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Emily Lindley, *Commissioner*
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Toby Baker, *Executive Director*



Vic McWherter, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 14, 2022

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

**RE: CONTINENTAL HOMES OF TEXAS L.P.
AND KY-TEX PROPERTIES L.L.C.
TCEQ DOCKET NO. 2021-1621-MWD**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Jamison".

Jennifer Jamison, Attorney
Assistant Public Interest Counsel

DOCKET NO. 2021-1621-MWD

**CONTINENTAL HOMES OF
TEXAS L.P. KY-TEX
PROPERTIES L.L.C., FOR TPDES
PERMIT NO. WQ0015940001**

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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 Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this Response to Request for Hearing in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is Continental Homes LP and KY-Tex Properties LLC's application for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015940001. The Commission received timely comments and a request for a contested case hearing from Melissa Aldrich. For the reasons stated herein, OPIC respectfully recommends the Commission find that Melissa Aldrich is an affected person in this matter and grant her pending hearing request. OPIC further recommends referring the issues specified in § III.H for a contested case hearing at the State Office of Administrative Hearings (SOAH) with a maximum duration of 180 days.

B. Background of Facility

On October 13, 2020, Continental Homes LP and KY-Tex Properties LLC (Applicants) applied to the TCEQ for new TPDES Permit No. WQ0015940001. If issued, this permit would authorize the disposal of treated domestic wastewater at the proposed Facility at a daily average

flow not to exceed 495,000 gallons per day (gpd). The proposed Facility would be approximately 3,907 feet northwest of the intersection of Getzenander Road and the railroad tracks, and approximately 670 feet northwest from the intersection of Satterwhite Road and Williamson Road, in Hays County, Texas 78610. The proposed Ky-Tex Wastewater Treatment Plant (WWTP) would serve Ky-Tex Residential single-family homes. The treated effluent would be discharged to an unnamed tributary, thence to Soil Conservation Service (SCS) reservoir 12, thence to Brushy Creek, thence to Plum Creek in Segment No. 1810 of the Guadalupe River Basin. The unclassified receiving water uses are minimal aquatic life use for the unnamed tributary, high aquatic life use for SCS reservoir 12, and limited aquatic life use for Brushy Creek. The designated uses for Segment No. 1810 are primary contact recreation, aquifer protection, and high aquatic life use.

The Facility, which has not yet been constructed, contains treatment units in the Interim I phase including fine screen rotary drum, an aeration tank, a secondary clarifier, a sludge holding tank, a chlorine contact tank, and a cloth disc media filter. Treatment units in the Interim II phase would include a fine screen rotary drum, three aeration tanks, two secondary clarifiers, two sludge holding tanks, two chlorine contact tanks, and a cloth disc media filter. Treatment units in the Final phase would include a fine screen rotary drum, six aeration tanks, three secondary clarifiers, four sludge holding tanks, three chlorine contact tanks, and a cloth disc media filter.

The effluent limitations in the draft permit authorize a discharge of treated domestic wastewater at an Interim I volume not to exceed a daily average flow of 0.066 million gallons per day (MGD), an Interim II volume not to exceed a daily average flow of 0.251 MGD, and a Final phase volume not to exceed a daily average flow of 0.495 MGD. The effluent limitations in the Interim and Final phases of the draft permit, based on a 30-day average, are 7 mg/l five-day

carbonaceous biochemical oxygen demand CBOD5, 15 mg/l total suspended solids (TSS), 2 mg/l ammonia-nitrogen (NH3-N), 126 colony forming units (CFU) or most probable number (MPN) of E.coli per 100 ml, and 6.0 mg/l minimum dissolved oxygen (DO). The effluent shall contain a chlorine residual of at least 1.0 mg/l and shall not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow.

C. Procedural Background

TCEQ received the application for a new permit on October 13, 2020, and declared it administratively complete on March 3, 2021. Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English on March 17, 2021, in the *Hays Free Press* newspaper and in Spanish on March 25, 2021, in *El Mundo* newspaper. The Executive Director (ED) completed the technical review of the application on May 21, 2021, and prepared the draft permit which, if approved, would establish the conditions under which the Facility must operate. Applicant published the Combined NORI and Notice of Application and Preliminary Decision (NAPD) in English on July 7, 2021, in the *Hays Free Press* and in Spanish on July 8, 2021, in *El Mundo* newspaper. The comment period for the Application closed on August 9, 2021. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on September 28, 2021. The deadline for filing requests for a contested case hearing was October 28, 2021.

The Commission received timely comments and a request for a contested case hearing from Melissa Aldrich. For the reasons stated herein, OPIC recommends granting Melissa Aldrich's request for a contested case hearing.

II. 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 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 requestor'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.

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 the purpose 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.

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.

III. DISCUSSION

A. Determination of Affected Person Status

Melissa Aldrich timely filed concurrent comments and a hearing request on May 19, 2021. Melissa Aldrich's stated interests include concerns about flooding, erosion, water quality, odors, effects on property value, and effects on livestock. Some of these interests are protected by the law under which this application will be considered, while others fall outside the jurisdiction of the TCEQ. Ms. Aldrich provided locations for her adjacent affected properties described by the Hays Central Appraisal District as R14595 and R14592 (A0219 Z Hinton Survey, 14.14 and 40.00 acres north of FM2001 and west of reservoir site 12) and R14589 and R14594 (96.50 and 94.75 acres south of FM2001 and southwest of reservoir site 12). According to the map prepared by the ED's staff, both of Ms. Aldrich's properties are located within one mile of the proposed outfall and discharge route. Given the close proximity to the regulated activity and the fact that several of Ms. Aldrich's interests, including nuisance odors, water quality, and adverse effects on livestock are protected by the law under which this application will be considered, OPIC concludes that she is likely to be affected in a way not common to members of the general public. Further, a reasonable relationship exists between Ms. Aldrich's concerns and the regulated activity. Therefore, OPIC recommends the Commission find Melissa Aldrich is an affected person in this matter and grant her pending hearing request.

B. Issues Raised in the Hearing Requests of Affected Person

Melissa Aldrich raised the following issues:

1. Whether the Draft Permit adequately protects against flooding and whether the Applicant is required to show the Plum Creek Conservation District Reservoir Site's capacity to contain floodwater;
2. Whether provisions in the Draft Permit adequately protect against erosion and whether a land application permit may be compelled as an alternative disposal method;
3. Whether issuance of the Draft Permit will decrease property values;
4. Whether the proposed Facility and draft permit are adequately protective of livestock;
5. Whether the Draft Permit is adequately protective of water quality; and
6. Whether the proposed Facility and draft permit contain provisions sufficient to prevent nuisance odors.

C. Issues Raised in the Hearing Requests Remain Disputed

There is no agreement between the affected person and the ED on the issues raised in the hearing requests; thus, they remain disputed.

D. The Disputed Issues Are 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). All issues raised by Melissa Aldrich are issues of fact.

E. Issues Were Raised by the Requestor During the Comment Period

All issues were raised by the affected person during the comment period.

F. The Hearing Requests are Based on Issues Raised in Public Comments Which Have Not Been Withdrawn

The hearing requests are based on timely comments that have not been withdrawn.

G. Issues That are Relevant and Material to the Decision on the Application

The hearing request raises some issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4)(B) and 55.211(c)(2)(A)(ii), and some that are not. 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 the permit. Relevant and material issues are those governed by the substantive law under which the permit is to be issued. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

Flooding

Ms. Aldrich raised concerns regarding an increased risk of flooding. The TCEQ does not have jurisdiction to consider general concerns about flooding. With respect to this application, TCEQ has jurisdiction under the Commission's Chapter 309 rules to consider location standards and site suitability to mitigate the risk of contamination of water in the state. In doing so, the Commission may examine factors such as the proper functioning of a facility's operational features and potential impact to surface water and groundwater at a particular site. In this matter, however, OPIC cannot find that the requestor's stated concerns can be distinguished from general concerns about an increased risk of flooding. Accordingly, OPIC cannot find that Ms. Aldrich's concerns pertaining to flooding are relevant and material to the Commission's decision on this Application.

Erosion and Alternative Disposal Methods

Ms. Aldrich also raised concerns about erosion, as well as a request to compel Applicant choose an alternative disposal method. Ms. Aldrich contends that an increase in water through the unnamed tributary between the proposed Facility and the reservoir will result in both erosion of the soil between the proposed water treatment plant and the reservoir, and changes in waterflow due to rainfall. Concerns about the transport of treated effluent through a watercourse of the state are generally not within TCEQ's jurisdiction as it relates to the permitting process unless there is a potential impact to water quality. Similarly, TCEQ does not have jurisdiction to require Applicant to seek alternative disposal methods, unless the method selected in the Application

would violate state or federal law. Accordingly, issues regarding erosion and alternative disposal methods are not relevant and material to the Commission's decision on this Application.

Property Values

TCEQ does not have jurisdiction to consider a Draft Permit's impact on property values. Therefore, Issue No. 3 is not relevant and material.

Livestock and Water Quality

Ms. Aldrich raised concerns about adverse effects to water quality, and the consequential impacts on her family's livestock. The Commission is responsible for the protection of water quality under Texas Water Code Chapter 26 and 30 TAC Chapters 305, 307 and 309. The Texas Surface Water Quality Standards ("Standards") in 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. According to§ 307.6(b)(4) of the Standards, "[w]ater in the state must be maintained to preclude adverse toxic effects on... livestock, or domestic animals, resulting from contact, consumption of aquatic organisms, consumption of water, or any combination of the three." As Chapter 307 designates criteria for the regulation of water quality and the protection of livestock and domestic animals, Issue nos. 4 and 5 are relevant and material to the Commission's decision regarding this Application and are appropriate for referral to SOAH.

Nuisance Odors

Ms. Aldrich expressed concern regarding nuisance odors. TCEQ regulates this issue under 30 TAC § 309.13(e) which requires applicants to implement a nuisance odor abatement plan. The 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. Because 30 TAC § 309.13 addresses

nuisance odors, Issue No. 6 is relevant and material to the Commission's decision on this Application.

H. Issues Recommended for Referral

For the reasons stated above, OPIC recommends referral of the following issues to SOAH:

1. Whether the proposed Facility and draft permit are adequately protective of livestock;
2. Whether the Draft Permit is adequately protective of water quality; and
3. Whether the proposed Facility and draft permit contain provisions sufficient to prevent nuisance odors.

I. Maximum Expected Duration of Hearing

Commission rule 30 TAC § 50.115(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, 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 estimates that the maximum expected duration of a hearing on this Application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

Having found that Melissa Aldrich qualifies as an affected person in this matter, OPIC respectfully recommends the Commission grant her hearing request and refer the issues specified in Section III. H. for a contested case hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2022 the Office of Public Interest Counsel's Response to Hearing Requests 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.



Jennifer Jamison

**MAILING LIST
CONTINENTAL HOMES OF TEXAS L.P.
AND KY-TEX PROPERTIES L.L.C.
TCEQ DOCKET NO. 2021-1621-MWD**

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