

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*



Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 13, 2015

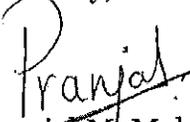
Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: **CRUTCHER TIE & LUMBER, LLC**
TCEQ DOCKET NO. 2015-0832-IWD

Dear Ms. Bohac:

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

Sincerely,


Pranjal M. Mehta, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2015-0832-IWD

IN THE MATTER	§	BEFORE THE
OF THE APPLICATION OF	§	
CRUTCHER TIE & LUMBER, LLC	§	TEXAS COMMISSION ON
FOR TPDES PERMIT	§	
NO. WQ0005120000	§	ENVIRONMENTAL QUALITY

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

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 (TCEQ or "Commission") files this Response to Request for Hearing in the above-referenced matter and respectfully submits the following.

I. INTRODUCTION

A. Background of Facility

Crutcher Tie & Lumber, LLC (Applicant) has applied to the TCEQ for a new permit that would authorize the discharge of wet decking water and contact stormwater on an intermittent and flow-variable basis via Outfall 001.

The proposed permit requires wastewater discharged via Outfall 001 to be sampled and analyzed for the parameters listed in Tables 1, 2, and 3 of Attachment A found in the draft permit. Analytical testing for Outfall 001 must be completed within 60 days of initial discharge. Results of the analytical testing must be submitted within 90 days of initial discharge to the TCEQ Industrial Permits Team. The testing results will be compared to the water quality-based effluent limitations for the protection of aquatic life and human health found in Appendix A of the Statement of Basis / Technical Summary for the draft permit. Based on this technical review, an amendment may be initiated by TCEQ staff to include additional effluent limitations, monitoring requirements, or both if

it is determined that these are required for the protection of water quality of the receiving waters. (Executive Director's Response to Comment No. 3).

The facility is located at 4890 North State Highway 37, approximately four and a half miles south of the City of Winnsboro, in Wood County, Texas 75494. The effluent will be discharged to a manmade ditch; then to a tributary of Indian Creek; then to Indian Creek; then to Big Sandy Creek in Segment No. 0514 of the Sabine River Basin. The unclassified receiving waters have minimal aquatic life use for the unnamed ditch and tributary of Indian Creek and high aquatic life use for Indian Creek. The designated uses for Segment No. 0514 are high aquatic life use, primary contact recreation, and public water supply.

B. Procedural Background

TCEQ received Applicant's application on March 13, 2014. On April 30, 2014, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in English on May 22, 2014 in the *Winnsboro News*. The ED completed the technical review of the application and prepared a draft permit. The Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published in English on October 16, 2014 in the *Winnsboro News*. On December 24, 2014, the Applicant published in English the Combined Notice of Public Meeting and Notice of Application and Preliminary Decision for Water Quality Permit in the *Winnsboro News*. A public meeting regarding this permit application was held on February 5, 2015 at Winnsboro City Auditorium. The ED filed the Response to Comments on April 10, 2015. The Chief Clerk's office mailed the Executive Director's Decision and Response to Comments on April 17, 2015. The deadline to request a contested case hearing was May 18, 2015.

The Commission received a timely request for a contested case hearing from the Commissioner's Court of Wood County Texas by a letter dated June 6, 2014. This request for a contested case hearing was signed by Commissioner Jerry Gaskill, Commissioner Jon Shirley, Wood County Judge Bryan Jeans, Commissioner Virgil Holland and Commissioner Roger Pace. For the reasons stated herein, OPIC recommends that the Commission grant the hearing request from the Commissioner's Court of Wood County of Texas (County).

II. APPLICABLE LAW

This application was declared administratively complete on April 30, 2014. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. WATER CODE (TWC) § 5.556).

Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of the application. 30 TEX. ADMIN. CODE (TAC) § 55.201(d).

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). This justiciable interest does not include an interest common to the general public. *Id.* Governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons. 30 TAC § 55.203(b). Relevant factors 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; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

The Commission shall grant an affected person’s timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission’s decision on the application. 30 TAC § 55.211(c).

Accordingly, responses to hearing requests must specifically address:

- (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 of 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 Executive Director'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).

III. DISCUSSION

A. Determination of affected person status

The County's hearing request expresses concerns about the environmental impact of the proposed permit. The County is concerned that a long term discharge of contaminants from the Applicant's facility could irreversibly damage the ecosystem of the creek. The County is concerned that any prolonged period of rain could cause the treatment system to overflow and might create greater erosion of the creek area. The hearing request states that if the creek gets contaminated, it could affect future county tax revenue by the loss of future development. The County expresses general concern about unknown possible long term problems that might be caused by the Applicant's facility.

Local governments, such as the County, have broad statutory authority over water quality issues. TEX. WATER CODE (TWC), Chapter 26. Subchapter E. A local government may inspect the public water in its area to determine whether the quality of the water meets the state water quality standards adopted by the commission and persons discharging effluent into the public water located in the areas of which the local government has jurisdiction have obtained permits for discharge of the effluent. TWC § 26.171. According to the hearing request, the County believes that this permit will affect the water quality of the creek. Therefore OPIC finds that the County has a personal justiciable interest because it is a governmental entity with

statutory authority over water quality issues, and water quality issues are clearly relevant to the application. Therefore, the County is an affected person under 30 TAC § 55.203(b) and (c) (6).

B. Issues Raised in the hearing request

1. Whether the proposed facility's operations and discharges would have a negative environmental impact by adversely affecting water quality and harming the ecosystem of the receiving waters?
2. Whether any prolonged periods of rain could cause the treatment system to overflow and cause erosion of the creek?
3. Whether a contaminated creek or the perception of a contaminated creek could affect future county tax revenue by the loss of future development?
4. Whether the Applicant's proposed facility will result in any unpredictable long term problems?

C. Which issues raised in the hearing request are disputed

All of the issues raised in the hearing request are disputed.

D. Whether the dispute involves questions of fact or of law

The disputed issues involve questions of fact.

E. Whether the issues were raised during the public comment period

All of the issues were raised during the public comment period.

F. Whether the hearing request is based on issues raised solely in a public comment which has been withdrawn

The hearing request is not based on issues raised solely in a public comment which has been withdrawn.

F. Whether the issues raised are relevant and material to the decision on the

application

In order to refer an issue to the State Office of Administrative Hearings (“SOAH”), the Commission must find that the issue is relevant and material to the Commission’s decision to issue or deny this permit. *See* 30 TAC §§ 55.201(d)(4), 55.209(e)(6) and 55.211(c)(2)(A).

Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *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.”)

Issue no. 1 concerns water quality and can be addressed in proceedings on this application. Chapter 307 of the Commission’s rules (Texas Surface Water Quality Standards) provides that the surface waters of Texas cannot be made toxic to aquatic or terrestrial organisms or cause endangerment to human health. One of the charges of 30 TAC § 307.1 is to “maintain the quality of water in the state consistent with public health and enjoyment.” The water quality concerns raised by the County are addressed by the substantive law that governs this application and therefore this issue is relevant and material to the Commission’s decision.

OPIC cannot recommend referral of the issue of erosion. While the TCEQ has jurisdiction over water quality, it lacks jurisdiction over erosion issues. As noted in the Executive Director’s Response to Comments at page 3, the issue of erosion is outside of the scope of normal evaluations for a wastewater discharge permit application. Possible future erosion is not a factor in determining whether an applicant has met all of the statutory and regulatory criteria

applicable to a wastewater permit. Therefore, issue no. 2 is not relevant and material to the Commission's decision.

OPIC further finds that issue no. 3 concerning reduction in future county tax revenue cannot be adjudicated by the Commission when considering this application. While the TCEQ has jurisdiction over water quality issues governed by the law applicable to this application, the Texas Legislature has not given the agency jurisdiction to consider the potential impacts on the county tax revenue by the loss of future development in the wastewater permitting process. Therefore, this issue is not relevant and material to the Commission's decision.

Issue no. 4 regarding the Applicant's proposed facility resulting in any unpredictable long term problems is overly broad and raises concerns beyond the scope of this application. Water quality concerns within the scope of this proceeding are covered under issue no. 1. To the extent this issue raises a concern about long term effects, assuming compliance with applicable operational and monitoring standards, such an issue is beyond the scope of the current proceedings and therefore, not relevant and material to the Commission's decision.

H. Issues for Referral

OPIC recommends that the Commission refer the following disputed issue of fact to SOAH for a contested case hearing:

1. Whether the proposed facility's operations and discharges would have a negative environmental impact by adversely affecting water quality and harming the ecosystem of the receiving waters?

IV. MAXIMUM EXPECTED DURATION OF HEARING

Commission Rule 30 TAC § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which

the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

V. CONCLUSION

For the reasons stated above, OPIC recommends granting the hearing request of the Commissioner's Court of Wood County of Texas and referring this application to SOAH for a contested case hearing of no longer than six months on the issues listed in Section III H above.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

for By: *Vic McWherter*
Pranjal M. Mehta
Assistant Public Interest Counsel
State Bar No. 24080488
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-0574 Phone
(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2015 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing 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.

for *Vijay Mehta*
Pranjal M. Mehta

MAILING LIST
CRUTCHER TIE & LUMBER, LLC
TCEQ DOCKET NO. 2015-0832-IWD

FOR THE APPLICANT:

Ervin Don Crutcher, Owner
Crutcher Tie & Lumber, LLC
307 North Louise Street, Suite B
Atlanta, Texas 75551-21285
Tel: 903/796-7691 Fax: 903/796-5996

Erin Crafton, Lab Manager
AWWS, Inc.
695 Shady Lane
Hallsville, Texas 75650-2255
Tel: 903/668-4133 Fax: 903/668-1095

FOR THE EXECUTIVE DIRECTOR

Alicia Ramirez, Staff Attorney
TCEQ Environmental Law Division
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606

Kara Denney, Technical Staff
TCEQ Water Quality Division, MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4680 Fax: 512/239-4430

Brian Christian, Director
TCEQ Environmental Assistance
Division, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678

FOR ALTERNATIVE DISPUTE
RESOLUTION

Kyle Lucas
TCEQ Alternative Dispute Resolution,
MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4010 Fax: 512/239-4015

FOR THE CHIEF CLERK:

Bridget Bohac
TCEQ Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311

REQUESTERS:

Bryan Jeans
Wood County Judge
PO Box 938
Quitman, Texas 75783

Virgil Holland
Precinct 1 Commissioner
Wood County
PO Box 938
Quitman, Texas 75783

Jerry Gaskill
Precinct 2 Commissioner
Wood County
PO Box 938
Quitman, Texas 75783

Roger Pace
Precinct 3 Commissioner
Wood County
PO Box 938
Quitman, Texas 75783-0938

Jon Shirley
Precinct 4 Commissioner
Wood County
PO Box 938
Quitman, Texas 75783

