

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Erin E. Chancellor, *Interim Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 13, 2023

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: **PHAU - Lockhart 450, LLC (Applicant)**
TCEQ Docket No. 2022-1700-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

cc: Mailing List

DOCKET NO. 2022-1700-MWD

**APPLICATION BY PHAU-
LOCKHART 450, LLC FOR
TPDES PERMIT NO.
WQ0016107001**

§
§
§
§

**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL
QUALITY**

**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 PHAU-Lockhart 450, LLC (Applicant) for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016107001. The Commission received timely comments and requests for a contested case hearing from Shalaina Walker and Dana Garrett. For the reasons stated herein, OPIC respectfully recommends the Commission find that Shalaina Walker and Dana Garrett are affected persons in this matter and grant their pending hearing requests.

B. Background of Facility

On February 2, 2022, Applicant applied to the TCEQ for new TPDES Permit No. WQ001610700. If issued, the permit would authorize a limit of 125,000 or 0.125 million gallons per day (MGD) in the Interim Phase I, a daily average flow limit of 0.25 MGD in the Interim Phase II, and a Final Phase flow limit of 0.499 MGD from the Clear Fork Ranch Wastewater Treatment Facility (proposed facility). The proposed permit authorizes sludge generated at the proposed

facility to be disposed of at any TCEQ-authorized land application site, co-disposal landfill, wastewater treatment facility, or facility that further processes sludge.

If issued, the proposed facility would be located approximately 0.75 miles southeast of the intersection of Clark Loop and State Highway 142, in Caldwell County, and serve the Clear Fork Ranch Development. It would be an activated sludge process plant, operated in the conventional mode. Treatment units in the Interim Phase I would include a headworks screen, an aeration basin, a final clarifier, an aerobic digester, and a chlorine contact chamber. Treatment units in the Interim Phase II would include a headworks screen, two aeration basins, a clarifier, an aerobic digester, and a chlorination chamber. Treatment units in the Final Phase would include a headworks screen, four aeration basins, two clarifiers, two aerobic digesters, and two chlorination chambers. The proposed discharge route for the treated effluent is to Clear Fork Plum Creek, then to Plum Creek in Segment No. 1810 of the Guadalupe River Basin.

Clear Fork Plum Creek, an unclassified waterbody, uses are high aquatic life use with a corresponding DO (Dissolved Oxygen) criteria of 5.0 mg/L DO. The effluent limitations of the draft permit, based on a 30-day average, are 10 milligrams per liter (mg/L) five-day carbonaceous biochemical oxygen demand (CBOD5), 15 mg/l total suspended solids (TSS), 3.0 mg/l ammonia-nitrogen (NH3-N), 63 colony forming units (CFU) or most probable number (MPN) of E. coli per 100 milliliters (ml), and 4.0 mg/l minimum 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.

C. Procedural Background

The TCEQ received the application on February 2, 2022, and declared it administratively complete on March 23, 2022. The Applicant published the Notice of Receipt and Intent to Obtain

a Water Quality Permit (NORI) in Caldwell County in the *Lockhart Post Register* on April 7, 2022. The ED completed the technical review of the application on May 18, 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 Caldwell County in the *Lockhart Post Register* on June 23, 2022. The public comment period ended on July 25, 2022. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on September 30, 2022. The deadline for filing requests for a contested case hearing was October 31, 2022.

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 Texas Administrative Code (TAC) § 55.201(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue raised solely in a public comment which has been withdrawn, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

Section 55.201(d) states that a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the 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

Shalaina Walker

Shalaina Walker submitted timely combined comments and a hearing request on May 2, 2022. The request lists Shalaina Walker's address as 3575 Borchert Loop, and the map prepared by the ED's staff confirms Ms. Walker's property is located .89 miles from the facility.

Generally, the request raises concerns about human health and safety, property value, and nuisance conditions, including odors. All of these interests are protected by the law under which this application will be considered, with the exception of property value, which falls outside the jurisdiction of the TCEQ. Given her proximity to the proposed facility and the fact that Ms.

Walker's stated concerns regarding human health and safety and nuisance conditions such as

odors are protected by the law under which this application will be considered. Accordingly, OPIC finds that Shalaina Walker is more likely to be affected in a manner not common to the general public.

Dana Garrett

Dana Garrett submitted timely combined comments and a hearing request on April 20, 2022. The request states that Dana Garrett's home is located on Borchert Loop, and the ED's map confirms that the address is located approximately .51 miles from the proposed facility and discharge route. The hearing request raises concerns related to water quality, effects on wildlife, and effects on recreational activities. Each of these interests is protected by the law under which this application will be considered and within the jurisdiction of the TCEQ. Due to Dana Garrett's stated concerns and the proximity of the Requestor's home to the proposed facility and discharge route, OPIC finds Dana Garrett is more likely to be affected in a manner not common to the general public.

B. Issues Raised in the Hearing Requests of Affected Persons

Shalaina Walker and Dana Garrett raised the following issues:

1. Whether the draft permit is adequately protective of water quality;
2. Whether the proposed wastewater discharge will adversely affect the health and safety of persons on nearby property;
3. Whether the proposed discharge will adversely impact fish, wildlife, and the environment;
4. Whether the proposed discharge will adversely affect recreational activities;
5. Whether the proposed facility will cause nuisances such as odors; and
6. Whether the proposed facility will negatively impact property values.

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. All issues raised by the affected persons are issues of fact.

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

Issues 1-6 in Section III. B. were specifically raised by affected persons during the public 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 requests raise 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 Recreational Activities

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. 1-4 are relevant and material to the Commission’s decision regarding this application and are appropriate for referral to SOAH.

Nuisance Odors

Shalaina Walker 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. 5 is relevant and material to the Commission’s decision on this Application.

Property Values

Requestors raised concerns regarding the proposed facility's impact on property value. The TCEQ does not have jurisdiction under the Texas Water Code or its regulations to address or consider property values or the marketability of adjacent property in its determination of whether to issue a water quality permit. 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 water quality;
2. Whether the proposed wastewater discharge will adversely affect the health and safety of persons on nearby property;
3. Whether the proposed discharge will adversely impact fish, wildlife, and the environment;
4. Whether the proposed discharge will adversely affect recreational activities; and
5. Whether the proposed facility will cause nuisances such as odors.

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 Shalania Walker and Dana Garrett qualify as affected persons in this matter, OPIC respectfully recommends the Commission grant their hearing requests and refer Issue Nos. 1-5 specified in Section III. H. for a contested case hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By:  _____

Jennifer Jamison
Assistant Public Interest Counsel
State Bar No. 24108979
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-6363 Phone
(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2023 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

MAILING LIST
PHAU - LOCKHART 450, LLC
TCEQ DOCKET NO. 2022-1700-MWD

FOR THE APPLICANT

via electronic mail:

Nick McIntyre, VP Land
Phau-Lockhart 450, LLC
9000 Gulf Freeway
Houston, Texas 77017
Tel: 713/948-7841
nick.mcintyre@perryhomes.com

Ian Clements, P.E.
Kimley-Horn
5301 Southwest Parkway
Building 2, Suite 100
Austin, Texas 78735
Tel: 737/241-9266
ian.clements@kimley-horn.com

FOR THE EXECUTIVE DIRECTOR

via electronic mail:

Michael T. Parr, II, Staff Attorney
Texas Commission on Environmental
Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606
michael.parr@tceq.texas.gov

Ashiqur Rahman, Technical Staff
Texas Commission on Environmental
Quality
Water Quality Division MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4547 Fax: 512/239-4430
ashiqur.rahman@tceq.texas.gov

Ryan Vise, Director
Texas Commission on Environmental
Quality
External Relations Division
Public Education Program MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678
pep@tceq.texas.gov

FOR ALTERNATIVE DISPUTE
RESOLUTION

via electronic mail:

Kyle Lucas, Attorney
Texas Commission on Environmental
Quality
Alternative Dispute Resolution MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0687 Fax: 512/239-4015
kyle.lucas@tceq.texas.gov

FOR THE CHIEF CLERK

via eFiling:

Docket Clerk
Texas Commission on Environmental
Quality
Office of Chief Clerk MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311
<https://www14.tceq.texas.gov/epic/eFiling/>

REQUESTER(S):

Dana Garrett
1893 Borchert Loop
Lockhart, Texas 78644-4800

Shalaina Walker
3575 Borchert Loop
Lockhart, Texas 78644-4826