

Jon Niermann, *Chairman*
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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: **City of Dripping Springs (Applicant)**
Docket No. 2022-0940-MWD

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing and Requests for Reconsideration 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. 2022-0940-MWD

APPLICATION BY § **BEFORE THE TEXAS**
CITY OF DRIPPING SPRINGS § **COMMISSION ON**
FOR A MAJOR AMENDMENT § **ENVIRONMENTAL QUALITY**
TO TPDES PERMIT NO. §
WQ0014488001

**THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE
TO REQUESTS FOR HEARING AND REQUESTS FOR RECONSIDERATION**

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 and Requests for Reconsideration in the above-referenced matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

OPIC recommends granting the hearing requests of Save our Springs, the Hays Trinity Groundwater Conservation District, and Jennifer Schaeffer. OPIC also recommends the Commission refer Issues 1-13 specified in Section III.C. for a contested case hearing at State Office of Administrative Hearings (SOAH) with a maximum duration of 180 days. OPIC recommends the Commission deny the remaining hearing requests and all pending requests for reconsideration.

B. Background of Facility

The City of Dripping Springs (Applicant or Dripping Springs) has applied for a major amendment to Texas Land Application Permit No. WQ0014488001 to authorize the addition of a subsurface drip irrigation site of 13.8 acres with a flow volume not to

exceed a daily average flow of 60,000 gallons per day in the final phase and the addition of a surface irrigation site of 17 acres with a flow volume not to exceed a daily average flow of 50,000 gallons per day in the final phase, an increase in the total land application acreage from 113.53 acres to 144.33 acres, and an increase in the total wastewater treatment facility flow volume in the final phase to a volume not to exceed a daily average flow from 319,000 gallons per day to 429,000 gallons per day.

The existing permit authorizes the disposal of treated wastewater at a volume not to exceed a daily average flow of 133,000 gallons per day via subsurface area drip irrigation of 30.53 acres of public access land and the disposal of treated wastewater at a volume not to exceed a daily average flow not to exceed 186,000 gallons via surface irrigation of 83 acres of public access land. This permit will not authorize a discharge of pollutants into water in the state.

C. Procedural Background

TCEQ received the application for a major amendment on February 16, 2018, and declared it administratively complete on May 25, 2018. The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English on February 3, 2022, in the *Austin American Statesman* and in Spanish on February 3, 2022, in *El Mundo*. The application was determined to be technically complete on June 22, 2021. The Applicant published the Notice of Application and Preliminary Decision (NAPD) in English on February 3, 2022, in the *Austin American Statesman*, and in Spanish on February 3, 2022, in *El Mundo*. A public meeting was held on March 28, 2022. The public comment period ended at the close of the public meeting on March 28, 2022.

The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on May 23, 2022. The deadline for filing requests for a contested case hearing was June 22, 2022. The Commission received timely filed hearing requests from Protect Our Water, the Save Our Springs Alliance, Scott Emerson, the Hays Trinity Groundwater Conservation District; Wes Pitts; Jennifer Schaefer; Jeff Shaw; and Cynthia Wesson. The Commission also received requests for reconsideration from Scott Emerson and the Hays Trinity Groundwater Conservation District.

II. APPLICABLE LAW

A. Requests for Reconsideration

Any person may file a request for reconsideration of the ED's decision under Title 30, Texas Administrative Code ("TAC") § 55.201(e). The request must be in writing and filed with the Chief Clerk no later than 30 days after the Chief Clerk mails the ED's decision and RTC. The request must expressly state that the person is requesting reconsideration of the decision and give reasons why the decision should be reconsidered.

B. Requests 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 Title 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 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.

30 TAC § 55.203(d).

For applications filed on or after September 1, 2015, § 55.205(b) states that a hearing request by a group or association may not be granted unless all of the following requirements are met:

- (1) comments on the application are timely submitted by the group or association;

- (2) the request identifies, by name and physical address, one or more members of the group or association that would otherwise have standing to request a hearing in their own right;
- (3) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (4) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

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 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. Requests for Reconsideration

The Commission received timely-filed requests for reconsideration from Scott Emerson and the Hays Trinity Groundwater Conservation District. The concerns raised in these requests for reconsideration include protection of water wells and other forms of groundwater, surface water quality, sufficiency of monitoring and operating requirements, suitability of soils, identification and protection of recharge features, sufficiency of buffers to nearby creeks, accuracy of information in the application and draft permit, nitrate and total nitrogen limits, and unsuitable siting characteristics that include the 100-year floodplain and wetlands.

An evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the Applicant should be denied for these reasons. OPIC is recommending a contested case hearing on these issues as discussed in Section III.C. Therefore, OPIC recommends denial of all pending requests for reconsideration.

B. Hearing Requests: Determination of Affected Person Status

Protect Our Water

Protect Our Water submitted timely comments and a request for hearing through Managing Directors Richard Beggs, Jeff Shaw, and Wes Pitts. The concerns raised in the hearing request relate to deficiencies in the Applicant’s management and operations plan, due diligence efforts, capacity, and public notice. Because the purpose of the organization was not specified in the request, OPIC could not determine that the interests raised are germane in accordance with § 55.205(b)(3). Further, no member of the group was identified that would have standing to request a hearing in their own right as required by § 55.205(b)(2). For these reasons, OPIC recommends the Commission deny the request.

Save Our Springs Alliance

Save Our Springs Alliance (SOS) submitted timely comments and requests for hearing through Executive Director Bill Bunch and Senior Staff Attorney Kelly Deanne Davis. The concerns raised in the hearing requests relate to protection of groundwater, surface water quality, compliance with the Clean Water Act, sufficiency of monitoring and operating requirements, identification and protection of recharge features, sufficiency of wastewater storage, nitrate and total nitrogen limits, notice, siting requirements, and accuracy of information in the application and draft permit. SOS indicates that it is a non-profit conservation organization that works to “protect the Edwards Aquifer, its springs

and contributing springs, and the natural and cultural heritage of the Hill Country region and its watersheds.”

As required for group standing under 30 TAC § 55.205, SOS timely submitted comments; the interests SOS seeks to protect are germane to its purpose; neither the claim asserted nor the relief requested requires the participation of individual SOS members; and SOS’s hearing request identifies, by name and address, members who would otherwise have standing to request a hearing in their own right. Specifically, SOS identifies members Bill Bunch, Karen Hill, and Chris Hill.

The request indicates Bill Bunch swims in Onion Creek in Caliterra Park, as well as in the creek downstream on the Turkey Hollow Ranch and CharRo Ranch. Mr. Bunch indicates he intends to continue swimming in these locations and observing the fish, waterbirds, wildlife, and enjoying the water quality. The request indicates that potential contamination in these areas from irrigation at the Carter Ranch site poses direct harm to Mr. Bunch’s recreation, conservation, scientific, aesthetic, and personal health and safety interests.

Chris and Karen Hill receive their drinking water from Dripping Springs Water Supply Corporation, and some of the water provided to the Hills comes from groundwater wells near Onion Creek that could potentially be impacted from irrigated wastewater recharging into the Trinity River. The Hills also enjoy walking along the creek in the Caliterra parks and common areas and observing wildlife. The request also states that the Hills intend to continue enjoying Onion Creek within the Caliterra subdivision as long as it is safe and enjoyable to do so.

The Executive Director produced a map in these proceedings indicating that the Hills reside directly within Disposal Site 002. Additionally, the Adjacent Landowners Map included in the application reference the Hill Family Trust, and list Christopher and Karen Hill as trustees. In addition to these property interests, OPIC finds that the recreational interests articulated in the request are sufficiently particularized to be distinguishable from the general public. Each requestor identifies specific locations that they frequent which may be impacted by the draft permit, as well as their intent to continue recreating in those areas after land application activities commence. Further, potential impacts to the groundwater wells from which the Hills receive some of their water is a concern that is protected by the law under which the application will be considered, and a reasonable relationship exists between that interest and regulation of the Facility. For these reasons, OPIC finds that SOS meets the requirements for group standing and qualifies as an affected person.

Scott Emerson

A timely hearing request was submitted by Scott Emerson. The request, while generally mentioning Onion Creek as a point of reference, does not clearly articulate a concern that is protected by the law under which the application will be considered. Additionally, the Executive Director created a map that indicates Mr. Emerson does not live near the proposed application sites. The Adjacent Landowners List and map included in the application likewise do not indicate Mr. Emerson's is a nearby resident. For these reasons, OPIC cannot find that Mr. Emerson is an affected person and recommends the Commission deny his request.

Hays Trinity Groundwater Conservation District (HTGCD)

HTGCD submitted timely comments and requests for hearing through District 3 President Holly Fults and General Manager Charlie Flatten. The concerns raised in the hearing requests relate to protection of water wells and other forms of groundwater, surface water quality, sufficiency of monitoring and operating requirements, suitability of soils, identification and protection of recharge features, sufficiency of buffers to nearby creeks, accuracy of information in the application and draft permit, nitrate and total nitrogen limits, and unsuitable siting characteristics that include the 100-year floodplain and wetlands.

HTGCD is a governmental entity authorized by Chapter 8843 Special District Local Laws Code (SB 1147), and Chapter 36 of the State Water Code to protect and manage the quality and quantity of the Trinity Aquifer within the boundaries of its jurisdiction, which include the proposed new irrigation sites. OPIC finds that, as required by 30 TAC § 55.203(c)(7), HTGCD has raised relevant concerns over which it has statutory authority as a governmental entity tasked with protection of groundwater under its jurisdiction. For these reasons, OPIC finds that HTGCD meets the requirements of an affected person.

Jennifer Schaeffer

In timely comments and a hearing request, Jennifer Schaeffer raised concerns related to human health and safety, water quality, aquatic and terrestrial life, and water wells or other forms of groundwater. The Executive Director's map created for these proceedings demonstrates that she lives directly within Disposal Site 002. For this reason, OPIC makes a reasonable inference that "the community" for whom she expresses concern includes herself. The raised concerns are protected by the law under which the

application will be considered, and a reasonable relationship exists between that interest and the land application activities authorized under the Draft Permit. For these reasons, OPIC finds that Jennifer Schaeffer qualifies as an affected person.

Cynthia Wesson

Timely comments and a request for hearing were submitted by Cynthia Wesson. The request raised generally states that a hearing is appropriate due to the magnitude of the requested authorization, and that transparency is needed. This request does not state a personal justiciable interest sufficient to establish affectedness. Further, because neither the Adjacent Landowners map submitted by the Applicant nor the map created by the Executive Director shows the location of Cynthia Wesson in proximity to the proposed application sites or facility, OPIC surmises her distance from the regulated activities does not support a conclusion of affectedness. For these reasons, OPIC cannot find that Cynthia Wesson qualifies as an affected person and recommends that the Commission deny her request.

C. Issues Raised in the Hearing Requests of Affected Persons

The affected persons discussed above raised the following issues:

1. Whether the proposed effluent limits and operations under the draft permit are adequately protective of groundwater, including water wells, and surface water quality? (Raised by SOS, HTGCD, and Jennifer Schaeffer)
2. Whether the draft permit complies with the federal Clean Water Act, including 33 U.S.C. §§ 1251 (a) & 1341? (Raised by SOS)

3. Whether the Draft Permit contains sufficient monitoring and operating requirements to avoid prohibited discharges into surface or groundwater?
(Raised by SOS and HTGCD)
4. Whether the soil depths and characteristics are suitable for land application disposal as authorized under the Draft Permit? (Raised by SOS and HTGCD)
5. Whether the draft permit adequately protects recharge features? (Raised by SOS and HTGCD)
6. Whether the Draft Permit includes sufficient and enforceable buffers from nearby creeks? (Raised by HTGCD)
7. Whether the Draft Permit requires sufficient wastewater storage? (Raised by SOS)
8. Whether the Draft Permit contains sufficient nitrate and nitrogen limits?
(Raised by SOS and HTGCD)
9. Whether proper notice of the Amended Draft Permit was provided? (Raised by SOS)
10. Whether the Draft Permit complies with all applicable siting requirements, including the 100-year floodplain and wetlands? (Raised by SOS and HTGCD)
11. Whether the application and Draft Permit contain accurate information relating to location of wetlands, floodplains, depth of groundwater, size and location of irrigation sites, and the size of buffers? (Raised by SOS and HTGCD)
12. Whether the Draft Permit is protective of human health? (Jennifer Schaeffer)
13. Whether the Draft Permit is protective of aquatic and terrestrial life?
(Jennifer Schaeffer)

D. Issues Raised in the Hearing Requests Remain Disputed

There is no agreement between the hearing requestors and the ED on the issues raised in the hearing requests, thus, they remain disputed.

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). The issues listed above are issues of fact.

F. Issues Were Raised by the Affected Persons During the Comment Period

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

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

The hearing requests are all based on timely comments that have not been withdrawn.

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

The affected persons raise issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). 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. 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).

Water Quality

Though TLAP permits do not allow for the discharge of treated effluent, wastewater treatment and effluent limitations at wastewater treatment facilities must maintain water quality in accordance with the federal Clean Water Act and 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. In addition, under 30 TAC § 309.12 (Site Selection to Protect Groundwater or Surface Water), the siting of a facility should minimize possible contamination of both surface water and groundwater. Also, the land application of effluent must maintain groundwater quality and groundwater resources. 30 TAC § 309.20(4). The rules under 30 TAC § 222.81(a) are mandatory minimum buffer zone requirements for subsurface area drip dispersal system to protect public water wells, private water wells, and surface water in the state from any potential negative impact. Therefore, issue nos. 1, 2, 6 and 8 are relevant and material.

Soil Properties and Subsurface Geology

For TLAP applications, “[c]onceptual design aspects related to waste application rates, crop systems, seepage, and runoff controls shall be based upon the soil physical and chemical properties, hydraulic characteristics, and crop suitabilities for the waste application site.” 30 TAC § 309.20(a)(3). Under 30 TAC § 309.20(b)(4), soil testing is required for TLAP sites. Also, under 30 TAC § 222.79, a Recharge Feature Plan for the proposed irrigation fields is required as a part of the application for a Subsurface Area Drip Dispersal Systems wastewater facility. Therefore, issue nos. 3, 4, and 5 are relevant and material.

Wastewater Storage

30 TAC § 222.127 requires the Applicant to design and install sufficient temporary storage when the subsurface area drip disposal system is out of service. Therefore, issue 7 is relevant and material.

Nitrates and Nitrogen Limits

As explained in the RTC, the Domestic Technical Report 1.1, Section A, Part A of the application discusses the Applicant's need and estimates regarding land application area and effluent volume. The RTC also explains that the volume of water applied (maximum of 0.1 gallon/foot square/day) will be retained temporarily by the top 18 inches of soil and taken up by plant roots for plant growth. Effluent quality and waste application rates for a TLAP permit is addressed under the Commission's rules under 30 TAC Chapter 309. Therefore, issue nos. 9, 10, and 11 are relevant and material.

Notice

Proper notice must be provided as directed by the Commission rules in Chapter 39, Subchapter G. Therefore, issue 9 is relevant and material.

Siting Requirements

30 TAC § 309.13 states that a wastewater treatment plant unit may not be located in the 100-year flood plain unless the plant unit is protected from inundation and damage that may occur during that flood event, and the plant may not be located in wetlands. Therefore, issue 10 is material and relevant.

Accuracy of Application and Draft Permit

30 TAC § 22.31(d) states that the applicant shall submit an application that demonstrates compliance with the requirements set forth in this chapter. Therefore, issue 11 is material and relevant.

Protection of Human Health, Aquatic and Terrestrial Life

Texas Land Application Permits must comply with the Texas Water Code and the Clean Water Act to protect human health and safety. Additionally, these permits must comply with TCEQ's Surface Water Quality Standards, which specifically address aquatic life uses. 30 TAC § 307.4(h)-(i). Therefore, issue nos. 12-13 are relevant and material.

I. Issues Recommended for Referral

For the reasons discussed above, OPIC recommends referral of Issues 1-13 listed in Section III. C. to SOAH for a contested case hearing.

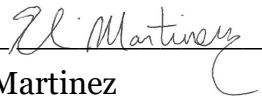
J. Maximum Expected Duration of Hearing

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 Save our Springs, the Hays Trinity Groundwater Conservation District, and Jennifer Schaeffer. OPIC also recommends the Commission refer Issues 1-13 specified in Section III. C. for a contested case hearing at SOAH with a maximum duration of 180 days. OPIC further recommends the Commission deny the remaining hearing requests and all pending requests for reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2022 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing and Requests for Reconsideration were 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.


Eli Martinez

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TCEQ DOCKET NO. 2022-0940-MWD**

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