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



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: JONATHAN CARTER OSINGA AND LAURA CHRISTINA OSINGA
TCEQ DOCKET NO. 2022-0273-IWD**

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 that reads "Vic McWherter".

Vic McWherter
Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2022-0273-IWD

IN THE MATTER	§	BEFORE THE
OF THE APPLICATION OF	§	
JONATHAN & LAURA OSINGA	§	TEXAS COMMISSION ON
FOR A MAJOR AMENDMENT	§	
TO TPDES PERMIT WQ0002959000	§	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 (Commission or TCEQ) files this Response to Request for Hearing in the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

A. Summary of Position

OPIC recommends the Commission grant the hearing request of Touchstone Ranch Land LLC and Touchstone Ranch Recovery Center. OPIC further recommends referral of Issue Nos. 1–9 listed in Section III.B to the State Office of Administrative Hearings for a contested case hearing with a maximum duration of 180 days.

B. Background of Facility

Jonathan Carter Osinga and Laura Christine Osinga (Applicants) have applied to the TCEQ for a major amendment of Texas Pollutant Discharge Elimination System Permit No. WQ0002959000. The amendment would authorize expansion of the Applicants’ Concentrated Animal Feeding Operation (CAFO) known as Overcrest Dairy (formerly operated as Moo-Over Dairy) located at 17298 South US Highway 281, in Hico, Erath County, Texas. Changes

authorized would include an increase in the livestock headcount from a maximum capacity of 990 head to 2,500 head, and an increase in the total land application area from 78 to 171 acres.

C. Procedural Background

TCEQ received this application on December 3, 2020. On January 14, 2021, the Executive Director of the TCEQ declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published in English in the *Stephenville Empire Tribune* on January 21, 2021, and in Spanish in *La Prensa de La Comunidad* on January 26, 2021. The Executive Director completed technical review of the application and prepared a draft permit. The Notice of Application and Preliminary Decision for a Water Quality Permit was published in English in the *Stephenville Empire Tribune* on August 18, 2021, and in Spanish in *La Prensa de La Comunidad* on August 26, 2021. The public comment period ended on September 23, 2021. On November 23, 2021, the Chief Clerk mailed the Executive Director's Decision and Response to Comments. The deadline to request a contested case hearing was December 23, 2021.

II. APPLICABLE LAW

This 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 Title 30, Texas Administrative Code ("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 person'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, or mixed questions of law or 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 Executive Director's Response to Comments, and that are relevant and material to the Commission's decision on the application.

III. DISCUSSION

A. Requestors are Affected Persons

Touchstone Ranch Land LLC and Touchstone Ranch Recovery Center (Requestors) timely filed comments and a hearing request on September 22, 2021. Touchstone Recovery Center operates a licensed 26-bed residential and outpatient treatment center for clients experiencing substance use disorder and co-occurring psychiatric disorders. Requestors state their property is approximately 1500 feet north of Overcrest Dairy, and the mapping done by Executive Director confirms the Requestors' location within .44 mile (approximately 2300 feet) of Overcrest Dairy.

Treatments at Touchstone Recovery Center include outdoor equine therapy that could be impaired by foul odors and vectors. Also, Requestors rely on a groundwater well as a water supply for Touchstone Recovery Center operations. Requestors express concern regarding the proposed permit amendment's potential impact on the health and welfare of Touchstone Recovery Center's clients, many of whom have compromised health conditions. Requestors contend that the potential impact of surface water contamination, groundwater contamination, and nuisance conditions of odors, dust, and vectors, all threaten Touchstone Recovery Center's ability to care for its clients.

To be granted a contested case hearing, Requestors must show that they are "affected persons" who have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. That interest must be distinguishable from interests common to the general public. *See* 30 TAC § 55.203(a). OPIC finds that Requestors have a personal justiciable interest that is not common to the general public based on: (1) their ownership of property and their operation of a residential treatment facility located less than half

a mile from Overcrest Dairy; (2) their concerns for the well-being of Touchstone Recovery Center's clients; and (3) their concerns for the continued viability of Touchstone Recovery Center as a residential treatment center.

Requestors' stated interests are protected by the law under which this application will be considered. 30 TAC § 55.203(c)(1). A reasonable relationship exists between Requestors' interests and the CAFO activities to be regulated under the proposed permit. 30 TAC § 55.203(c)(3). The Requestors' location relative to Overcrest Dairy increases the likelihood of adverse impacts to the use and enjoyment of their property. 30 TAC § 55.203(c)(4). Therefore, OPIC finds that Requestors have successfully demonstrated that they are affected persons in this matter.

B. Issues Raised in the Hearing Request

Requestors raised the following issues:

1. Whether the draft permit contains provisions sufficient to protect human health, including the health of Requestors' clients treated at Touchstone Recovery Center.
2. Whether the draft permit contains provisions sufficient to protect Requestors' use and enjoyment of property.
3. Whether the draft permit contains provisions sufficient to prevent nuisance conditions of odors, dust, and vectors, and with respect to odors:
 - (a) under the buffer zone requirements of the Table found at 30 TAC §321.43(j)(2), whether the CAFO to be authorized by the draft permit "was in operation on or before August 19, 1998"; and accordingly
 - (b) under 30 TAC § 321.43(d), whether the CAFO to be authorized by the draft permit qualifies for the air quality standard permit for animal feeding operations based on (i) this water quality application for an individual permit, and (ii) satisfaction of the applicable buffer zone requirements of the Table found at 30 TAC §321.43(j)(2).¹
4. Whether the draft permit contains provisions sufficient to protect groundwater and surface water.

¹ See *infra* note 2.

5. Whether the draft permit's provisions are consistent with the state's Water Quality Management Plan, including the Total Maximum Daily Loads for phosphorus for the North Bosque River, Segment No. 1226 of the Brazos River Basin.
6. Whether the draft permit's provisions addressing nutrient application rates and the overall amount of nutrients to be land applied are adequately protective and comply with applicable regulatory requirements.
7. Whether the draft permit adequately addresses soil conditions at Applicants' land management units and contains provisions sufficient to prevent harmful runoff.
8. Whether the draft permit requires retention control structures that are designed and operated in compliance with applicable regulatory requirements and adequately protect water quality.
9. Whether the draft permit requires best management practices that comply with applicable regulatory requirements and adequately protect water quality.

C. Issues Raised in the Hearing Request Remain Disputed

There is no agreement between the Requestors and the Executive Director on the issues raised in the hearing request. The issues remain disputed.

D. The Disputed Issues Are Issues of Fact, or Mixed Questions of Law and Fact

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, or mixed questions of law or fact. All issues raised by Requestors satisfy this criterion.²

E. The Issues Were Raised by the Requestors During the Comment Period

Each issue was raised by the Requestors during the public comment period.

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

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

² Issues 3(a)-(b) are mixed questions of fact and law appropriate for referral to hearing as authorized under 30 TAC §55.211(c)(A)(ii).

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

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 this permit. Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Anderson v. Liberty Mutual, Inc.*, 477 U.S. 242, 248-51 (1986). Requestors have raised issues that are relevant and material under the requirements of 30 TAC §§ 55.201(d)(4)(B) and 55.211(c)(2)(A)(ii).

A determination of whether Overcrest Dairy's expanded operations would negatively impact human health and the environment is relevant and material to the Commission's decision on this application. CAFO permit applications must be examined on a case-by-case basis to ensure that all issued permits contain the terms and conditions necessary to protect human health and the environment. 30 TAC §321.36(b). A permitted CAFO must have a pollution prevention plan, as required by 30 TAC §321.46. This plan must include measures necessary to limit the discharge of pollutants into or adjacent to water in the state. A permitted CAFO is also prohibited from discharging manure, sludge, or wastewater from land management units under the provisions of 30 TAC §321.40(d).

Whether the draft permit contains provisions sufficient to prevent nuisance conditions is relevant and material to the Commission's decision on this application. The Commission's rules at 30 TAC § 321.40(d)-(e) prohibit the creation of nuisance conditions from discharges of waste at land management units and require irrigation practices that prevent nuisance conditions. In addition, 30 TAC § 321.31 requires that all manure and wastewater generated be retained and utilized in a manner that prevents the creation of a nuisance or a condition of air pollution. Furthermore, to qualify for the air quality standard permit required for any animal feeding operation, 30 TAC §321.43 requires odor abatement measures which -- depending on whether a

facility was in operation before August 19, 1998 -- may be satisfied by buffer zones or odor control plans, or both.

Protecting surface water and groundwater is a primary objective of permitting under Texas Water Code, Chapter 26, Subchapter L, and the Commission's Chapter 321 rules. As discussed in the hearing request, TPDES permits are required to contain conditions necessary to ensure that applicable water quality standards will be achieved and ensure consistency with the state's Water Quality Management Plan (WQMP). Total Maximum Daily Loads (TMDLs) are incorporated into the state's WQMP. As stated on the TCEQ's website "[a]ll applications for new and amended permits are reviewed for conformance with applicable WQMP recommendations."³

EPA's website also addresses the nexus between TMDLs and state-administered NPDES permitting:

A TMDL identifies the amount of specific pollutants or properties of a pollutant from point, non-point, and natural background sources, including margin of safety, that may be discharged to a water body and still ensure that the water body attains water quality standards. The allocations of pollutant loadings to point sources are called waterload allocations. *Effluent limits in NPDES permits must be consistent with assumptions used to derive the waterload allocations.* (emphasis added.)⁴

Furthermore, under 30 TAC § 305.531(4) (Establishing and Calculating Additional Conditions and Limitations for TPDES Permits), the Commission has adopted by reference 40 CFR §122.44. This regulation requires state NPDES permitting programs to ensure that effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload

³ <https://www.tceq.texas.gov/permitting/wqmp>

⁴ <https://www.epa.gov/npdes/permit-limits-tbels-and-wqbels>

allocations for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7 (TMDLs and individual water-quality based effluent limitations).

40 CFR §122.44(d)(1)(vii)(B).

Retention control structures at CAFOs prevent runoff and are critical to protecting water quality. The Commission's rules at 30 TAC § 321.38(e) specify regulatory requirements for the design and operation of these structures. Therefore, Requestors' concerns related to the draft permit's requirements for retention control structures are relevant and material to a decision on the application.

Requestors also raise relevant and material issues regarding whether the draft permit's provisions effectively require Applicants to utilize best management practices and prevent the overloading of nutrients. The CAFO rules at 30 TAC § 321.36 require the operator to develop and implement a nutrient management plan. This plan is required to include site-specific nutrient management practices that ensure appropriate agricultural utilization of nutrients in the manure, sludge, or wastewater. Nutrient loading and application rates are addressed by 30 TAC §§ 321.36, 321.40, and §321.42. Also, as discussed above, the pollution prevention plan required under 30 TAC § 321.46 must include best management practices to ensure that waste applied to the land is utilized by soils in the land management units, rather than running off to pollute waters in the state.

H. Issues Recommended for Referral

For the reasons discussed above, OPIC recommends referral of Issues 1–9 in Section III.B to the State Office of Administrative Hearings (“SOAH”).

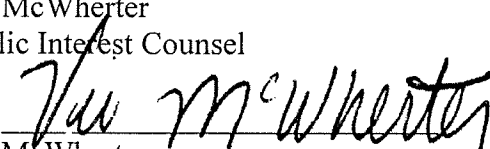
I. Maximum Expected Duration of Hearing

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 Administrative Law Judge (ALJ) is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 1, 2015, the ALJ 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 ALJ 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

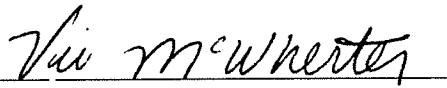
OPIC concludes that Touchstone Ranch Land LLC and Touchstone Ranch Recovery Center are affected persons in this matter, and respectfully recommends the Commission grant their hearing request. OPIC further recommends the Commission refer Issue Nos. 1–9 specified in Section III.B for a contested case hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,
Vic McWherter
Public Interest Counsel

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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.


Vic McWherter

MAILING LIST
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TCEQ DOCKET NO. 2022-0273-IWD

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