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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 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: HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 495
TCEQ DOCKET NO. 2022-0148-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. 2022-0148-MWD

**HARRIS COUNTY MUNICIPAL
UTILITY DISTRICT NO. 495
PERMIT NO. WQ0015222001**

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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 Harris County Municipal Utility District No. 495's application for a major amendment to Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015222001. The Commission received timely comments and requests for a contested case hearing from Christopher and Donnisha Spicer. For the reasons stated herein, OPIC respectfully recommends the Commission find that Christopher Spicer and Donnisha Spicer are affected persons in this matter and grant their pending hearing requests. OPIC further recommends referring Issues No. 1 through 6 specified in § III.I 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 March 10, 2020, Harris County Municipal Utility District No. 495 (Applicant) applied to the TCEQ for a major amendment to permit WQ0015222001 to authorize an increase in the discharge of treated domestic wastewater. If issued, this permit would authorize an increase in the

discharge of treated domestic wastewater from an annual average flow not to exceed 0.90 million gallons per day (MGD) to an annual average flow not to exceed 1.50 MGD. The existing Facility serves Harris County Municipal Utility District No. 495, and is located at 5455 ½ Porter Road, in Harris County, Texas. The treated effluent is discharged to South Mayde Creek, thence to Buffalo Bayou, thence 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, and the designated uses for Segment No. 1014 are primary contact recreation and limited aquatic life use.

The Harris County Municipal Utility District No. 495 Wastewater Treatment Facility is an activated sludge process plant operated in the extended aeration mode in all phases. Treatment units in Interim I phase include one bar screen, five aeration basins, two final clarifiers, three aerobic digesters and one chlorine contact chamber. Treatment units in Interim II phase would include one bar screen, nine aeration basins, three final clarifiers, three aerobic digesters and three chlorine contact chambers. Treatment units in the Final phase would include one bar screen, three concrete aeration basins, three concrete final clarifiers, two concrete aerobic digesters and three concrete chlorine contact chambers.

The effluent limitations in the draft permit, based on a 30-day average, authorize are 10 milligrams per liter (mg/L) five-day carbonaceous biochemical oxygen demand, 15 mg/L total suspended solids, 2.0 mg/L ammonia nitrogen, 126 colony-forming units or most probable number of E.coli per 100 milliliters, and 6.0 mg/L minimum dissolved oxygen in all phases. The effluent shall contain a chlorine residual in the range of 1.0 to 4.0 mg/L after a detention time of at least 20 minutes (based on peak flow). The pH must be in the range of 6.0 to 9.0 standard units.

C. Procedural Background

TCEQ received the application for a new permit on March 10, 2020, and declared it

administratively complete on June 12, 2020. Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English on June 24, 2020 in the *Houston Chronicle dba Examiner* newspaper, and in Spanish on June 21, 2020 in *El Perico Newspaper*. The Executive Director (ED) completed the technical review of the application on February 1, 2021 and prepared the draft permit which, if approved, would establish the conditions under which the Facility must operate. Applicant published the Notice of Application and Preliminary Decision (NAPD) in English on April 21, 2021, in the *Houston Chronicle dba Examiner*, and in Spanish on April 18, 2021, in *El Perico Newspaper*. The Combined Notice of Receipt and Intent/ Notice of Application and Preliminary Decision was published on November 3, 2021 in the *Houston Chronicle dba Examiner* in English, and October 31, 2021, in the *El Perico Newspaper* in Spanish. The comment period for the Application closed on December 3, 2021. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on December 21, 2021. The deadline for filing requests for a contested case hearing was January 20, 2022.

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

II. APPLICABLE LAW

A. Request for Hearing

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

Christopher and Donnisha Spicer timely filed concurrent comments and a hearing request on April 23, 2021. Christopher Spicer filed prior comments and a hearing request on July 6, 2020. The Spicers' stated interests include concerns about flooding, erosion, water quality, effects on health and safety, effects on livestock, aquatic life, and wildlife, nuisance conditions such as odors and noise, effects on property value, protecting existing uses of property, and effects on groundwater. 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. Christopher and Donnisha Spicer listed their property's address as 23910 Stockdick School Road Katy, TX 77493. According to the map prepared by the ED's staff, the Spicers' property is located less than one-quarter mile from both the proposed outfall and the proposed discharge route. Given the Spicers' close proximity to the regulated activity and the fact that several of the Christopher and Donnisha Spicer's interests, including nuisance odors, water quality, adverse effects on livestock and wildlife, and effects on human health are protected by the law under which this application will be considered, OPIC concludes that they are likely to be affected in a way not common to members of the general public. Further, a reasonable relationship exists between the Spicers' concerns and the regulated activity. Therefore, OPIC recommends the Commission find both Christopher Spicer and Donnisha Spicer are affected persons in this matter and grant their pending hearing requests.

B. Issues Raised in the Hearing Requests of Affected Person

Christopher and Donnisha Spicer raised the following issues:

1. Whether the draft permit is adequately protective of human health and safety;

2. Whether the draft permit is adequately protective of livestock, wildlife including aquatic life, and the environment;
3. Whether the draft permit is adequately protective of water quality;
4. Whether the draft permit is adequately protective of groundwater;
5. Whether the draft permit contains provisions sufficient to prevent nuisance conditions, including odor;
6. Whether the draft permit's nutrient limits and other effluent limitations are sufficiently stringent to protect against excessive growth of algae;
7. Whether the draft permit adequately protects against flooding and erosion;
8. Whether the draft permit adequately protects against noise;
9. Whether issuance of the amended draft permit will decrease property values;
10. Whether the draft permit protects soil and water from emerging contaminants such as pharmaceuticals, household cleaners, and personal care products;

D. 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.

E. 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 Christopher and Donnisha Spicer are issues of fact.

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

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

G. 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.

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

The hearing requests raise 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).

Water Quality, Human Health and Safety, Animal Life, and the Environment

Requestors raised concerns about adverse effects to water quality and the consequential impacts on human health, animal life, including aquatic life, and the environment. The Commission is responsible for the protection of water quality under Texas Water Code Chapter 26 and 30 TAC Chapters 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 aquatic life, terrestrial life, livestock, or domestic animals, resulting from contact, consumption of aquatic organisms, consumption of water, or any combination of the three." Additionally, "[s]urface waters must not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life." 30 TAC § 307.4(d). As Chapter 307 designates criteria for the regulation of water quality and the protection of human health and safety and terrestrial life, Issue nos. 1–3 are relevant and material to the Commission's decision regarding this application and are appropriate for referral to SOAH.

Groundwater

Christopher and Donnisha Spicer expressed concern regarding the impact on groundwater quality and drinking water. Specifically, the Spicers noted concerns for their family's health resulting from contaminated groundwater and drinking water caused by an increase in effluent. As discussed above, the Commission is responsible for the protection of water quality under TWC Chapter 26 and 30 TAC § 307 and 309. Section 309.10(b) states, in part, that, "[t]he purpose of this chapter is to condition issuance of a permit and/or approval of construction plans and specifications for new domestic wastewater treatment facilities...on selection of a site that minimizes possible contamination of ground and surface waters..." Under 30 TAC § 309.12, the Commission considers several factors relating to a facility's proposed design, construction, and operational features to evaluate a facility's potential to cause surface water and groundwater contamination. The rule further provides for consideration of active geologic processes and groundwater conditions such as groundwater flow rate, groundwater quality, length of flow path to points of discharge, and aquifer recharge and discharge conditions. Therefore, issue No. 4 is relevant and material to the Commission's decision on this Application.

Nuisance

Requestors further expressed concerns regarding nuisance conditions resulting from operations under the proposed permit amendment. Under 30 TAC § 309.13(e), TCEQ requires applicants to implement a nuisance odor abatement plan. In addition, one of the purposes of Chapter 309 is "to minimize the possibility of exposing the public to nuisance conditions." 30 TAC § 309.10. Further, § 307.4 delineates general criteria that surface waters must meet, including aesthetic parameters which, in part, work to prevent nuisance conditions attributable to the proposed Facility. Further, 30 TAC Chapter 217, relating to "Design Criteria for Domestic

Wastewater Systems” requires permit holders to ensure that facilities and systems of collection and disposal are properly operated and maintained. A goal of the Chapter 217 design, operation and maintenance requirements is to prevent adverse health effects and nuisance conditions such as those of concern to the Spicers. See RTC, Response to Comment No. 14. Because 30 TAC § 309.13 addresses nuisance odors and 30 TAC Chapter 217 requires proper maintenance of facilities, Issue No. 5 is relevant and material to the Commission’s decision on this Application.

Algae

30 TAC § 307.4(e) requires that nutrients from permitted discharges or other controllable sources shall not cause excessive growth of aquatic vegetation which impairs an existing, designated, presumed, or attainable use. Therefore, Issue No. 6 regarding mitigation of algae is relevant and material.

Flooding and Erosion

Christopher and Donnisha Spicer raised concerns regarding an increased risk of flooding on their property as well as erosion along the discharge route. The TCEQ does not have jurisdiction to consider general concerns about flooding, nor does it have jurisdiction to address erosion. With respect to this application, TCEQ has jurisdiction over issues related to water quality under the Commission’s Chapter 307 rules and site suitability under the Commission’s Chapter 309 rules. These rules have not been interpreted to address concerns that a permitted discharge of treated wastewater effluent could cause an increased risk of flooding. In this matter, OPIC cannot find that the stated concerns can be distinguished from general concerns about an increased risk of flooding.

Similarly, with respect to erosion, under 30 TAC § 309.12, “[t]he Commission may not issue a permit for a new facility or for the substantial change of an existing facility unless it finds

that the proposed site, when evaluated in light of the proposed design, construction, or operational features, minimizes possible contamination of water in the state.” In making this determination under 30 TAC § 309.12(1), the Commission may consider active geologic processes and their impact on groundwater contamination. According to 30 TAC § 309.11(1), active geologic processes consist of any natural process which alters the surface and/or subsurface of the earth, including, but not limited to, erosion. Although Chapter 309 authorizes consideration of “active geological processes,” OPIC interprets these regulatory provisions as being limited to specific existing conditions associated with a proposed site location, rather than potential erosion. Therefore, OPIC finds that the issue of potential erosion is not relevant and material to the Commission’s decision on this Application. Accordingly, OPIC cannot find that the Spicers’ concerns pertaining to flooding or erosion are relevant and material to the Commission’s decision on this Application.

Noise

Requestors also expressed concern regarding potential noise from the facility, and the possibility that it will significantly affect their quality of life and enjoyment of their property. While TCEQ's rules under 30 TAC Chapter 309 grants authority to condition the issuance of a wastewater discharge permit on the selection of a site that minimizes certain nuisance conditions, the TCEQ does not have the authority to address concerns about noise pollution when determining whether to grant a discharge permit application. Accordingly, OPIC cannot find that the Spicers’ concerns regarding noise are relevant and material to the Commission’s decision on this application.

Property Values

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

Emerging Contaminants

Finally, Christopher Spicer and Donnisha Spicer raised concerns about potential soil and water contamination from personal care products, house chemicals, antibiotics, and pharmaceutical drugs present in effluent. Neither the TCEQ nor the EPA have promulgated rules or criteria limiting emerging contaminants in wastewater, and presently, standard removal efficiencies have not been established. In addition, there are currently no federal or state effluent limits for emerging contaminants. Because no applicable regulations exist with respect to emerging contaminants in wastewater, OPIC cannot find that the Spicers' concerns are relevant and material to the Commission's decision on this application.

I. Issues Recommended for Referral

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

1. Whether the draft permit is adequately protective of human health and safety;
2. Whether the draft permit is adequately protective of livestock, wildlife including aquatic life, and the environment;
3. Whether the draft permit is adequately protective of water quality;
4. Whether the draft permit is adequately protective of groundwater;
5. Whether the draft permit contains provisions sufficient to prevent nuisance conditions, including odor;
6. Whether the draft permit's nutrient limits and other effluent limitations are sufficiently stringent to protect against excessive growth of algae;

J. 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 Christopher Spicer and Donnisha Spicer are affected persons in this matter, OPIC respectfully recommends the Commission grant their hearing requests and refer Issue Nos. 1-6 specified in Section III. I. 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 February 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

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TCEQ DOCKET NO. 2022-0148-MWD

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