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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 9, 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: **City of Star Harbor (Applicant)**
Docket No. 2022-0325-MWD

Dear Ms. Gharis:

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 cursive script that reads "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2022-0325-MWD

APPLICATION BY	§	BEFORE THE TEXAS
CITY OF STAR HARBOR FOR	§	COMMISSION ON
TLAP PERMIT NO. WQ0016017001	§	ENVIRONMENTAL QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE
TO REQUESTS 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 Requests for Hearing in the above-referenced matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

OPIC recommends the Commission grant the hearing requests of Don Norwood and Castell Realty, LLC based on their stated interests and the location of their properties in relation to the proposed wastewater treatment plant. OPIC also recommends the Commission refer the issues specified in Section III.C. 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 July 14, 2021, the City of Star Harbor (Star Harbor or Applicant) applied to the TCEQ for TLAP Permit No. WQ0016017001 authorizing the disposal of treated wastewater at a volume not to exceed a daily average flow of 60,000 gallons per day (GPD) via irrigation of 22 acres of public access land with a golf course. The proposed permit does not authorize a discharge of pollutants into water in the state.

C. Procedural Background

The application was received on July 14, 2021 and declared administratively complete on August 16, 2021. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in the *Athens Daily Review* on August 19, 2021. The Executive Director (ED) completed the technical review of the application on August 24, 2021 and prepared the proposed permit, which if approved, would establish operational conditions. The Notice of Application and Preliminary Decision (NAPD) was published on October 16, 2021 in the *Athens Daily Review*. The public comment period for this application closed on November 15, 2021. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on January 20, 2022. The deadline for filing requests for a contested case hearing was February 20, 2022. The Commission received timely-filed hearing requests from Don Norwood and Castell Realty LLC.

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.

A hearing request must substantially comply with the following requirements:

- (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.

30 TAC § 55.201(d).

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), 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 RTC, and that are relevant and material to the Commission's decision on the application. Under § 55.211(c)(2)(B)-(D), a hearing request 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

On February 22, 2022, the Commission received timely hearing requests from both Don Norwood and Castell Realty LLC. Among other disputed issues of law, policy and fact, the requestors express concerns related to: inaccurate and incomplete information in notices of the application; inaccurate and incomplete information in the application itself; Star Harbor's failure

to identify all affected landowners for purposes of mailed notice; improper siting of the proposed wastewater treatment plant and the resulting potential negative impacts on surface water and groundwater; and inadequate effluent limits, buffer zones, and pond lining requirements. These interests are protected by the law under which the application will be considered.

The ED produced a map in this matter showing Mr. Norwood's property located either adjacent to, or otherwise in very close proximity to, the proposed wastewater treatment plant and its effluent holding pond. The ED's map in this matter does not indicate the location of property owned by Castell Realty LLC; however, prior mapping submitted for purposes of Star Harbor's application for TPDES Permit No. WQ0014268002 (TCEQ Docket No. 2019-0575-MWD) shows Castell Realty LLC as the owner of property close to the proposed wastewater treatment plant and effluent holding pond (within a half mile). Both requestors were found to be affected persons and participated as parties in the 2019 proceedings on Star Harbor's TPDES wastewater discharge permit application.¹ Given the proximity of the requestors' properties to Applicant's proposed wastewater treatment plant and effluent holding pond, OPIC finds that a reasonable relationship exists between the interests claimed by the requestors and the activity regulated. Therefore, OPIC finds that Don Norwood and Castell Realty LLC are affected persons in accordance with 30 TAC § 55.203 and recommends their hearing requests be granted.

C. Issues Raised in the Hearing Requests

The requestors raised the following issues:

1. Whether mailed notice of the application was provided to all required persons.

¹ In the 2019 proceedings, the requestors' location along the proposed discharge route was relevant to their standing as affected persons. Here, there is no longer a proposed discharge route to consider, however, a review of all mapping related to the 2019 application and the current application shows the proximity of both requestors' properties to the planned site for proposed wastewater plant and effluent holding pond.

2. Whether the Adjacent Landowners Map submitted with the application identified all required property owners.
3. Whether notices of the application correctly stated the location of the disposal site and relevant watershed and/or drainage basin.
4. Whether the application correctly identifies private groundwater wells within one mile of the proposed facility and effluent pond.
5. Whether the application includes all required maps, diagrams, bases of design, calculations, and other pertinent data required by 30 TAC Chapter 309.
6. Whether the application includes all information required for determining or reviewing facility design, hydraulic application rates, effluent storage calculations, and water balance studies.
7. Whether the application contains complete information on nitrogen application rates, soil testing, and irrigation best management practices.
8. Whether the proposed pattern and method of disposal will adequately protect surface water quality and groundwater quality.
9. Whether the proposed wastewater treatment plant and effluent pond comply with the siting, buffer zone, and liner requirements of 30 TAC Chapter 309, Subchapter B.
10. Whether the effluent limits in the draft permit are adequately protective and properly calculated.
11. Whether the application includes adequate calculations for agronomic uptake of nutrients and other pollutants and correctly identifies suitable crop types for the disposal site.

Additionally, requestors rely on issues of law and policy in seeking to have this application denied. They contend that: (1) the doctrine of collateral estoppel prohibits the Commission from revisiting issues that were previously adjudicated in proceedings on Star Harbor's TPDES permit application (TCEQ Docket No. 2019-0575-MWD) -- especially issues questioning the suitability of this specific location for placement of Star Harbor's proposed wastewater treatment facilities; (2) the ED has violated 30 TAC § 80.25(b) by refusing to enter an order dismissing Star Harbor's TPDES application with prejudice following remand of that application by the State Office of Administrative Hearings; and (3) the ED's entry of an order dismissing the TPDES application with prejudice would function legally to preclude TCEQ's consideration of this pending TLAP application.

D. Issues Raised in the Hearing Request Remain Disputed

There is no agreement between the hearing requestors and the ED on these issues.

E. Whether 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). As acknowledged in the hearing requests, the issues related to collateral estoppel, and any duty of the ED under 30 TAC § 80.25(b) to issue an order dismissing the TPDES application with prejudice, are disputed issues of law and policy. Only disputed issues of fact are appropriate for referral to a SOAH hearing.²

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

All issues were raised by the requestors during the public comment period.

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

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. 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). The Commission can only consider issues within its jurisdiction. Therefore, relevant and material issues include those governed by the substantive law of the permit at issue. *Anderson v. Liberty Mutual, Inc.*, 477 U.S. 242, 248-51 (1986).

The requestors have raised issues that are relevant and material to the Commission's decision on this application. Proper notice is required by Chapter 39 of the Commission's rules.

² Although these issues of law and policy do not meet the legal criteria for referral as issues of fact, OPIC finds no barrier to preclude the Commission or an Administrative Law Judge from considering and acting on these legal arguments when developing any conclusions of law.

Wastewater treatment and effluent limitations at wastewater treatment facilities must maintain water quality in accordance with the TCEQ's surface water quality standards. 30 TAC § 309.1(a). Effluent quality for a TLAP permit is addressed under the Commission's rules at 30 TAC § 309.4. Location standards under 30 TAC Chapter 309, Subchapter B, address wastewater treatment plant siting requirements intended to protect surface water quality and groundwater quality. To protect water supplies and minimize nuisance odors, Chapter 309, Subchapter B also specifies construction design and liner requirements for effluent ponds and establishes specified buffer zones.

Requestors' remaining issues are addressed by 30 TAC § 309.20 provisions requiring TLAP applications to include: location information; accurate copies of all necessary maps; information identifying private groundwater wells; specified diagrams, designs, and calculations; hydraulic application rates; effluent storage calculations; accurate water balance studies; nitrogen application rates; and crop system information regarding crop suitability and nutrient uptake rates.

I. Issues Recommended for Referral

For the reasons discussed above, OPIC recommends referral of Issues 1-11 listed in Section III. C. to SOAH for a contested case hearing.

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 recommends the Commission grant the hearing requests of Don Norwood and Castell Realty LLC, and further recommends the Commission refer Issues 1-11 specified in Section III. C. for a contested case hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2022, the original of the Office of Public Interest Counsel's Response to Requests for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, and/or by deposit in the U.S. Mail.



Eli Martinez

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DOCKET NO. 2022-0325-MWD; PERMIT NO. WQ0016017001

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