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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 8, 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: **Buck Creek WWTP, LLC (Applicant)**
TCEQ Docket No. 2023-0530-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. 2023-0530-MWD

APPLICATION BY BUCK CREEK	§	BEFORE THE
WWTP, LLC FOR NEW TPDES	§	TEXAS COMMISSION ON
PERMIT NO. WQ0016189001	§	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 Buck Creek WWTP, LLC (Applicant or Buck Creek) for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016189001. The Commission received timely comments and requests for a contested case hearing from Dale Connor, Shelby and Jody Garner, Kimberly Lane, Evelyn Heller, and Dale E. Rogers. For the reasons stated herein, OPIC recommends the Commission find that Dale Connor, Shelby and Jody Garner, and Kimberly Lane are affected persons in this matter and grant their pending hearing requests. Finally, OPIC respectfully recommends denial of the requests submitted by Evelyn Heller and Dale E. Rogers.

B. Background of Facility

Buck Creek has applied to the TCEQ for new TPDES Permit No. WQ0016189001. If issued, the permit would authorize discharge of treated domestic wastewater at a daily average

flow not to exceed 999,000 gallons per day. The proposed wastewater treatment facility would serve the Buck Creek subdivision in Grayson County.

The Buck Creek Wastewater Treatment Facility (Facility) would be a Membrane Bioreactor (MBR) activated sludge process plant operated in the conventional mode. Treatment units in the Interim I phase would include a lift station, an equalization basin, two fine screens, an anoxic basin, an aeration basin, a membrane basin, a belt filter press, and two ultraviolet light (UV) disinfection systems. Treatment units in the Interim II phase would include a lift station, two equalization basins, two fine screens, two anoxic basins, two aeration basins, two membrane basins, a belt filter press, and four UV disinfection systems. Treatment units in the Final phase would include a lift station, three equalization basins, four fine screens, three anoxic basins, three aeration basins, three membrane basins, two belt filter presses, and eight UV disinfection systems.

The effluent limitations in the Interim I phase of the draft permit, based on a 30-day average, are 5 mg/l (milligrams per liter) five-day carbonaceous biochemical oxygen demand (CBOD₅), 5 mg/l total suspended solids (TSS), 2 mg/l ammonia-nitrogen (NH₃-N), 1.0 mg/l total phosphorus, 126 colony forming units (CFU) or most probable number (MPN) of *Escherichia coli* (*E. coli*), and 4.0 mg/l minimum dissolved oxygen (DO). The permittee would be required to utilize an UV system for disinfection purposes and must not exceed a daily average *E. coli* of 126 CFU or MPN per 100 milliliters.

The effluent limitations in the Interim II and Final phases of the draft permit, based on a 30-day average, are 5 mg/l CBOD₅, 5 mg/l TSS, 2 mg/l NH₃-N, 1.0 mg/l total phosphorus, 126 CFU or MPN of *E. coli*, and 5.0 mg/l minimum DO. The permittee would utilize an UV system for disinfection purposes, and may not exceed a daily average *E. coli* of 126 CFU or MPN per 100 ml.

The treated effluent would be discharged to an unnamed tributary, then to Buck Creek, then to Ray Roberts Lake in Segment No. 0840 of the Trinity River Basin. The unclassified receiving water uses are minimal aquatic life use for the unnamed tributary, and high aquatic life use for Buck Creek. The designated uses for Segment No. 0840 are primary contact recreation, public water supply, and high aquatic life use.

C. Procedural Background

TCEQ received the application on July 11, 2022, and declared it administratively complete on August 2, 2022. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in the *Herald Democrat* on August 7, 2022. Executive Director (ED) staff completed technical review of the application on September 28, 2022, and prepared a draft permit. The Notice of Application and Preliminary Decision (NAPD) and public meeting was published in the *Herald Democrat* on November 25, 2022. A public meeting was held on January 5, 2023, and the public comment period ended at the close of the meeting. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on February 17, 2023. The deadline for filing requests for a contested case hearing was March 20, 2023.

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

Dale E. Connor

Dale E. Connor submitted timely combined comments and a hearing request on August 22, 2022. Mr. Connor's request lists his property's address as 626 Scoggins Rd., Tioga, TX, and the map prepared by the ED's staff confirms the property is located directly along the discharge route and roughly one mile from the proposed facility. Generally, the request raises concerns about effects to the environment; including impacts to local wildlife and livestock; water quality; nuisance conditions such as flies, mosquitoes and odors; property value, and lack of proper notice. Interests in nuisance conditions, environmental impact, water quality, and proper notice are protected by the law under which this application will be considered, while other concerns raised by requestor fall outside the jurisdiction of the TCEQ. Given Mr. Connor's proximity to the proposed facility and the fact that many of his stated concerns are relevant and material to the Commission's decision on this application, OPIC finds that Dale E. Connor is more likely to be affected in a manner not common to the general public.

Dr. Shelby L. Garner and Jody Garner

Shelby and Jody Garner submitted numerous timely combined comments and hearing requests outlining several relevant concerns regarding the proposed permit. The requests state that Shelby and Jody Garner's property is located on Scoggins Road, and the ED's map confirms that the address is located approximately 0.66 miles from the proposed facility, and less than one mile from the discharge route. The hearing requests raise concerns related to effects on human health and safety, water quality, effects on wildlife, and effects on property values. Most of these interests

are protected by the law under which this application will be considered, while concerns related to property value fall outside TCEQ's jurisdiction. Due to the Garners' stated concerns and the proximity of their property to the proposed facility and discharge route, OPIC finds Shelby and Jody Garner are more likely to be affected in a manner not common to the general public.

Kimberly Lane

Kimberly Lane submitted timely combined comments and a hearing request on August 30, 2022. Ms. Lane's request lists her property's address as 520 Baker Rd. Pilot Point, TX, and the map prepared by the ED's staff confirms the property is located 0.48 miles from the proposed facility and less than one mile from the discharge route. Generally, the request raises concerns about impacts to water quality, including ground water, as well as effects to the environment including wildlife and livestock. Each of these interests is protected by the law under which this application will be considered. Given Ms. Lane's proximity to the proposed facility and the fact that all of her stated concerns are relevant and material to the Commission's decision on this application, OPIC finds that Kimberly Lane is more likely to be affected in a manner not common to the general public.

Evelyn Heller

Evelyn Heller submitted a timely combined comment and hearing request on August 22, 2022, and the map prepared by the ED's staff indicates the address provided by Ms. Heller is approximately 0.78 miles from the proposed facility. Ms. Heller's request articulates general disapproval for the proposed permit and concern for effects on property value but fails to identify a personal justiciable interest pursuant to 30 TAC § 55.203. For these reasons, OPIC cannot find that Ms. Heller is affected in a manner not common to the general public.

Dale Lee Rogers

Mr. Rogers submitted a timely hearing request on August 31, 2022. Mr. Rogers provided an address in Celina, TX and his request simply states that he requests a public hearing on the proposed permit. Given the distance of over 20 miles between the proposed facility and Mr. Roger's listed address, and the fact the request fails to identify any personal justiciable interest as required by 30 TAC § 55.203, OPIC cannot find that Dale Lee Rogers is affected in a manner not common to the general public.

B. Issues Raised in the Hearing Requests of Affected Persons

Affected persons 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 wildlife, livestock, and the environment;
4. Whether the proposed Facility will cause nuisances such as odors, flies, and mosquitoes; and
5. 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 1-5 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, and Animal Life

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. 1-3 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 odors, and the presence of increased disease vectors such as mosquitoes and flies. TCEQ regulates nuisance conditions under 30 TAC § 309.13(e) which requires applicants to implement a nuisance odor abatement plan. Further, permits issued by TCEQ do 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 as described by requestors, Issue No. 4 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. 5 is not relevant or 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; and
4. Whether the proposed Facility will cause nuisances such as odors, mosquitoes, and flies.

I. Maximum Expected Duration of Hearing


Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to State Office of Administrative Hearings (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 Dale Connor, Shelby and Jody Garner, and Kimberly Lane qualify as 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,


Garrett T. Arthur
Public Interest Counsel

By:  _____

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 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

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TCEQ DOCKET NO. 2023-0530-MWD

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FOR ALTERNATIVE DISPUTE

RESOLUTION

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REQUESTER(S):

See attached list.

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