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Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 12, 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: **Rattler Ridge, LLC (Applicant)**
TCEQ Docket No. 2022-1046-MWD

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request for Hearing and Request for Reconsideration 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. 2022-1046-MWD

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| APPLICATION BY RATTLER RIDGE LLC., FOR TPDES PERMIT NO. WQ0016049001 | § § § § | BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY |
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**THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE
TO REQUEST FOR HEARING AND REQUEST FOR RECONSIDERATION**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this Response to Request for Hearing and Request for Reconsideration in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is Rattler Ridge LLC’s application for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016049001. The Commission received timely comments, requests for a contested case hearing, and a request for reconsideration from Attorney Arturo Rodriguez Jr. on behalf of the City of San Marcos. For the reasons stated herein, OPIC respectfully recommends the Commission find that the City of San Marcos is an affected person in this matter and grant its pending hearing request. However, OPIC recommends denial of the City of San Marcos’ request for reconsideration.

B. Background of Facility

On October 1, 2021, Rattler Ridge, LLC (Applicant) applied to the TCEQ for new TPDES Permit No. WQ0016049001. If issued, this permit would serve the Rattler Ridge subdivision and would be located approximately 7,656 feet southeast of the intersection of Farm-to-Market Road 1978 and State Highway 123, in Guadalupe County, 78666. The draft permit would authorize

discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 or 0.1 Million Gallons per Day (MGD) in the Interim I phase, at a daily average flow not to exceed 0.20 MGD in the Interim II phase, and at a daily average flow not to exceed 0.40 MGD in the Final phase. The treated effluent would be discharged to an onsite pond where it would continue to an unnamed tributary, then to Long Creek, then to an unnamed impoundment, then back to Long Creek, then to York Creek, and finally to the Lower San Marcos River in Segment No. 1808 of the Guadalupe River Basin.

The unclassified receiving water uses are limited aquatic life use for the onsite pond, the unnamed tributary, and Long Creek (all 3.0 milligrams per liter and dissolved oxygen), and high aquatic life use for the unnamed reservoir (5.0 mg/L DO). The designated uses for Segment No. 1808 are primary contact recreation, public water supply, and high aquatic life use. Segment No. 1808 is not currently listed on the state's inventory of impaired and threatened waters (the 2020 Clean Water Act § 303(d) list).

The Facility, which has not yet been constructed, would be an activated sludge process plant operating in the extended aeration mode. Treatment units common across all phases would include a bar screen and tertiary filters. Treatment units specific to the Interim I phase would include an aeration basin, a final clarifier, an aerobic sludge digester, and a chlorine contact chamber. Treatment units specific to the Interim II phase would include a flow splitter, two aeration basins, two final clarifiers, two aerobic sludge digesters, and two chlorine contact chambers. Treatment units specific to the Final phase would include a flow splitter, three aeration basins, three final clarifiers, three aerobic sludge digesters, and three chlorine contact chambers.

The effluent limitations in the draft permit, based on a 30-day average, are 10/15/2.0 milligrams per liter, CBOD5/TSS/NH3-N (Five-day Carbonaceous Biochemical Oxygen Demand

(CBOD5), Total Suspended Solids (TSS), and Ammonia Nitrogen (NH3-N) respectively, 0.5 mg/L TP (total phosphorus), and a bacteria limit of 126 colony forming units (CFU) or most probable number (MPN) of E. coli per 100 ml. The proposed permit includes requirements that the Applicant use Chlorine for disinfection purposes. Specifically, the treated effluent must contain a total chlorine residual of at least 1.0 mg/l and must not exceed a total chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes (based on peak flow) and must be monitored five times per week by grab sample. An equivalent method of disinfection may be substituted only with prior approval of the ED.

C. Procedural Background

The TCEQ received the application on October 1, 2021, and declared it administratively complete on December 2, 2021. The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English in Guadalupe County in the *San Marcos Daily Record* on December 8, 2021, and in Spanish in *El Mundo* on December 9, 2021. The ED completed the technical review of the application on February 23, 2022, and prepared the proposed permit, which if approved, would establish the conditions under which the proposed facility must operate. The Applicant published the Notice of Application and Preliminary Decision (NAPD) in English in Guadalupe County, Texas in the *San Marcos Daily Record* on March 31, 2022, and in Spanish in *El Mundo* on March 31, 2022. The public comment period ended on May 2, 2022. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on July 12, 2022. The deadline for filing requests for a contested case hearing was August 11, 2022.

The Commission received timely comments, requests for a contested case hearing, and a request for reconsideration from Arturo Rodriguez Jr. on behalf of the City of San Marcos. For the

reasons stated herein, OPIC recommends granting the City's hearing request, and denying the City's request for reconsideration.

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.

B. Request 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 ED's decision and give reasons why the decision should be reconsidered.

III. DISCUSSION

A. Determination of Affected Person Status

City of San Marcos

The City timely filed hearing requests on April 14, 2022, April 18, 2022, August 10, 2022, and August 11, 2022. Generally, the requests raise concerns related to incompatibility of the Facility with the State's regionalization policy; whether the Applicant has demonstrated a need for the Facility; protection of water quality; impacts on groundwater; effects on wildlife, livestock, and the environment; effects on health and safety of nearby persons; nuisance odors; and

Applicant's compliance history. Each of these interests are protected by the law under which this application will be considered.

The proposed service area is within the City's extraterritorial jurisdiction, and the Request specifies that the property is approximately 0.6 miles from the City's corporate limits. The City represents that it owns a wastewater treatment plant that serves the region and that it has an existing plant and facilities that can serve the area sought to be served by the Application. OPIC finds that the City has a unique interest related to a legal right, duty, privilege, power, or economic interest affected by the application that is not common to the general public. The City's stated ability and willingness to provide wastewater treatment service is reasonably related to its concerns about the application, including the application's potential conflicts with the State's policies on regionalization and need.

Further, the municipalities of Texas have general authority to promote and protect the health and welfare of persons residing within their borders and within their extraterritorial jurisdiction. Texas Health & Safety Code § 121.003; Texas Local Gov't Code § 42.001. Finally, Texas Water Code, Chapter 26, Subchapter E authorizes cities to carry out specific duties, functions, and programs for purposes of water pollution prevention. For these reasons, OPIC finds that the city is a governmental entity with statutory authority over its stated issues of concern and, therefore, an affected person pursuant to 30 TAC § 55.203(c)(7).

B. Request for Reconsideration

The City timely submitted a request for reconsideration with several assertions, including the veracity of the Application, whether the proposed Application is in direct violation of the Clean Water Act and TCEQ's technical regulations, whether the discharge will adversely affect the health of nearby persons, effects on recreational activities, and whether the Application is

sufficiently protective of water quality. As more fully discussed below, these issues are relevant and material to the decision on this application. However, an evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the proposed permit should be denied on these grounds. While OPIC is recommending a hearing be held, OPIC cannot recommend Commission action on the application without the benefit of such a hearing.

C. Issues Raised in the Hearing Requests of Affected Person

The City raised the following issues:

1. Whether the draft permit is adequately protective of water quality, including groundwater;
2. Whether the water quality parameters are adequate to ensure that the existing water quality uses, including recreational uses, will not be impaired;
3. Whether the proposed design of the wastewater treatment plant is adequate to ensure that the required effluent will be achieved;
4. Whether the proposed wastewater discharge will adversely affect the health of persons on nearby property;
5. Whether the proposed discharge will violate TCEQ's antidegradation policy and procedures, and harm fish, livestock, wildlife, and other environmental receptors;
6. Whether the operator is sufficiently qualified to operate the proposed treatment plant;
7. Whether the draft permit is complete and accurate;
8. Whether Applicant's compliance history or technical capabilities raise issues regarding Applicant's ability to comply with material terms of the permit;
9. Whether the draft permit meets the need requirements of Texas Water Code §. 26.0282;
10. Whether issuance of the draft permit is contrary to the State's regionalization policy or Texas Water Code § 26.0282; and
11. Whether the draft permit complies with applicable requirements to abate and control nuisance odors.

D. Issues Raised in the Hearing Requests Remain Disputed

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

E. The Disputed Issues Are Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. All issues raised by the City are issues of fact.

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

Issues 1-11 in Section III. C. were specifically raised by City 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 based on timely comments that have not been withdrawn.

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

The City's hearing requests raise issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4)(B) and 55.211(c)(2)(A)(ii). To refer an issue to 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

The City raised concerns about adverse effects to water quality (including groundwater) 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 Nos. 1-5 are relevant and material to the Commission’s decision regarding this application and are appropriate for referral to SOAH.

Application Accuracy and Completeness and Applicant’s Qualification

The City raised concerns regarding the accuracy of the Application, noting potential deficiencies regarding compliance with the Clean Water Act and TCEQ’s rules and regulations. Additionally, the City raised concerns about the veracity of information provided by Applicant. The Commission’s Chapter 305 and Chapter 281 rules address the required contents of applications and approved application forms. Moreover, TCEQ rules require that if an applicant becomes aware that it failed to submit relevant facts or submitted incorrect information in a permit

application, the applicant is required to promptly submit such facts and information. 30 TAC § 305.125(19). Accordingly, Issue Nos. 6-7 are relevant and material to the Commission's decision on this Application.

Compliance History

The TCEQ is required to consider compliance history when making decisions regarding issuance of a permit. 30 TAC § 60.1(a)(1)(A); 30 TAC § 60.3(a)(1)(A). The City asserts that Applicant's compliance history for the past five years warrants concern for Applicant's ability to comply with material terms of the permit. To address concerns with compliance history, the TCEQ may impose certain permit conditions or provisions. 30 TAC § 60.3(a)(2). Because compliance history must be considered in the decision to issue a permit and whether special conditions should be included in the permit, Issue No. 8 is relevant and material to the Commission's decision regarding this Application and is appropriate for referral to SOAH.

Regionalization and Need

Under TWC § 26.081(a), it is "state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems ... to prevent pollution and maintain and enhance the quality of the water in the state." Further,

[i]n considering the issuance ... of a permit to discharge waste, the commission may deny or alter the terms of the proposed permit ... based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order....

TWC § 26.0282. Therefore, Issues Nos. 9-10 regarding regionalization and need are relevant and material to the Commission's decision on the Application and are appropriate for referral to SOAH.

Nuisance Odors

The City expressed concern regarding nuisance odors. 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 odors, Issue No. 11 is relevant and material to the Commission's decision on this Application.

I. 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 water quality, including groundwater;
2. Whether the water quality parameters are adequate to ensure that the existing water quality uses, including recreational uses, will not be impaired;
3. Whether the proposed design of the wastewater treatment plant is adequate to ensure that the required effluent will be achieved;
4. Whether the proposed wastewater discharge will adversely affect the health of persons on nearby property;
5. Whether the proposed discharge will violate TCEQ's antidegradation policy and procedures, and harm fish, livestock, wildlife, and other environmental receptors;
6. Whether the operator is sufficiently qualified to operate the proposed treatment plant;
7. Whether the draft permit is complete and accurate;
8. Whether Applicant's compliance history or technical capabilities raise issues regarding Applicant's ability to comply with material terms of the permit;
9. Whether the draft permit meets the need requirements of Texas Water Code § 26.0282;
10. Whether issuance of the draft permit is contrary to the State's regionalization policy or Texas Water Code § 26.0282; and

11. Whether the draft permit complies with applicable requirements to abate and control nuisance odors.

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

Having found that the City of San Marcos qualifies as an affected person in this matter, OPIC respectfully recommends the Commission grant its hearing requests and refer Issue Nos. 1-11 specified in Section III. I. for a contested case hearing at SOAH with a maximum duration of 180 days. OPIC further recommends the Commission deny the City's request for reconsideration.

Respectfully submitted,

Garrett T. Arthur
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By: 

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CERTIFICATE OF SERVICE

I hereby certify that on September 12th, 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.



Jennifer Jamison

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TCEQ DOCKET NO. 2022-1046-MWD**

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RESOLUTION

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