

Jon Niermann, *Chairman*
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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 21, 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.**
TCEQ DOCKET NO. 2022-0272-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 black ink, appearing to read "Amanda D. Pesonen", with a long horizontal flourish extending to the right.

Amanda D. Pesonen
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2022-0272-MWD

APPLICATION BY	§	BEFORE THE
CONTINENTAL HOMES OF	§	TEXAS COMMISSION ON
TEXAS LP FOR TPDES PERMIT	§	ENVIRONMENTAL
NO. WQ0015948001	§	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 of Texas LP's (Applicant) application for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015948001. The Commission received timely comments and a request for a contested case hearing from Ms. Florence M. Dews. For the reasons stated herein, OPIC recommends the Commission find Ms. Dews is an affected person in this matter and grant her hearing request as detailed below.

B. Background of Facility

On December 1, 2020, Applicant applied to the TCEQ for new TPDES Permit No. WQ0015948001. If issued, this permit would authorize the disposal of treated domestic wastewater at the proposed Trails at Mustang Ridge Wastewater Treatment Facility at an annual average flow not to exceed 0.20 million gallons per day (MGD).

The facility is proposed to be located approximately 0.81 miles northeast of the intersection of Laws Road and U.S. Highway 183 in Travis County, Texas 78610. The treated effluent will be

discharged to an unnamed tributary, then to Cedar Creek, then to the Colorado River above La Grange in Segment No. 1434 of the Colorado River Basin. The unclassified receiving water uses are limited aquatic life use for the unnamed tributary and Cedar Creek. The designated uses for Segment No. 1434 are primary contact recreation, public water supply, and exceptional aquatic life use.

The facility will be an activated sludge process plant operated in suspended growth with single stage nitrification mode. Treatment units will include a bar screen, two aeration basins, a final clarifier, two aerobic sludge digesters, and a chlorine contact chamber. The proposed facility will serve the Trails at Mustang Ridge Residential Development Tract.

The effluent limitations in the draft permit, based on a 30-day average, are 5 milligrams per liter (mg/l) five-day carbonaceous biochemical oxygen demand (CBOD₅), 5 mg/l total suspended solids (TSS), 2.0 mg/l ammonia-nitrogen (NH₃-N), 126 colony forming units (CFU) or most probable number (MPN) of *E. coli* per 100 milliliters, and 4.0 mg/l minimum dissolved oxygen (DO). 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

The TCEQ received the permit application on December 1, 2020, and declared it administratively complete on February 3, 2021. Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English in the *Austin-American Statesman* on February 9, 2021, and in Spanish in the *El Mundo Newspaper* on February 11, 2021. Applicant published the Notice of Application and Preliminary Decision (NAPD) in English in the *Austin-American Statesman* on August 25, 2021, and in Spanish in the *El Mundo Newspaper* on August

26, 2021. The public comment period for the application closed on September 27, 2021. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on December 1, 2021. The deadline for filing requests for a contested case hearing was January 3, 2022.

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

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

The Commission received timely public comments and a timely hearing request from Ms. Florence M. Dews. According to the map prepared by the ED, Ms. Dews resides 0.76 miles from the proposed facility and directly adjacent to the discharge route.¹ In her hearing request, Ms. Dews raised a number of concerns that are relevant and material to a decision on this application, including water quality and its affect on domestic animals and wildlife, impacts to use and enjoyment of property, and the suitability of the discharge route.

OPIC finds Ms. Dews has a personal justiciable interest in this matter. Her proximity to the proposed facility demonstrates that she could be impacted in a manner not common to the general public and distinguishes her personal justiciable interests from an interest common to the

¹ Ms. Dews owns two parcels of land, both of which are located within a mile of the proposed facility and adjacent to the discharge route.

general public. The § 55.203 affected person determination factors indicate that Ms. Dews qualifies as an affected person. First, her concerns about water quality and use and enjoyment of her property are interests protected by the law under which this application is being considered. Second, a reasonable relationship exists between those interests and the regulation of water quality. Finally, her proximity to the proposed facility and the activities to be regulated under this permit increases the likelihood of impacts to her stated interests. OPIC therefore finds that Ms. Dews qualifies as affected person in this matter.

B. Issues Raised in the Hearing Request

Ms. Dews raised the following issues in both timely comments and her hearing request:

1. Whether the draft permit adequately provides for protection of water quality.
2. Whether the draft permit and operation of the proposed facility will be adequately protective of animal life.
3. Whether the draft permit is protective of the requestor's use and enjoyment of her property.
4. Whether the discharge route, as an operational feature of the facility, will function properly under the draft permit.
5. Whether the volume of discharged effluent exceeds the capacity of the receiving waters.
6. Whether operation of the proposed facility will contribute to flooding on the requestor's property.

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 request; 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. All of the issues raised are issues of fact.

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

All of the issues were raised by the requestor during the public comment period.²

G. The Hearing Request is Based on Issues Raised in Public Comments Which Have Not Been Withdrawn

The hearing request is based on timely comments that have not been withdrawn.

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

The hearing request raised 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). To refer an issue to 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).

Issues No. 1, 2, and 3, concerning protection of water quality, animal life, and use and enjoyment of property, are addressed by the substantive law that governs this application. The TCEQ 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 (TSWQS) contained in 30 TAC Chapter 307 require a proposed permit "to maintain the quality of water in the state consistent with public health and enjoyment..." as well as "propagation and protection of

² OPIC notes that in her hearing request, Ms. Dews also raised a concern about nuisance odors; however, this issue was not raised in her public comments and therefore is not appropriate for referral to SOAH.

terrestrial and aquatic life....” 30 TAC § 307.1. 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). The TSWQS further provide that “[t]he commission may not issue a permit for a new 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.” 30 TAC § 309.12. OPIC therefore finds Issues No. 1 through 3 are relevant and material to the Commission’s decision on this application and are appropriate for referral to SOAH.

Issues No. 4 and 5, relating to the proper functioning of the discharge route and whether the volume of discharged effluent exceeds the capacity of the receiving waters, are relevant and material to the Commission's decision on this application for several reasons. Location standards in Chapter 309 of the Commission’s rules are intended “to prohibit issuance of a permit for a facility to be located in an area determined to be unsuitable or inappropriate, unless the design, construction, and operational features of the facility will mitigate the unsuitable site characteristics.” 30 TAC § 309.10(b); *see also* 30 TAC § 309.12 (proposed site must minimize possible contamination of water in the state “when evaluated in light of the proposed design, construction or operational features” of the facility). Moreover, excessive discharge of treated effluent could impair the use and enjoyment of property belonging to downstream property owners including Ms. Dews. *See* 30 TAC § 307.1. Additionally, the discharge of effluent into a discharge route with insufficient additional capacity to channel the effluent could result in inundation of surrounding property and exposure to contaminants, creating a nuisance. 30 TAC § 309.10(b) provides that the issuance of a permit is conditioned on the minimization of the possibility of

exposing the public to nuisance conditions. Issues No. 4 and 5 are therefore relevant and material to the Commission's decision on this application and are appropriate for referral to SOAH.

Regarding Issue No. 6, to the extent Ms. Dews raises general concerns related to flooding, this issue is not appropriate for referral to SOAH because such concerns are not within TCEQ's jurisdiction to address. OPIC acknowledges that in her public comment submitted on April 16, 2021, Ms. Dews raised concerns regarding the location of her properties within the 100-year flood plain, but she did not include issues regarding the location of the flood plain in her hearing request. Moreover, 30 TAC § 309.13(a) conditionally prohibits the location of a wastewater treatment plant unit within the 100-year flood plain but does not specifically address the location of properties of affected persons within the flood plain. The ED's Response to Comment No. 7 states that Applicant's facility is proposed to be located above the 100-year flood plain and therefore would be in compliance with 30 TAC § 309.13(a).

I. Issues Recommended for Referral

As set forth above, OPIC recommends referral of Issues No. 1 through 5 specified in Section III.B to SOAH because they are relevant and material to the Commission's decision on this application.

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

OPIC respectfully recommends the Commission find that Ms. Florence M. Dews qualifies as an affected person in this matter, grant her hearing request, and refer Issues No. 1 through 5 specified in Section III.B 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 March 21, 2022, 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.



Amanda D. Pesonen

**MAILING LIST
CONTINENTAL HOMES OF TEXAS, L.P.
TCEQ DOCKET NO. 2022-0272-MWD**

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