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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: **TWO CREEKS CROSSING RESORT, LLC (APPLICANT)**  
**TCEQ DOCKET NO. 2022-1701-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 "Pranjal".

Pranjal M. Mehta, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

**TCEQ DOCKET NO. 2022-1701-MWD**

**APPLICATION BY TWO CREEKS  
CROSSING RESORT, LLC  
FOR TPDES PERMIT NO.  
WQ0016056001**

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**BEFORE THE  
TEXAS COMMISSION  
ON  
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE  
TO REQUEST FOR HEARING AND REQUEST 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 Request for Hearing and Request for Reconsideration in the above-referenced matter and respectfully submits the following.

**I. INTRODUCTION**

**A. Summary of Position**

Preliminarily, OPIC notes that the TCEQ Chief Clerk’s office received one timely hearing request from Corrie Griffin and a timely request for reconsideration from Timothy Mansell. For the reasons discussed herein, OPIC recommends denial of the hearing request and request for reconsideration.

**B. Background of Facility**

Two Creeks Crossing Resort, LLC (Applicant) applied for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016056001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 45,000 gallons per day. The proposed wastewater treatment facility (facility) will serve the Two Creek Crossings RV Resort Park. The facility would be located at 1581 Triple Creek Loop, in Polk County, 77351. The treated

effluent would be discharged directly to the Rocky Creek arm of Lake Livingston in Segment No. 0803 of the Trinity River Basin.

### **C. Procedural Background**

The TCEQ received the application on October 15, 2021, and declared it administratively complete on December 10, 2021. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in the *Polk County Enterprise* on December 16, 2021. The Executive Director (ED) completed the technical review of the application on February 9, 2022 and prepared the proposed draft permit. The Notice of Application and Preliminary Decision (NAPD) was published in the *Polk County Enterprise* on March 27, 2022. The public meeting was held on August 22, 2022. The public comment period for this application closed on August 22, 2022. The Chief Clerk mailed the ED's Decision and Response to Comments on October 13, 2022. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was November 14, 2022. The Commission received one timely filed hearing request and one timely request for reconsideration, as discussed below.

## **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 Response to Comments. 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 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).

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. Determination of Affected Person Status**

Connie Griffin submitted a timely hearing request on November 14, 2022. Ms. Griffin stated that she is the owner of a fishing business. She is concerned that the amount of chlorine from the proposed discharge would destroy the wildlife in Rocky Creek and would negatively impact her business. The map provided by the ED's staff shows that Ms. Griffin's address is within 0.5 miles from the facility. Ms. Griffin provided oral comments during the public meeting held on August 22, 2022. She said that she is concerned but welcomed the Applicant to the neighborhood. Her oral comments did not include any concerns regarding any impact on the wildlife in the creek or any adverse impact on her fishing business. Ms. Griffin did not provide any written comments during the public comment period.

Under 30 TAC § 55.201(c), a hearing request must be based on the requestor's timely comments. Further, § 55.201(d)(4) requires that a hearing request 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. Though Ms. Griffin raised certain specific concerns in her hearing request, those concerns were raised for the first time in her hearing request, and were not raised during the public comment period. Ms. Griffin's hearing request must be based on her timely comments, and her single timely comment was a general statement of concern made as a formal comment at the public meeting. While Ms. Griffin's proximity and hearing request concerns might otherwise be sufficient to establish affectedness, OPIC cannot consider the hearing request concerns which were not raised during the public comment period. Ms. Griffin's single general comment does not indicate a personal justiciable interest, and OPIC must find that she does not qualify as an affected person. However, if the Commission finds Ms. Griffin to be affected, OPIC provides the following analysis of the issue raised in her hearing request.

**B. Issue Raised in the Hearing Request**

Connie Griffin raised the following issue:

1. Whether the proposed discharge would impact the wildlife in Rocky Creek.

**C. Issue Raised in the Hearing Request Remains Disputed**

There is no agreement between the hearing requestor and the ED on the issue raised in the hearing request; therefore, it remains disputed.

**D. Whether the Disputed Issue Is an Issue 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 issue listed above is an issue of fact.

**E. Issue Raised by the Affected Person During the Comment Period**

The issue was not raised during the comment period.

**F. The Hearing Request is Based on Issues Raised in Public Comments Which Have Not Been Withdrawn**

The hearing request is not based on a timely comment that has been withdrawn.

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

To refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny a permit. The Commission can only consider issues within its jurisdiction. Therefore, relevant and material issues include those governed by the substantive law relating to the permit at issue. *Anderson v. Liberty Mutual, Inc.*, 477 U.S. 242, 248-51 (1986).

The Commission is responsible for the protection of water quality under Texas Water Code Chapter 26 and 30 TAC Chapters 307 and 309. These responsibilities include ensuring compliance with the Texas Surface Water Quality Standards. The purpose of these standards is to "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. Additionally, surface waters must not be toxic to humans from ingestion, consumption of aquatic organisms, or contact with the skin. 30 TAC § 307.4(d). Therefore, the issue regarding any potential impact on the wildlife in Rocky Creek is relevant and material to the Commission's decision regarding this application and would be appropriate for referral to SOAH.



## **H. 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.

## **I. Request for Reconsideration**

The Commission received one timely-filed request for reconsideration from Timothy Mansell. The request for reconsideration raises concerns regarding well water contamination, human health, wildlife health, environmental destruction of vegetation, odor, property devaluation, destruction of the pristine natural beauty and tranquility of the neighborhood, and recreational uses of the receiving water stream. The TCEQ does not have jurisdiction to consider concerns regarding loss of property value. With respect to the remaining issues, an evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the Application should be denied. The RTC document shows that the ED and her staff have already considered each of those issues. Based on the available record, OPIC sees no new information or issue that has come to light since the ED's consideration and decision. If this request for reconsideration was

to be granted, there is no indication the ED would come to a different conclusion on the disputed issues following a remand. Therefore, OPIC recommends denial of the request for reconsideration.

#### IV. CONCLUSION

For the reasons discussed above, OPIC recommends the Commission deny the hearing request of Connie Griffin. If the Commission grants a hearing, the issue of whether the proposed discharge would impact the wildlife in Rocky Creek is relevant and material to the Commission's decision and could be referred to, SOAH. Finally, OPIC recommends the Commission deny the request for reconsideration.

Respectfully submitted,

Garrett T. Arthur  
Public Interest Counsel

By: Pranjal

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 13, 2023, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties 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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Pranjal M. Mehta

**MAILING LIST**  
**TWO CREEKS CROSSING RESORT, LLC**  
**TCEQ DOCKET NO. 2022-1701-MWD**

FOR THE APPLICANT

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FOR ALTERNATIVE DISPUTE  
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