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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 22, 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: **Gilden Blair Blackburn (Applicant)**
TCEQ Docket No. 2023-0546-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

cc: Mailing List

DOCKET NO. 2023-0546-MWD

| | | |
|-------------------------|---|---------------------|
| APPLICATION BY GILDEN | § | BEFORE THE |
| BLAIR BLACKBURN FOR NEW | § | TEXAS COMMISSION ON |
| TPDES PERMIT NO. | § | ENVIRONMENTAL |
| WQ0016104001 | § | QUALITY |

**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 of the Executive Director's (ED) decision on the application in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is an application by Gilden Blair Blackburn (Applicant) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016104001. The Commission received timely comments, a request for a contested case hearing and a request for reconsideration from attorney Andrew Scott on behalf of Bartlett Ranch Brock LLC and FM 1189 LLC (collectively, Bartlett Ranch Owners). For the reasons stated herein, OPIC respectfully recommends the Commission find that the Bartlett Ranch Owners are affected persons in this matter and grant their pending hearing request. OPIC further recommends denial of the pending request for reconsideration.

B. Description of Application and Facility

On January 31, 2022 Gilden Blair Blackburn applied to the TCEQ for new TPDES Permit No. WQ0016104001. If issued, this permit would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The Brock North Wastewater Treatment Facility (facility) would be an activated sludge process plant operated in extended aeration mode. Treatment units would include one bar screen, one aeration basin, one final clarifier, one sludge digester with a sludge holding chamber, and one chlorine contact chamber. If constructed, the facility would serve the Brock North duplexes.

The proposed facility would be located approximately 1,273 feet northwest of the intersection of Fairview Road and Interstate Highway 20, in Parker County. The treated effluent would be discharged to an unnamed tributary, then to an unnamed tributary of Grindstone Creek, then to Grindstone Creek, then to the Brazos River below Possum Kingdom Lake in Segment No. 1206 of the Brazos River Basin. The unclassified receiving water uses are limited aquatic life use for the unnamed tributary and unnamed tributary of Grindstone Creek and high aquatic life use for Grindstone Creek. The designated uses for Segment No. 1206 are primary contact recreation and high aquatic life use.

Effluent limits in the draft permit, based on a thirty-day average, are 20 milligrams per liter (mg/L) five-day biochemical oxygen demand (BOD5), 20 mg/L total suspended solids, 126 colony-forming units or most probable number of E.

coli per 100 milliliters, and 2 mg/L minimum dissolved oxygen. The pH (potential Hydrogen) must be in the range of 6.0 to 9.0 standard units, and the effluent must contain a total chlorine residual in the range of 1.0 to 4.0 mg/L after a detention time of at least twenty minutes (based on peak flow).

C. Procedural Background

TCEQ received the application on January 31, 2022, and declared it administratively complete on April 5, 2022. The Notice of Receipt of Application and Intent to Obtain Water Quality Permit (NORI) was published in English on April 12, 2022 in the *Weatherford Democrat* and in Spanish on April 26, 2022 in *La Prensa Comunidad*. ED staff completed the technical review of the application on June 9, 2022 and prepared a draft permit. The Notice of Application and Preliminary Decision (NAPD) for TPDES Permit for Municipal Wastewater was published in English on July 9, 2022 in the *Weatherford Democrat* and in Spanish on July 12, 2022 in *La Prensa Comunidad*. The public comment period ended on August 11, 2022. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on October 18, 2022. The deadline for filing requests for a contested case hearing or reconsideration of the ED's decision on the application was November 17, 2022.

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 Texas Administrative Code § 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 must 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. ANALYSIS OF HEARING REQUEST

A. Whether the requestor is an affected person

Bartlett Ranch Owners

Bartlett Ranch Owners submitted timely combined comments and a hearing request on August 11, 2022. Bartlett Ranch Owners list their property

location as approximately 0.35 miles south and downstream of Applicant's proposed facility.¹ Bartlett Ranch Owners use the property as both their primary residence and to raise quarter horses, cattle, and bird dogs. The hearing request raises numerous concerns pertaining to degradation of water quality, effects on wildlife, and effects on human health and safety. Specifically, Bartlett Ranch Owners state that their livestock regularly use Grindstone Creek, and they would be directly impacted by any degradation in effluent water quality because of an influx of discharge into the creek. Further, Bartlett Ranch Owners state that they rely on groundwater wells on their property as a source of water for their operations, and they are concerned that the proposed Application would potentially increase the risk of contamination of groundwater in the area.

The Bartlett Ranch Owners' claimed interests are protected by the law under which this application will be considered. Also, a reasonable relationship exists between those interests and the activity to be regulated. Further, the Owners' proximity to the proposed facility increases the likelihood of impacts to their health, safety, use of property, and use of water resources. Finally, their proximity distinguishes their interests from those common to the general public. For these reasons, OPIC finds the Bartlett Ranch Owners qualify as affected persons.

B. Which issues raised in the hearing request are disputed

¹ OPIC notes that the ED's map reflected the address of John Andrew Scott, the attorney representing Bartlett Creek Ranch Owners. A google maps search lists Bartlett Ranch LLC's address as 3655 Lazy Bend Rd. Millsap, TX 76066, which appears to be within a mile of the proposed facility.

Affected persons raised the following disputed issues:

1. Whether notice was adequate;
2. Whether the proposed facility will negatively impact the requestor's use of Grindstone Creek;
3. Whether the proposed facility will negatively impact agriculture and livestock;
4. Whether water quality will be adequately protected;
5. Whether the proposed facility will negatively impact aquatic and terrestrial life;
6. Whether the draft permit is adequately protective against dangerous constituents in receiving waters;
7. Whether discharges from the proposed facility will result in nuisance conditions;
8. Whether the draft permit is adequately protective of groundwater; and
9. Whether the proposed facility violates TCEQ's regionalization policy.

C. Whether the dispute involves questions of fact or of law

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 person are issues of fact.

D. Whether the issues were raised during the public comment period

Issues 1-9 in Section III.B were specifically raised by affected persons during the public comment period.

E. Whether the hearing request is based on issues raised solely in a withdrawn public comment

The hearing request is based on timely comments that have not been withdrawn.

F. Whether the issues are relevant and material to the decision on the application

The hearing request raises 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).

Notice

Requestors raised the issue of whether the Applicant complied with all applicable notice requirements. Chapter 39 contains requirements relating to notice publication, alternative language publication, mailing of notice, and posting of the application in a public place within the county. The issue of whether the Applicant complied with all applicable notice requirements is relevant and material to the Commission's decision on this application. Therefore, issue No. 1 is appropriate for referral to SOAH.

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, and the environment. The

Commission is responsible for the protection of water quality under Texas Water Code (TWC) 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, the protection of human health and safety and animal life, Issues No. 2-6 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 conditions, primarily odors and other conditions that may result without appropriate nutrient

limitation. 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 their property. Because 30 TAC § 309.13 addresses nuisance conditions as described by requestors, Issue No. 7 is relevant and material to the Commission's decision on this Application.

Groundwater

Requestors expressed concerns regarding the impact on groundwater nearby the proposed facility. As discussed above, the Commission is responsible for the protection of water quality under TWC Chapter 26 and 30 TAC Chapters 307 and 309. Section 309.10(b) states, in part, that “[t]he purpose of this chapter is to condition issuance of a permit and/or approval of construction plans and specifications for new domestic wastewater treatment facilities ... on selection of a site that minimizes possible contamination of ground and surface waters....” Under 30 TAC § 309.12, the Commission considers several factors relating to a facility's proposed design, construction, and operational features to evaluate a facility's potential to cause surface water and groundwater contamination. The rule further provides for consideration of active geologic processes and groundwater conditions such as groundwater flow rate, groundwater quality, length of flow path to points of discharge, and aquifer recharge and discharge

conditions. Therefore, issue No. 8 is relevant and material to the Commission's decision on this Application.

Regionalization

TCEQ's regionalization policy comes from Section 26.081 of the Texas Water Code, which implements "the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state." TCEQ's wastewater permit application requires the applicant for a new permit to provide information concerning other wastewater treatment facilities that exist near the applicant's proposed treatment facility site. The applicant is required to state whether any portion of the applicant's proposed service area is located in an incorporated city, whether its proposed service area is located within another utility's certificate of convenience and necessity area, and whether there is a facility, or any sewer collection lines located within the three-mile area surrounding the proposed facility site. Accordingly, issues pertaining to regionalization are relevant and material to the Commission's decision on this Application.

G. Maximum expected duration for the contested case 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. REQUEST FOR RECONSIDERATION

Bartlett Ranch Owners submitted a timely request for reconsideration reiterating the concerns raised in their hearing request. As previously discussed, 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.

V. CONCLUSION

Having found that the Bartlett Ranch Owners qualify as affected persons in this matter, OPIC respectfully recommends the Commission grant their

hearing request and refer Issue Nos. 1-9 specified in Section III. B. 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 22, 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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FOR ALTERNATIVE DISPUTE

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