

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Jon Niermann, *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

February 9, 2016

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: **JARRAR HOLDINGS, LLC**
TCEQ DOCKET NO. 2015-1708-MWD

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink that reads "Pranjal".

Pranjal M. Mehta, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2015-1708-MWD

**IN THE MATTER
OF THE APPLICATION BY
JARRAR HOLDINGS, LLC FOR
NEW TPDES PERMIT
NO. WQ0015299001**

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**BEFORE THE
TEXAS COMMISSION ON
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 the "Commission") files this Response to Request for Hearing in the above-referenced matter and respectfully submits the following.

I. INTRODUCTION

A. Background of Facility

On September 11, 2014, Jarrar Holdings, LLC (Applicant) applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) permit no. WQ0015299001. The Applicant applied for a new permit to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.012 million gallons per day (MGD). The proposed wastewater treatment facility will be an activated sludge process plant operated in the extended aeration mode. Treatment units will include an aeration basin, a final clarifier, a sludge digester, and a chlorine contact chamber. The draft permit also authorizes the disposal of sludge at a TCEQ authorized land application site or co-disposal landfill. The facility would be located at 16825 Hollister Street, in Harris County, Texas 77066.

The treated effluent will be discharged to Harris County Flood Control District (HCFCD) ditch 149-00-00, then to Greens Bayou Above Tidal in Segment No. 1016 of the San Jacinto

River Basin. The unclassified receiving water use is minimal aquatic life use for HCFCD ditch 149-00-00. The designated uses for Segment No. 1016 are limited aquatic life use and primary contact recreation.

B. Procedural Background

TCEQ received Applicant's application on September 11, 2014. On October 24, 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 December 4, 2014 in the *Houston Chronicle*, and in Spanish on November 28, 2014 in the *El Observador News*. The ED completed the technical review of the application and prepared an initial draft permit. The Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published in English on June 11, 2015 in the *Houston Chronicle*, and in Spanish on June 12, 2015 in *El Observador News*. The public comment period ended on July 13, 2015. The Response to Comments was filed on September 23, 2015. The Chief Clerk mailed the Executive Director's Decision on September 24, 2015. The deadline for filing requests for a contested case hearing was October 26, 2015.

The Commission received multiple requests for a contested case hearing from Kathleen Bradley on June 1, 2015, October 21, 2015 and October 27, 2015. As the deadline for filing requests for a contested case hearing was October 26, 2015, OPIC considers the requests filed on June 1, 2015 and October 21, 2015 as timely filed. OPIC has not analyzed the hearing request filed on October 27, 2015.

For the reasons stated herein, OPIC recommends that the hearing request from Kathleen Bradley (Requester) be granted.

II. APPLICABLE LAW

This application was declared administratively complete on July 1, 2013. 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 TEXAS 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 with authority under state law over issues contemplated 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).

II. DISCUSSION

A. Determination of affected person status

According to the hearing request, the wastewater discharge from the proposed facility would contaminate the Requester's water well. The hearing request claims that Requester's water well is her sole drinking water source. The hearing request states that the Requester's well is situated less than 3 feet from the Applicant's property line and adjacent to the southwest portion of the Applicant's property. The hearing request also states that the Requester's property

is a residential structure adjacent to the Applicant's property and within the buffer zones prescribed by the Commission's Chapter 309 rules. The hearing request also raises concerns about the noise and odor. The hearing request further states that the potential contamination would affect the health and welfare of the Requester's family and anyone who drinks from the well, and the potential nuisance would interfere with the reasonable use and enjoyment of the Requester's property.

The map prepared by ED confirms that the Requester's property is in close proximity of the proposed facility and discharge route. Given the Requester's proximity to the facility and her concerns regarding the groundwater quality, she has demonstrated a personal justiciable interest which is not common to the general public and has shown that she is an affected person. 30 TAC § 55.203(a).

The factors listed in § 55.203(c) support the conclusion that the Requester is an affected person. First, the Requester's claimed interests regarding groundwater quality and nuisance odor are protected by the law under which this application will be considered. 30 TAC § 55.203(c)(1). Also, a reasonable relationship exists between the concerns expressed in the hearing request and the TCEQ's regulation of the proposed facility. 30 TAC § 55.203(c)(3). Finally, the activity to be regulated in this matter has the potential to adversely impact the Requester's use of her property and the water well on her property. For all these reasons, OPIC finds that the Requester is an affected persons under 30 TAC § 55.203.

B. Issues raised in the hearing requests

1. Whether the proposed discharge would contaminate the water produced by the well on Requester's property.
2. Whether the proposed facility would cause potential odor and noise 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 requests are not based on issues raised solely in a public comment which has been withdrawn.

G. Whether the issues 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 questions whether the proposed discharge would contaminate the water produced by the well on Requester’s property. One of the stated purposes in the TCEQ rules on Domestic Wastewater Effluent Limitations and Plant Siting (30 TAC Chapter 309) is selection of

a site that minimizes the possible contamination of ground and surface waters. 30 TAC § 309.10 (b). TCEQ's siting requirements under 30 TAC § 309.13(a)-(d) were developed to protect surface and groundwater. Therefore, issue no. 1 is relevant and material.

Issue no. 2 questions whether the permitted activities would result in nuisance odors and noise. While noise concerns are not addressed by the Commission rules, odor is specifically addressed by the TCEQ regulations concerning the siting of domestic wastewater plants. 30 TAC § 309.13. The Commission rules require domestic wastewater treatment facilities to meet buffer zone requirements for the abatement and control of nuisance odors pursuant to 30 TAC § 309.13(e) prior to construction of the new wastewater facility. Therefore issue no. 2 is relevant and material.

H. Issues for Referral

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

1. Whether the proposed discharge would contaminate the water produced by the well on Requester's property.
2. Whether the proposed facility would cause potential odor problems.

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 herein above, OPIC recommends granting the hearing request of Requester. Furthermore, OPIC recommends referring this application to the SOAH for a six month hearing on the issues listed in Section III. H above.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2016 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.

Pranjal
Pranjal M. Mehta

**MAILING LIST
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TCEQ DOCKET NO. 2015-1708-MWD**

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