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Garrett T. Arthur, *Public Interest Counsel*

## 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: **CRYSTAL SPRINGS WATER CO., INC. (APPLICANT)**  
**TCEQ DOCKET NO. 2023-0569-MWD**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Request in the above-entitled matter.

Sincerely,

A handwritten signature in black ink that reads "Pranjal".

Pranjal M. Mehta, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-0569-MWD

APPLICATION BY CRYSTAL  
SPRINGS WATER CO., INC.  
FOR NEW TPDES PERMIT NO.  
WQ0016116001

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§

BEFORE THE  
TEXAS COMMISSION  
ON  
ENVIRONMENTAL QUALITY

OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE  
TO HEARING REQUEST

To the 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 hearing request in the above-referenced matter.

**I. Introduction**

**A. Summary of Position**

The TCEQ Chief Clerk's office received one timely hearing request on behalf of Bayou City Waterkeeper (BCW). For the reasons discussed herein, OPIC recommends denial of the hearing request.

**B. Description of Application and Facility**

Crystal Springs Water Co., Inc. (Applicant) applied to TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016116001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 140,000 gallons per day. The wastewater treatment facility (the facility) would be located approximately 2,300 feet northeast of the intersection of Copperhead Road and Nicholson Road, in Montgomery County. The treated

effluent would be discharged via pipe to Camp Creek, then to Caney Creek in Segment No. 1010 of the San Jacinto River Basin.

The effluent limitations in both phases of the draft permit, based on a 30-day average, are 10 milligrams per liter (mg/l) five-day carbonaceous biochemical oxygen demand (CBOD<sub>5</sub>), 15 mg/l total suspended solids (TSS), 3 mg/l ammonia-nitrogen (NH<sub>3</sub>-N), 63 colony forming units (CFU) or most probable number (MPN) of *Escherichia coli* (*E. coli*) per 100 ml, and 4.0 mg/l minimum dissolved oxygen (DO). The 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.

### **C. Procedural Background**

The TCEQ received the application on February 25, 2022, and declared it administratively complete on April 25, 2022. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in the *Conroe Courier* on May 2, 2022, and a Spanish language notice was published in the *Buena Suerte Newspaper* on May 10, 2022. The Executive Director (ED) completed the technical review of the application on July 20, 2022. The Notice of Application and Preliminary Decision (NAPD) was published in the *Houston Chronicle* on September 9, 2022, and a Spanish language notice was published in the *Buena Suerte Newspaper* on September 13, 2022.<sup>1</sup> The public comment period for this

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<sup>1</sup> Based on the available record, the NORI was published in the *Conroe Courier*, and the NAPD was published in the *Houston Chronicle*. Commission rule § 39.419(b) requires the Applicant to publish the NAPD in the same newspaper as the NORI. OPIC has been unable to determine why

application closed on October 13, 2022. The Chief Clerk mailed the ED's Decision and Response to Comments on January 30, 2023. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was March 1, 2023. The Commission received one timely filed hearing request, as discussed below.

## **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 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;

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different newspapers were used, but if the public notice process was defective, we reserve the right to change our recommendation to the Commission.

- (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 § 55.205(b), a hearing request by a group or association may not be granted unless all of the following requirements are met:

- (1) comments on the application are timely submitted by the group or association;
- (2) the request identifies, by name and physical address, one or more members of the group or association that would otherwise have standing to request a hearing in their own right;
- (3) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (4) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

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 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. Analysis of Hearing Request**

#### **A. Whether the requestor is an affected person**

The Commission received timely comments and a hearing request on behalf of BCW. BCW indicates it is a 501(c)(3) nonprofit corporation dedicated to protecting the health of the waters and communities across the Lower Galveston Bay watershed. Centered around this mission, BCW aims to represent its members by participating in the TCEQ decision-making process.

As required for group standing under 30 TAC § 55.205(b), BCW timely submitted comments, the interests BCW seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires the participation of individual BCW members. BCW's hearing request identifies Brandt Mannchen as the group member who spends a significant amount of time hiking, driving, and birding in and around the Sam Houston National Forest. The hearing request emphasizes that Mr. Mannchen has recreational and aesthetic

interests in maintaining the health of the forest, including the waterways that traverse it. The hearing request expresses concerns regarding the potential impact of the proposed facility on wildlife habitat, forest ecology, and productivity, which would affect Mr. Mannchen's interests.

The hearing request states that Mr. Mannchen lives in Houston. The ED's GIS map shows that Mr. Mannchen resides approximately 45.19 miles away from the proposed facility. While BCW's hearing request emphasizes Mr. Mannchen's recreational and aesthetic interests in preserving the forest and waterways, the concerns raised in the hearing request are not distinguishable in regularity and particularity from members of the general public, and therefore do not establish a personal justiciable interest. The hearing request also fails to identify the discharge route and fails to assert specific impacts to the applicable segments of the discharge route. Further, the likely impact of the regulated activity on the use of the natural resource articulated in the request is attenuated given the large, 163,000-acre footprint of the Sam Houston National Forest and the relatively small, 140,000 gallons per day effluent volume authorized in the draft permit. Therefore, OPIC cannot find that Mr. Mannchen would qualify as an affected person and must conclude that BCW lacks standing. However, if the Commission finds BCW to be affected, OPIC provides the following analysis of the issues raised in BCW's hearing request.

**B. Which issues raised in the hearing request are disputed**

BCW raised the following disputed issues:



1. Whether the draft permit is protective of water quality and the uses of the receiving waters under the applicable Texas Surface Water Quality Standards.
2. Whether the draft permit includes adequate odor prevention measures.
3. Whether the proposed location for the facility complies with the 100-year flood plain location standards found in 30 TAC § 309.13(a).
4. Whether the draft permit complies with 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. 30 TAC § 55.211(c)(2)(A). The issues listed above are issues of fact.

**D. Whether the issues were raised during the public comment Period**

All of the issues were raised by BCW 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**

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 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).

### Water Quality

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 (TSWQS) 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. The TSWQS also require that "[a] permit must contain effluent limitations that protect existing uses and preclude degradation of existing water quality." 30 TAC § 307.2(d)(5)(D). 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). Furthermore, 30 TAC § 307.4(j)(1) provides that "[e]xisting, designated, presumed, and attainable uses of aquatic recreation must be maintained, as determined by criteria that indicate the potential presence of pathogens." Finally, provisions of the general criteria of 30 TAC § 307.4 remain in effect even under low flow conditions. 30 TAC § 307.4(a). Therefore, Issue No. 1 is relevant and material to the Commission's decision regarding this application.

### Nuisance Odors

Nuisance odor is specifically addressed by TCEQ regulations concerning the siting of domestic wastewater plants. 30 TAC § 309.13. The Commission's

rules require domestic wastewater treatment facilities to meet buffer zone requirements for the abatement and control of nuisance odors prior to construction. 30 TAC § 309.13(e). Therefore, Issue No. 2 regarding odor prevention is relevant and material.

*100-year Flood Plain Location Standards*

Under 30 TAC § 309.13(a), a wastewater treatment plant unit may not be located in the 100-year flood plain unless the plant unit is protected from inundation and damage that may occur during that flood event. Therefore, Issue No. 3 is relevant and material to the Commission's decision on this application.

*Regionalization*

It is state policy to encourage regionalization, and TCEQ must consider regionalization when deciding whether to issue a discharge permit. TWC §§ 26.081(a), 26.0282. Therefore, Issue No. 4 regarding regionalization is relevant and material to the Commission's decision on this application.

**F. Maximum expected duration for the contested case 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**

For the reasons discussed above, OPIC recommends the Commission deny the hearing request of BCW. If the Commission grants a hearing, the issues specified in Section III.B could be appropriately referred to SOAH for a contested case hearing.

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 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**  
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**TCEQ DOCKET NO. 2023-0569-MWD**

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