and be protective of the downstream landowners' use and enjoyment of property; whether a Tier-2 Anti-degradation analysis should have been conducted to evaluate water quality impacts on the San Marcos River downstream of the discharge; whether the proposed discharge will impair existing uses of Dickerson Creek and the San Marcos River, including source of groundwater recharge supplying public water supply and private wells, use by aquatic life, and use for primary contact recreation; whether the permit should include more stringent effluent limits; nuisance odors; adverse impacts to water quality due to spills; whether the application properly describes the discharge route; whether there was a sufficient demonstration of need for the volume requested in the permit; whether the applicant complied with all notice requirements; and whether the permit should contain provisions to limit discharge and require reuse of wastewater. These interests are protected under the law under which the application will be considered.

According to the request, Michael Ohlendorf and his family own and operate a family farm located just south east of the intersection of the San Marcos Highway (TX-80) and FM 1977. The Ohlendorf property is identified as Property Nos. 7 and 8 on the Adjacent & Downstream Landowners Map contained as Attachment C in Cherryville MUD's application. The proposed discharge route on Dickerson Creek flows through

the Ohlendorf property less than one mile from the proposed discharge point. The Ohlendorf property encompasses approximately 265 acres of pastureland, cropland, native open space, and a homesite. Additionally, the ED has produced a map in these proceedings confirming the Ohlendorf property lies well within a mile of the proposed facility and outfall, and the discharge route runs directly through the property. Given the proximity of the property to the Applicant's facility, outfall, and discharge route, OPIC finds that a reasonable relationship exists between the interests expressed above and the activity regulated. Therefore, OPIC finds that the Ohlendorfs are affected persons in accordance with 30 TAC § 55.203.

The request states that SMRF is a non-profit organization dedicated to protecting public access and preserving the flow, beauty, and purity of the San Marcos River since 1985. OPIC finds that the interests SMRF seeks to protect, listed above, are germane to the organization's purpose as described in its request.⁹

SMRF has two members identified as individuals who have standing to request a hearing in their own right. Michael and Nancy Ohlendorf's affected person status has been analyzed above; their location on the Adjacent & Downstream Landowners Map and on the ED's map and their stated concerns demonstrate that they are affected persons.

The second person identified by SMRF as a member with standing to request a hearing in their own right is Kevin Holmes. Mr. Holmes's property is identified as Property No. 1 on the Adjacent & Downstream Landowner's Map contained as Attachment C in Cherryville MUD's application. Mr. Holmes's property is directly

⁹ 30 TAC § 55.205(b)(3).

adjacent to the site for the proposed wastewater treatment plant, just west across TX-80. The ED's map confirms that Mr. Holmes's property is well within a mile of the proposed Facility and outfall. Given the proximity of the property to the Facility, outfall, and discharge route, OPIC finds that a reasonable relationship exists between the interests expressed above and the activity regulated. Therefore, OPIC finds that Kevin Holmes is an affected person in accordance with 30 TAC § 55.203 with standing to request a hearing in his own right.

The request states that TRPA is a non-profit organization whose mission is to protect the flow, water quality, and natural beauty of the rivers of Texas. TRPA sponsors river clean-ups, engages in public outreach and education to its members and the public concerning preservation of water quality in Texas rivers and streams, and participates in wastewater permitting cases. OPIC finds that the interests TPRA seeks to protect, listed above, are germane to the organization's purpose as described in its request.¹⁰

TRPA has identified Michael and Nancy Ohlendorf as individuals who have standing to request a hearing in their own right. The Ohlendorfs' affected person status has been analyzed above; their location on the Adjacent & Downstream Landowners Map and on the ED's map and their stated concerns demonstrate that they are affected persons.

For these reasons, OPIC recommends that the Commission find that Michael and Nancy Ohlendorf, the San Marcos River Foundation (SMRF) and the Texas Rivers Protection Association (TRPA) are affected persons and grant their hearing requests.

¹⁰ 30 TAC § 55.205(b)(3).

C. Issues Raised by Affected Persons

The following issues have been raised by the affected persons:

1. Whether the draft permit contains provisions sufficient to ensure compliance with the Texas Surface Water Quality Standards, including:
 - a. Whether the proposed discharge will cause algae blooms. (SMRF, TRPA)
 - b. Whether the proposed discharge will protect adjacent and downstream landowners' use and enjoyment of their property. (Ben O Corp, Ohlendorfs, SMRF, TRPA)
2. Whether the ED should have conducted a Tier-2 Anti-degradation analysis to evaluate water quality impacts on the San Marcos River downstream of the discharge. (Ohlendorfs, SMRF, TRPA)
3. Whether the proposed discharge, as authorized by the proposed permit, will impair existing uses of Dickerson Creek and the San Marcos River, including:
 - a. Source of groundwater recharge supplying public water supply and private wells. (SMRF, TRPA)
 - b. Use by aquatic life. (Ben O Corp, SMRF, TRPA)
 - c. Use for primary contact recreation. (Ben O Corp, Ohlendorfs, SMRF, TRPA)
4. Whether the draft permit should include more stringent effluent requirements. (Ohlendorfs, SMRF, TRPA)
5. Whether the draft permit contains sufficient provisions to prevent nuisance odor from operation of the proposed wastewater treatment plant and discharge. (SMRF)
6. Whether the draft permit contains sufficient provisions to prevent adverse impacts to water quality from contamination due to spills. (SMRF, TRPA)
7. Whether the application properly describes the discharge route. (Ben O Corp, Ohlendorfs, TRPA)
8. Whether the applicant sufficiently demonstrated need for the volume requested in the permit. (TRPA)
9. Whether the applicant complied with all notice requirements. (TRPA)
10. Whether the permit should contain provisions to limit discharge and require reuse of wastewater. (Ohlendorfs, SMRF, TRPA)

D. Issues of Fact

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 issue of whether the permit should contain provisions to limit discharge and require reuse of wastewater is an issue of policy rather than fact. Before the applicant may obtain authorization for the use of reclaimed water, it must have a TPDES permit in accordance with 30 TAC § 210.5(a). Use of reclaimed water is permissible only if the use occurs after the wastewater has been treated in accordance with the producer's wastewater permit and the permit provides for an alternative means of disposal during times when there is no demand for the use of the reclaimed water. 30 TAC § 210.1. Therefore, the issue of whether the applicant should be required to reuse its wastewater is not appropriate for referral to SOAH.

E. Issues Were Raised by the Affected Persons During the Comment Period

All of the issues raised by the affected persons were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

F. Disputed Issues

There is no agreement between the affected persons and the ED on the issues raised in the hearing request.

G. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order 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 this permit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–251 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material . . . it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

The Commission is responsible for the protection of water quality under TWC Chapter 26 and 30 TAC Chapters 307 and 309. The Texas Surface Water Quality Standards (“Standards”) in 30 TAC 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. Therefore, the concerns raised by the affected persons relating to compliance with the Standards, including algae blooms and use and enjoyment of property, the appropriateness of the anti-degradation analysis, potential impairment of existing uses (including impacts to potable water, aquatic life, and contact recreation), sufficient safety measures to prevent accidental spills and discharges, and whether the draft permit contains protective effluent limits, are all relevant and material considerations in the Commission's decision on this application.

Affected persons also raise the issue of potential odor nuisance. TCEQ regulates nuisance odors under § 309.13(e), which requires an applicant to abate nuisance odors. Furthermore, the wastewater permit does not allow the permit holder to create or maintain a nuisance that interferes with a landowner's use and enjoyment of his or her property. Therefore, this issue is relevant and material to the Commission's decision on the application.

The affected persons raise the issue of whether the applicant sufficiently demonstrated need for the volume requested in the permit. The Texas Water Code (TWC) § 26.0282 provides that: in considering the issuance, amendment, or renewal of a permit to discharge waste, the Commission may deny or alter the terms and conditions of the proposed permit, amendment, or renewal based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed area wide or regional waste collection, treatment, and disposal systems not designated as area wide or regional disposal systems by Commission Order." Therefore, this issue is relevant and material to the Commission's decision on the application.

The affected persons raised the issue of the proper identification and functioning of the discharge route. The affected persons are concerned that the discharge route as represented in the application does not reflect the current condition of Dickerson Creek following changes made in the channel by Texas Department of Transportation. They are concerned that the operation of the proposed facility will increase the flow of the creek, allow contaminated water to flow onto their property, or otherwise cause flooding along the discharge route and prevent them from accessing their property. Flooding concerns are not within TCEQ's jurisdiction as it relates to the permitting process, unless there is a potential impact to water quality. *See* 30 TAC § 309.13(a) and TWC §

26.082(a). While general concerns about flooding are not within the Commission's jurisdiction to address, proper functioning of a discharge route as an operational feature of a wastewater treatment plant may be addressed under 30 TAC § 309.12. For these reasons, OPIC finds that this issue is relevant and material to the Commission's decision on this application.

Finally, the affected persons question whether notice was properly provided, including whether the permit application, ED's preliminary decision, and draft permit were available for viewing and copying at the Caldwell County Courthouse in Lockhart Texas in accordance with 30 TAC § 309.45(g). This issue is relevant and material to the Commission's decision on this application and appropriate for referral to SOAH.

H. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether the draft permit contains provisions sufficient to ensure compliance with the Texas Surface Water Quality Standards, including:
 - a. Whether the proposed discharge will cause algae blooms.
 - b. Whether the proposed discharge will protect adjacent and downstream landowners' use and enjoyment of their property.
2. Whether the ED should have conducted a Tier-2 Anti-degradation analysis to evaluate water quality impacts on the San Marcos River downstream of the discharge.
3. Whether the proposed discharge, as authorized by the proposed permit, will impair existing uses of Dickerson Creek and the San Marcos River, including:
 - a. Source of groundwater recharge supplying public water supply and private wells.
 - b. Use by aquatic life.
 - c. Use for primary contact recreation.
4. Whether the draft permit should include more stringent effluent requirements.

5. Whether the draft permit contains sufficient provisions to prevent nuisance odor from operation of the proposed wastewater treatment plant and discharge.
6. Whether the draft permit contains sufficient provisions to prevent adverse impacts to water quality from contamination due to spills.
7. Whether the application properly describes the discharge route.
8. Whether the applicant sufficiently demonstrated need for the volume requested in the permit.
9. Whether the applicant complied with all notice requirements.

I. Maximum Expected Duration of Hearing

Commission rule 30 TAC § 50.115(d) requires any Commission order referring a case to hearing to specify the maximum expected duration of the hearing by stating the 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 recommends that the duration of hearing on this application be stated in the Commission's order as 180 days from the first date of the preliminary hearing until the proposal for decision is issued.


IV. Conclusion

OPIC recommends that the Commission grant the hearing requests of Ben O Corp, Michael and Nancy Ohlendorf, SMRF, and TRPA. OPIC also recommends denying all remaining hearing requests and the pending request for reconsideration. If a

timely reply is filed by Tri-Community Water Supply Corporation, OPIC may reconsider its recommendation regarding this requestor's affected person status. Finally, OPIC recommends referring the application to SOAH for an evidentiary hearing on the issues in Section III. H. for a hearing duration of 180 days.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2020, the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing and Request for Reconsideration was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.


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