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Vic McWherter, *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 15, 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: **FM 2920 LAND COMPANY, LTD. (Applicant)**  
**TCEQ DOCKET NO. 2022-0939-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 "Jennifer Jamison".

Jennifer Jamison, Attorney  
Assistant Public Interest Counsel

**DOCKET NO. 2022-0939-MWD**

<b>APPLICATION OF FM 2920</b>	<b>§</b>	<b>BEFORE THE</b>
<b>LAND COMPANY, LTD. FOR</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>NEW TPDES PERMIT NO.</b>	<b>§</b>	<b>ENVIRONMENTAL</b>
<b>WQ0015977001</b>	<b>§</b>	<b>QUALITY</b>

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

**I. INTRODUCTION**

**A. Summary of Position**

Before the Commission is an application by FM 2920 Land Company, Ltd. for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015977001. The Commission received comments and a request for a contested case hearing from Dana R Boehm, Tom Glass, William Cooper, Pete and Karen Rezzoffi, as well as multiple individual Requestors represented by attorney Charles Irvine. For the reasons stated herein, OPIC respectfully recommends the Commission find that the following individuals are affected persons in this matter and grant their pending hearing requests: Pete and Karen Rezzoff, Karen and Scott Hill, Rick and Renay Carter, Vic and Linda Smart, Kenneth and Betsey Gardner, Terry and Paula Hart, Liana Jones, Kevin and Cynthia Crane, Judy and Colin Allison, James P. Long and Rene L. Sanchez, and Jana Epplin. OPIC recommends denial of all remaining requests for a contested case hearing. Finally, OPIC recommends referring Issues No. 1, 2, 3, and 4 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 April 15, 2021 FM 2920 Land Company, Ltd. applied to the TCEQ for new TPDES Permit No. WQ0015977001. If issued, this permit would authorize the disposal of treated domestic wastewater via Outfall 001 at a daily average flow not to exceed 120,000 gallons per day (gpd). The proposed Facility would be an activated sludge process plant operated in the complete mix mode. Treatment units in the Interim phase include one lift station, one bar screens, one aeration basin, one final clarifier, one sludge digester, and one chlorine contact chamber. Treatment units in the Final phase include one lift station, one bar screens, two aeration basins, one final clarifier, two sludge digesters, and two chlorine contact chambers. The facility has not been constructed.

The proposed Facility would be located on Farm-to-Market Road 2920 approximately 550 feet east of the intersection of Farm-to-Market Road 2920 and Three Pines Drive, in Harris County, Texas 77447. The treated effluent will be discharged to a man-made ditch, thence to Spring Creek in Segment No. 1008 of the San Jacinto River Basin. The receiving water uses are minimal aquatic life use for the man-made ditch and high aquatic life use for Spring Creek. The designated uses for Segment No. 1008 are primary contact recreation, public water supply, and high aquatic life use.

The effluent limitations in both the Interim and Final phases of the draft permit, based on a 30-day average, are 10 mg/l five-day carbonaceous biochemical oxygen demand (CBOD5), 15 mg/l total suspended solids (TSS), 3 mg/l ammonia-nitrogen (NH3-N), 63 CFU or MPN of E. coli per 100 ml, and 4.0 mg/l minimum dissolved oxygen (DO). The effluent shall contain a total chlorine residual of at least 1.0 mg/l and shall not exceed a total chlorine residual of 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 in all phases.

## **C. Procedural Background**

TCEQ received the application for a new permit on April 15, 2021, and declared it administratively complete on May 20, 2021. Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English on June 11, 2021, in the *Houston Business Journal* and in Spanish on July 7, 2021, in the *Houston Chronicle dba La Voz*. The Executive Director (ED) completed the technical review of the application on September 7, 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 October 22, 2021, in the *Houston Business Journal*. The Combined NAPD and Public Meeting Notice was published on January 4, 2022, in the *Houston Business Journal*. The public meeting was virtually held on February 7, 2022. The public comment period ended on February 7, 2022, at the close of the public meeting. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on April 26, 2022. The deadline for filing requests for a contested case hearing was May 26, 2022.

The Commission received timely comments and a request for a contested case hearing from Dana R Boehm, Tom Glass, Pete and Karen Rezzoffi, as well as multiple individual Requestors represented by attorney Charles Irvine.

## **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**

##### **Dana Boehm**

Dana Boehm filed a timely hearing request on July 6, 2021 and was included on the joint hearing request letter submitted by attorney Charles Irvine on May 26, 2022. Although both hearing requests submitted by Dana Boehm were timely, the Commission did not receive comments from this Requestor prior to the close of the comment period on February 7, 2022. To be considered an affected person, a hearing requestor must have submitted comments on the application, and the request must be based only on the affected person's timely comments. Texas Water Code ("TWC") § 5.115(a)(a-1)(2)(B); 30 TAC § 55.201(c). Because no comments were received from Dana Boehm during the comment period, OPIC cannot find that this Requestor has demonstrated affected person status and must respectfully recommend denial of the request.

##### **William Cooper**

William Cooper submitted a timely combined comment and hearing request on July 6, 2021 stating concerns about flooding caused by discharge from the proposed permit. Mr. Cooper provided an address of 22011 Pine Tree Lane, Hockley, TX 77447, which according to the map prepared by the ED's staff is approximately one mile from the proposed Facility and discharge route. 30 TAC § 55.203(a) outlines relevant factors used to evaluate whether a Requestor is an affected person who has a personal, justiciable interest affected by the application. 30 TAC § 55.203(a)(1) weighs whether the interest claimed is one protected by the law under which the application will be considered. The sole concern raised by Mr. Cooper was flooding. Because the TCEQ does not have jurisdiction to address flooding issues in the wastewater permitting process,

OPIC cannot find that Mr. Cooper has demonstrated affected person status per 30 TAC §55.203(a) and must respectfully recommend denial of his hearing request.

### **Tom Glass**

Tom Glass submitted timely comments on July 2, 2021, oral comments at the Public Meeting held on February 7, 2022, and a hearing request on February 7, 2022. Mr. Glass lists his address as 22915 Three Pines Drive, Hockley, TX 77447. The map provided by the ED confirms that the address provided by Mr. Glass is within 0.5 miles of the proposed Facility, outfall, and discharge route. In his comments, Mr. Glass raised concerns regarding the accuracy and completeness of the application, water quality, and flooding. The entirety of Mr. Glass's hearing request reads, "I formally request a formal hearing on this permit in addition to the public meeting being held on Feb 7, 2022." 30 TAC § 55.201(c) states that 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 must be based only on the affected person's timely comments. Further, 30 TAC § 55.201(d) requires that hearing requests substantially comply with certain of factors, including identification of the requestor's personal justiciable interest affected by the application, as well as providing a list of 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. 30 TAC § 55.201(d)(2)&(4). Due to that fact that Mr. Glass' hearing request does not identify any personal justiciable interest affected by the application, or list any issues timely raised during the comment period, OPIC cannot find that Tom Glass is an affected person in this matter and must respectfully recommend denial of his hearing request.

### **Pete and Lynda Karen Rezzoffi**



Pete and Karen Rezzoffi submitted a timely combined comment and hearing request on July 6, 2021. In addition, the Rezzoffis are listed on the joint request submitted by attorney Charles Irvine on May 26, 2022. In their individual request, the Rezzoffis raised concerns regarding water quality, traffic concerns, declining property value, and the number of mobile home spaces proposed by the developer. Water quality is an interest that is protected by the law under which this application will be considered, while the others fall outside the jurisdiction of the TCEQ. The Rezzoffis list their address as 20818 Pine Oak Lane, Hockley, TX 77447, which the ED map confirms is located less than a mile from the proposed Facility, outfall, and discharge route. Given the close proximity to the regulated activity and the fact that Pete Rezzoffi and Karen Rezzoffi's concerns about water quality 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 Rezzoffi's concerns and the regulated activity. Therefore, OPIC recommends the Commission find that Pete and Lynda Karen Rezzoffi are affected persons in this matter and grant their pending hearing request.

### **Joint Request**

The Commission received a joint hearing request submitted by attorney Charles Irvine on May 26, 2022 listing the following individuals as Requestors: Kerry Green, Lewis Green, Melissa Bronikowski, Danele and Don Pribilski, Jana Epplin, Karen and Scott Hill, Chuck and Bette Dickison, Donald and Iris Blackwell, John R. and Mary C. Carter, Rick and Renay Carter, Lee Lackey, Vic and Linda Smart, Larry and Toni Stephens, Walter and Linda L. Horswill, Kenny and Betsey Gardner, Kevin Burke, Kevin Burke, and Benzha Burke, Daniele Comeau and Michael Redden, Vi Dima Pima, Raymond and Kammie Shay, David and Theresa Harsch, Terry and Paula J. Hart, Russel and Michelle Smith, Michael and Angie Martino, Paul Rainer, Renee Arias, Liana

Jones, Kevin and Cynthia J. Crane, Michaela Mey, Judy and Colin Allison, James P. Long and Renee L. Sanchez, Doris and Mack Walpole, Trinity Walpole, Kylie Walpole, Vaughn Walpole, and Dodie Walpole, Deborah and William Cooper, Dana Boehn, Ian Blane, John and Catherine Abbruscato, Miguel Mujica, and Pedro Mujica.

OPIC notes that the date of the Joint Request letter (May 26, 2022) falls outside the comment period, which ended on February 7, 2022. For this reason, OPIC may only recommend a determination of affected person status for persons listed on the Joint Request letter who previously submitted timely comments and raised relevant and material issues that are echoed in the Joint Request letter. Accordingly, for the reasons stated below, OPIC recommends the Commission find that Karen and Scott Hill, Rick and Renay Carter, Vic and Linda Smart, Kenneth and Betsey Gardner, Terry and Paula Hart, Liana Jones, Kevin and Cynthia Crane, Judy and Colin Allison, James P. Long and Rene L. Sanchez, and Jana Epplin are affected persons in this matter and grant their pending hearing requests. OPIC recommends denial of all other hearing requests for the remaining persons listed on the Joint Request letter.

### **Karen and Scott Hill**

Karen and Scott Hill submitted oral comments at the Public Meeting on February 7, 2022, as well as multiple written comments during the comment period. The Hills are included on the Joint Request letter dated May 26, 2022, and their address is listed as 22914 Three Pines Drive, Hockley, Texas 77447. The ED's map confirms that the Hill's residence is directly adjacent to Applicant's property boundary, and less than half a mile from the discharge route, Facility, and outfall. In their submittal, Karen and Scott Hill raise concerns about flooding, accuracy and completeness of the application, water quality, and effects on wildlife. Many the issues stated in the request, including the those related to water pollution, wildlife, and the accuracy and

completeness of the application are protected by the law under which this application will be considered. 30 TAC § 55.203(c)(1). Given the close proximity to the regulated activity and the fact that many of Karen and Scott Hill's concerns 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 stated concerns and the regulated activity. Therefore, OPIC recommends the Commission find that Karen and Scott Hill are affected persons in this matter and grant their pending hearing request.

### **Rick and Renay Carter**

Rick Carter submitted a written comment on January 29, 2022, as well as an oral comment at the Public Meeting held for this application. The Carter's address is listed as 22603 Three Pines Drive, Hockley, Texas 77447, and the ED's map confirms that their residence is located less than half a mile from the discharge route, Facility, and outfall. The Carters are included on the timely Joint Request letter. In their oral comments, Rick Carter raised concerns regarding the need for TCEQ to visit the site in person, effect of pollution, flooding, and negative effects on wetlands. Many the issues stated in the request, including the those related to water pollution, and effects on wetlands are protected by the law under which this application will be considered. 30 TAC § 55.203(c)(1). Accordingly, OPIC recommends the Commission find that Rick and Renay Carter are affected persons in this matter and grant their pending hearing request.

### **Vic and Linda Smart**

Vic and Linda Smart submitted written comments on January 22, 2022 and are included on the Joint Request letter. Their address is listed as 22427 Three Pines Drive, Hockley, Texas 77447, and the ED's map confirms that the residence is located roughly half a mile from the Facility, discharge route, and outfall. In their comments and related Request, Vic and Linda Smart

raised concerns about effects on wildlife and aquatic life, including endangered species, property value, and flooding. Effects on wildlife and aquatic life, including endangered species is an interest protected by the law under which this application is considered. 30 TAC § 55.203(c)(1). Given the close proximity of the Smarts' residence, in addition to the fact that their concerns are reasonably related to the regulated activity, OPIC concludes that Vic and Linda Smart are likely to be affected by this application in a way not common to the general public. As such, OPIC recommends the Commission grant their pending hearing request.

### **Kenneth and Betsey Gardner**

Kenneth and Betsey Gardner submitted oral comments at the Public Meeting on February 7, 2022 as well as numerous written comments during the comment period. The Gardners are listed as Requestors on the Joint Request letter, and their address is listed as 22510 Three Pines Drive, Hockley, Texas 77447. The ED's map confirms that Kenneth and Betsey Gardner's location is within a mile of the discharge route, Facility, and outfall. In their submittal, Kenneth and Betsey Gardner raised numerous concerns, including concerns about discrepancies within the application, effect wetlands, flooding, effect on water tables, water quality, and effects on drinking water. Many of the issues stated in the request are protected by the law under which this application will be considered. 30 TAC § 55.203(c)(1). Given their close proximity to the regulated activity and the fact that many of Mr Gardner. and Ms. Gardner's concerns 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 stated concerns and the regulated activity. Therefore, OPIC recommends the Commission find that Kenneth and Betsey Gardner are affected persons in this matter and grant their pending hearing request.

### **Terry and Paula Hart**

Terry and Paula Hart submitted written comments on August 23, 2021 and are included on the Joint Request dated May 26, 2022. The map prepared by the ED confirms the Harts' address as 22219 Three Pines Drive, Hockley, Texas 77447, which is less than one mile from the Facility, discharge route, and outfall. The Harts raised numerous including concerns about effects of salinity on ecosystems, nuisance conditions including pests, and traffic. Issues regarding adverse impacts to the ecosystem are protected by the law under which this application will considered. 30 TAC § 55.203(c)(1). Given the close proximity of the Harts' residence and the regulated activity, and the fact that Terry and Paula Hart raised concerns protected by the law under which this application is considered, OPIC concludes that they are likely to be affected in a way not common to the general public. Accordingly, OPIC recommends the Commission grant the pending hearing request of Terry and Paula Hart.

### **Liana Jones**

Liana Jones submitted timely written comments on February 6, 2022 and was included on the Joint Request letter. Ms. Jones' address is listed as 22718 Three Pines Drive, Hockley, Texas 77447, and the ED's map confirms that the residence is located within a half mile of the Facility, outfall, and discharge route. In her submittal, Ms. Jones raised concerns about nuisance conditions, effects on wildlife, water quality, accuracy and completeness of the application, and flooding. Given Ms. Jones' proximity to the regulated activity in addition to her stated concerns, OPIC finds that Liana Jones is likely to be affected in a manner not common to the general public and recommends granting her hearing request.

### **Kevin and Cynthia Crane**

Cynthia Crane provided oral comments at the Public Meeting on February 7, 2022, in addition to written comments on February 2, 2022. Cynthia and Kevin Crane are included on the Joint Request and their address is listed as 22811 Three Pines Drive, Hockley, Texas 77447. The ED's map confirms proximity of the residence within half a mile of the Facility, outfall, and discharge route. Cynthia Crane's stated concerns include concerns about effects on wildlife, flooding, property value, and water quality. Many of these issues are protected by the law under which this application will be considered. 30 TAC § 55.203(c)(1). Given the proximity of the Crane residence to the regulated activity and the relevance of their stated concerns, OPIC finds that Kevin and Cynthia Crane are likely to be affected in a manner not common to the general public. Accordingly, OPIC recommends granting the Cranes' pending hearing request.

**Judy and Colin Allison**

Judy and Colin Allison submitted two written comments on February 1, 2022 and are included in the Joint Request. Their address is listed as 22727 Three Pines Drive, Hockley, Texas 77447, and the ED's map confirms that the residence is located less than half a mile from the regulated activity. The Allisons raised concerns about flooding, erosion, effects on the environment, algae blooms, nuisance conditions, effects on human and animal health, and effects on drinking water. Many of these issues fall within the purview of TCEQ's jurisdiction and are protected by the law under which this application is considered. Given the close proximity of the Allison's residence to the regulated activity in addition to their stated concerns, OPIC finds that Judy and Colin Allison are likely to be affected in a manner not common to the general public and recommends granting their pending hearing request.

**James P. Long and Renee L. Sanchez**

Mr. Long submitted written comments on February 7, 2022 and also provided oral comments at the public meeting. The primary focus of Mr. Long's concerns are the accuracy and completeness of the application. Mr. Long and Ms. Sanchez' address is listed as 22315 Three Pines Drive, Hockley, Texas 77447, and the ED's map confirms this residence is within one mile of the regulated activity. Given the close proximity of their residence to the Facility, outfall, and discharge route, and the relevance of their stated concerns, OPIC concludes that these Requestors are likely to be affected in a manner not common to the general public and recommends granting their pending hearing request.

### **Jana Epplin**

Ms. Epplin submitted written comments on January 24, 2022 in addition to offering formal comments at the Public Meeting on February 7, 2022. The Joint Request lists Ms. Epplin's address as 22015 Three Pines Drive, Hockley, Texas 77447. The map prepared by the ED confirms that Ms. Epplin's address is located within half a mile of the Facility, discharge route, and outfall. Ms. Epplin's request includes concerns regarding pollution of the creek, effects on wetlands, and effects on wildlife. Given the close proximity to the regulated activity and the fact that many of Ms. Epplin's concerns 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 the stated concerns and the regulated activity. Therefore, OPIC recommends the Commission find that Jana Epplin is an affected person in this matter and grant her pending hearing request.

### **B. Issues Raised in the Hearing Requests of Affected Persons**

The affected persons raised the following issues:

1. Whether the draft permit is adequately protective of terrestrial and aquatic wildlife, and adequately prevents adverse effects to human health or safety or to the environment (Joint Requestors);
2. Whether the Draft Permit is adequately protective of water quality, specifically the effects of algae growth; (Pete and Karen Rezzoffi, Joint Requestors)
3. Whether the draft permit is adequately protective of nuisance conditions including odors (Joint Requestors);
4. Whether the draft permit is accurate and complete (Joint Requestors);
5. Whether the Draft Permit adequately protects against flooding and erosion (Joint Requestors);
6. Whether issuance of the Draft Permit will decrease property values and create traffic concerns (Pete and Karen Rezzoffi).

**C. Issues Raised in the Hearing Requests Remain Disputed**

There is no agreement between the affected persons 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 affected persons are issues of fact.

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

All issues were raised by the affected persons 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).

*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). Finally, 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. As Chapter 307 designates criteria for the regulation of water quality and the protection of human health and safety and terrestrial life, Issues

no. 1 and 2 are relevant and material to the Commission's decision regarding this application and are appropriate for referral to SOAH.

*Nuisance Conditions*

Requestors expressed concern regarding nuisance conditions, including odor. 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 conditions, Issue No. 3 is relevant and material to the Commission's decision on this Application.

*Complete and Accurate Application*

Requestors question whether the application contains inaccuracies and omits relevant information. The Commission's Chapter 281 and Chapter 305 rules require applicants for TPDES permits to certify the accuracy of the information provided to TCEQ and to supplement or correct the application if an error is later discovered. Also, representations in the application become permit conditions. Therefore, Issue No. 4 regarding the accuracy and completeness of the application is relevant and material.

*Flooding and Erosion*

Requestors raised concerns regarding a potential increased risk of flooding and erosion. The TCEQ does not have jurisdiction to consider whether activities authorized under a wastewater discharge permit would cause flooding. 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 general concerns that a permitted discharge of treated wastewater effluent could cause an increased

risk of flooding. Likewise, in the absence of specifically stated concerns about the adequacy of the discharge route as an operational feature of the facility, the TCEQ does not have jurisdiction to address general concerns about erosion. Accordingly, Requestors' concerns pertaining to flooding and erosion are not relevant and material to the Commission's decision on this Application.

#### Property Values and Traffic

TCEQ does not have jurisdiction to consider a Draft Permit's impact on property values. Similarly, TWC Chapter 26 and applicable wastewater regulations do not authorize the TCEQ to consider issues such as noise and traffic. Accordingly, Issue no. 6 is not 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 draft permit is adequately protective of terrestrial and aquatic wildlife, and adequately prevents adverse effects to human health or safety or to the environment;
2. Whether the Draft Permit is adequately protective of water quality, specifically the effects of algae growth;
3. Whether the Draft Permit adequately protects against nuisance conditions, including odors;
4. Whether the Draft Permit is complete and accurate.

### **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 the above-mentioned Requestors qualify as an affected persons in this matter, OPIC respectfully recommends the Commission grant their hearing requests and refer Issue Nos. 1-4 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 August 15, 2022 the original of 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.



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