

TCEQ DOCKET NO. 2015-0035-MWD

**APPLICATION BY PULTE HOMES
OF TEXAS, L.P. FOR TPDES PERMIT
NO. WQ0015222001**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

APPLICANT'S RESPONSE TO HEARING REQUESTS

TO THE HONORABLE COMMISSIONERS:

COMES NOW, Pulte Homes of Texas, L.P. ("Pulte" or "Applicant") and files this response to the hearing requests regarding the application for Texas Pollution Discharge Elimination System ("TPDES") Permit No. WQ0015222001, and respectfully shows the following:

I. INTRODUCTION

A. Facility Description

Pulte has applied to the TCEQ for a new TPDES permit to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 900,000 gallons per day in the final phase of the Pulte Wastewater Treatment Facility ("the Facility"). The Facility would serve up to 3,000 residential connections, and would be located approximately 0.5 miles north of the intersection of Stockdick School Road and Porter Road and 0.1 mile west of Porter Road in Harris County, Texas 77493. The treated effluent would be discharged to South Mayde Creek, then to Buffalo Bayou, then to Buffalo Bayou Above Tidal in Segment No. 1014 of the San Jacinto River Basin. The unclassified receiving water use is minimal aquatic life use for South Mayde Creek. The designated uses for Segment No. 1014 are limited aquatic life use and primary contact recreation.

B. Procedural Background

The application in this case was submitted to TCEQ on February 11, 2014, and declared administratively complete on April 4, 2014. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published in Spanish on April 13, 2014, in *El Perico* and in English on April 17, 2014, in *The Houston Chronicle*. The Executive Director's ("ED's") Staff completed the technical review of the application on June 3, 2014, and prepared a draft permit. The Notice of Application and Preliminary Decision for a Water Quality Permit was published in English on August 22, 2014, in *The Houston Chronicle* and in Spanish on August 24, 2014 in *El Perico*. The public comment period ended on September 23, 2014. After the public comment period, the ED issued a Response to Comments ("RTC") on December 2, 2014. The deadline for requesting a contested case hearing or reconsideration of the ED's decision was January 2, 2015.

II. LEGAL STANDARDS GOVERNING HEARING REQUESTS

Because the application was administratively complete on or after September 1, 1999, it is subject to the procedural requirements adopted pursuant to House Bill 801, 76th Legislature, 1999, and TCEQ rules at 30 Tex. Admin. Code ("TAC") Chapter 55, Subchapter G, §§ 55.200-55.211.

Commission rules provide that a request for a contested case hearing shall be granted if the request is made by an "affected person" and it:

(A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the Commission's decision on the application;

(B) is timely filed with the chief clerk;

(C) is pursuant to a right to hearing authorized by law; and

(D) complies with the requirements of § 55.201¹ of this title (relating to Requests for Reconsideration or Contested Case Hearing).

30 TAC § 55.211(c)(2).

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.” 30 TAC § 55.203(a).

Commission rules also provide relevant factors that are to be considered in determining affected person status, including, but not limited to, the following:

- (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 the property of the person; and
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person.

30 TAC § 55.203(c).

¹ Section 55.201 specifies the requirements for reconsideration or contested case hearing. A request for a contested case hearing by an affected person must be in writing, filed with the Chief Clerk no later than 30 days after the Chief Clerk mails (or otherwise transmits) the Executive Director’s decision and response to comments and may not be based on an issue that was raised solely in a public comment withdrawn by the commenter in writing with the Chief Clerk prior to the filing of the ED’s Response to Comments. The 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. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group; (2) identify the person’s 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; and (4) list all relevant and material disputed issues of fact that were raised in the public comment period and that are the basis of the hearing request. 30 TAC § 55.201(c) & (d).

Commission rules specify that a response to a request for hearing must specifically address the following:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

Further, according to Commission rules, a group or association may request a contested case hearing only if the group or association meets all 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 rights 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.

30 TAC § 55.205(a).

III. ANALYSIS OF HEARING REQUESTORS' STATUS AS AFFECTED PERSONS

The timely hearing requestors on this application include James Riley, Hanelore ("Jennifer") Domahidi, Brenda Thompson, Donnisha and Christopher Spicer, Phillip Morris, Tyanne Shacklett, and the Mayde Creek Estates Owners Association. With respect to Mr. Riley,

Ms. Domahidi, Mr. Morris, Ms. Shacklett, and Ms. Thompson, Applicant objects to determination of these individuals to be affected persons. As the diagram in Attachment 1 notes, none of these individuals own property along South Mayde Creek, which is the proposed discharge route in this case. In addition, none of these individuals own property that border or is adjacent to the proposed Facility. In fact, their properties range in distance from approximately 479 feet to 1,971 feet away from the buffer zone limit for the proposed Facility. These individuals' interests are no different from that of the general public and, therefore, they should not be considered affected persons.

With respect to the Mayde Creek Estates Owners Association (“MCEOA” or “the Association”), its hearing requests fail to identify one or more members that would otherwise have standing to request a hearing in their own right. Further, the Association’s request failed to describe how the rights the Association seeks to protect are germane to the organization’s purpose. Consequently, MCEOA should not be determined to be an affected person with respect to this case.

With respect to the Spicers, Applicant takes no position as to whether they should be deemed affected persons.

IV. POTENTIAL ISSUES FOR REFERRAL

To the extent the Commission determines that one or more hearing requestors are affected persons, the Commission must determine which issues should be referred to the State Office of Administrative Hearings (“SOAH”) for consideration in the contested case hearing. *See* Tex. Water Code § 5.556. Section 5.556 also requires the Commission to limit the number and scope of issues that are referred to SOAH for hearing. *Id.*

Most of the issues that were raised in this case were raised by multiple hearing requests and have been addressed by the ED's RTC, dated December 2, 2014.² The following analysis only considers issues raised by the Spicers and MCEOA, as Applicant believes these are the only entities that could reasonably be determined to be affected persons for this case. Many, if not all, of these issues were addressed in the ED's RTC and this analysis will attempt to track the RTC's review.

1. Potential Flooding (ED's RTC No. 1)

Both the Spicers and the Association (and most of the other hearing requestors) raise concerns that the proposed discharge would potentially exacerbate flooding problems that the area has experienced. As the ED's Response noted, the TCEQ does not have jurisdiction to address flooding issues as part of the wastewater permitting process. The permitting process is limited to controlling the discharge of pollutants into waters of the state and protecting the water quality of the state's rivers, lakes, and coastal waters. Consequently, this issue is not a relevant and material issue for this case and should not be considered for referral to SOAH.

According to the application, the proposed wastewater treatment plant site is located above the 100-year flood plain. Further, the draft permit includes Other Requirement Number 5, which requires Pulte to provide protection for the wastewater treatment facility from a 100-year flood. Moreover, to respond to concerns expressed by the requestors, the ED provided a comparison to a real-life example to show how the proposed discharge could impact water levels in the creek. The proposed final-phase permitted flow, 900,000 gallons per day, is similar to twenty-three standard water hoses, 5/8 inch x 50 feet, operating at the same time at 60 pounds per square inch. This would be the equivalent of 1.4 cubic feet per second. To the extent this

² Please note that several hearing requests – three by Christopher Spicer received on February 25, 2015, March 23 and 25, 2015, and another by Brenda Thompson received on January 6, 2015 – are not timely, since they were received after the January 2, 2015 deadline.

issue is referred to SOAH, Pulte respectfully requests that it be described as follows: “Whether the application complies with TCEQ regulations at 30 TAC § 309.13(a) regarding facility protection from a 100-year flood event.”

2. Effects on Creek Bed During Dry Months

In MCEOA’s hearing request, dated May 7, 2014, they indicated “We want to bring some matters to the attention of the Pulte Homes engineers, as well as TCEQ, so that they can be taken into consideration when designing the Facility. Our main concerns are as follows:

...

- **Effects on creek bed during dry months** – We are at the northernmost part of Mayde Creek and during summer months it is usually dry. During these times, any water volume in the creek would be 100% treated wastewater. What sort of environmental impact would this have?

These statements by the Association do not identify a relevant and material disputed issue of fact for hearing. It is simply an inquiry, to which the ED responded in his RTC. To the extent this issue is referred to SOAH, Pulte respectfully requests that it be described as follows: “Whether the discharge authorized in the draft permit will comply with applicable Texas Surface Water Quality Standards.”

3. Potential Contamination of South Mayde Creek (ED’s RTC No. 3)

Ms. Spicer raised concerns regarding “contamination of water for residents east of the proposed sewage drain outlet” in her July 6, 2014 hearing request, which referred back to her comment, dated May 12, 2014. To the extent that Ms. Spicer is deemed an affected person and this issue should be referred to SOAH, Pulte respectfully recommends that the appropriate issue referral be “Whether the application and draft permit assure that the Facility will be designed and operated such that the effluent is properly disinfected prior to discharge.”

4. Assessment of Municipal Utility District (“MUD”) Taxes (ED’s RTC No. 4)

MCEOA expressed concern that it would have to pay MUD taxes without receiving service or value. This is not a relevant or material issue for issuance of a TPDES permit. Nevertheless, as the ED’s Response notes, a MUD’s authority to assess taxes is limited to property located within its boundary and the Mayde Creek Estates are not located within a MUD. Thus, the Association residents would not be subject to MUD taxes.

5. Photographs in Application Are Not Sufficient (ED’s RTC No. 6)

Christopher Spicer expressed concern that photographs in the application did not accurately depict his home, which is located near the proposed site. As the ED responded, the Applicant submitted the required photographs for the application. Pulte submitted photographs of the proposed plant site where treatment units will be located, along with a photograph showing the upstream area of the proposed discharge point and the downstream area of the proposed discharge point. Pulte complied with all of these requirements. Sufficiency of photographs in the application is not a relevant or material issue for consideration of this permitting case.

6. Potential Odors (ED’s RTC No. 7)

Both the Spicers and the Association have raised concerns regarding potential odors associated with the proposed Facility. Commission regulations require the permit holder to establish buffer zones or an odor control plan for abating nuisance odor. For this permit, the buffer zone requirements would be met by Pulte by submitting sufficient evidence of legal restrictions prohibiting residential structures within the part of the buffer zone not owned by Pulte. In this case, the hearing requestors properties are well beyond the 150-foot buffer zone requirement. Applicant believes the map and attachment demonstrate that the residences are well outside the 150-foot buffer zone. Consequently, it is Pulte’s position that this issue is not a

material issue for consideration regarding issuance of this permit. Nevertheless, if the Commission chooses to refer this issue, Applicant respectfully recommends that the issue be described as follows: “Whether the proposed Facility will meet the applicable requirements of 30 TAC § 309.13(e).”

7. Impact to Property Values (ED’s RTC No. 8)

Both the Association and Christopher Spicer express concern that the proposed Facility will impact their property values. As the ED notes in its RTC, TCEQ does not have jurisdiction over property value issues. Consequently, this issue is not a relevant or material issue for consideration at a contested case hearing in this matter.

8. Potential Air Pollutant Impacts (ED’s RTC No. 9)

Mr. Spicer raised concerns that the wind study in the application indicates air pollution from the Facility would be pushed into his neighborhood. As the ED responded in his RTC, the wind rose diagram in the application shows that the primary wind direction at the proposed plant site is from the southeast, so wind primarily blows to the northwest. The Spicers’ property and Mayde Creek Estates is located southeast of the proposed plant site, and thus, wind would primarily blow away from the plant site in the opposite direction from which the subdivision and the Spicers’ property is located. Consequently, this is not a material issue for considerations regarding permitting in this case. Nevertheless, to the extent the Commission determines that this case should be referred for hearing, Applicant respectfully requests that the issue concerning the buffer zone in connection with potential odors (Item No. 6 above) be used to address this concern, since they involve the same issue.

9. Potential Groundwater Pollution (ED’s RTC No. 10)

The Spicers expressed concerns that the proposed discharge could cause groundwater pollution and they are on a water well system. The ED’s Response on this issue treated it as a

water quality concern. Applicant disagrees. For properly constructed water wells, there is virtually no opportunity for commingling with surface water. Moreover, in contrast to an underground injection control permit, the only requirement in a TPDES permit application involving water wells is an offset requirement for the wastewater treatment plant unit of 250 feet from a private water well. 30 TAC § 309.13(c). Further, the application demonstrates that the proposed Facility will meet this offset requirement. Consequently, it is Pulte's position that this issue is not one that is material to consideration regarding permitting in this case. Nevertheless, if the Commission decides to refer this issue to SOAH, Applicant respectfully requests that the issue be framed as follows: "Whether the proposed wastewater treatment plant will meet the appropriate separation distance from private water wells specified in 30 TAC § 309.13(c)."

10. Facility Relocation and Modifications (ED's RTC No. 11)

Ms. Spicer suggested that the Facility be relocated to avoid damage to neighboring homes, contamination of natural waters, and odor. The Association asks if visible barriers are going to be constructed. As the ED's RTC explained, the TCEQ's administrative and technical review of wastewater discharge applications only consider whether the discharge route and plant site proposed by the applicant as presented in the application comply with Texas law. Consequently, whether the applicant could have filed its application differently is not a relevant or material issue for hearing.

11. Potential Trespass (Not addressed by ED in his RTC)

The Spicers allege that their real property ownership extends to the middle of South Mayde Creek and that Pulte does not have authority from them to discharge treated wastewater to the creek. The Spicers appear to be alleging a potential trespass and possibly a taking. Recent Texas case law holds that "The State has the right to use the channel of the watercourse to meet its constitutionally mandated duty to conserve and develop the State's water resources" and no

authority from downstream landowners is needed. *Dormel v. City of Georgetown*, 6 S.W.3d 349 (Tex. App.—Austin 1999, pet. denied). Further, no TCEQ regulations support the consideration of whether the permitted wastewater discharge represents a wrongful taking or trespass of downstream property rights. Consequently, this issue is not relevant or material for referral in this case.

V. MAXIMUM DURATION OF HEARING

Should the Commission decide to refer this case to SOAH for a hearing, given the limited number of scope of issues Applicant believes may be appropriate in this case, the maximum expected duration of a hearing on this application and draft permit should be no longer than six months from the first date of the preliminary hearing until the proposal for decision is issued.

VI. CONCLUSION

For the reasons set forth above, Pulte respectfully requests that the Commission deny Protestants' hearing requests, not refer this matter for a contested case hearing, and issue Pulte Homes of Texas, L.P. TPDES Permit No. WQ0015222001. Should the Commission decide to grant the Protestants' hearing requests, Applicant respectfully requests that the Commission limit the issues addressed in the contested case hearing to only those that the Commission determines to be relevant and material to this permit application as we have identified herein and for the duration specified above.

Respectfully submitted,

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By: 

Danny Worrell
State Bar No. 22002000

ATTORNEYS FOR
PULTE HOMES OF TEXAS, L.P.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document has been sent to the following parties of record in this case on April 6, 2015.

FOR THE EXECUTIVE DIRECTOR

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Danny Worrell

ATTACHMENT 1
TO PULTE HOMES OF TEXAS, L.P.'S
RESPONSE TO HEARING REQUESTS

HARRIS COUNTY
MUD NO. 495

SPICER
DONNISHA
& CHRIS
ACCT:
0431060000035

SHACKLETT
TYANNE L
ACCT: 0431060000031

THOMPSON MARK W
& BRENDA C
ACCT: 0431060000027

MORRIS PHILIP
& MARY E
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RILEY JAMES W &
MARSHA DAVIS
ACCT: 0431060000029

DOMAHIDI
JENNIFER
ACCT: 1287480010001

ATTACHMENT 1 HEARING REQUESTORS' PROPERTIES MAP

APRIL, 2015

LEGEND

-  WASTEWATER TREATMENT PLANT (WWTP)
-  WWTP SITE BOUNDARY
-  PACKAGE PLANT BUFFER
-  FINAL PLANT BUFFER ZONE
-  HARRIS COUNTY MUD NO. 495
-  PARCELS (HCAD)
-  PARCELS CONTESTING PERMIT
-  PROPOSED OUTFALL
-  DISCHARGE ROUTE

1 inch = 400 feet

AERIAL PHOTOGRAPHY DATE: JANUARY 2014



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Account No.	Owner	Owner Address	Area (ac.)	Distance to Buffer (ft.)
0431060000029	RILEY JAMES W & MARSHA DAVIS	23826 STOCKDICK SCHOOL RD KATY, TX 77493-6318	6.24	1214.29
0431060000035	SPICER DONNISHA & CHRIS	23910 STOCKDICK SCHOOL RD KATY, TX 77493-6317	8.35	336.31
0431060000028	MORRIS PHILIP & MARY E	23934 STOCKDICK SCHOOL RD KATY, TX 77493-6317	5.51	943.82
0431060000027	THOMPSON MARK W & BRENDA C	23834 STOCKDICK SCHOOL RD KATY, TX 77493-6318	6.43	994.95
1287480010001	DOMAHIDI JENNIFER (JENNIFER MELISSA DOMAHIDI SEC 867 MANAGEMENT TRUST)	PO BOX 2845 HOUSTON, TX 77252-2845	5.17	1971.39
0431060000031	SHACKLETT TYANNE L	23926 STOCKDICK SCHOOL RD KATY, TX 77493-6317	5.22	478.76