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Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 10, 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: **EPITOME DEVELOPMENT, LLC (Applicant)**
TCEQ DOCKET NO. 2023-0571-MWD

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Requests 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

DOCKET NO. 2023-0571-MWD

APPLICATION BY EPITOME
DEVELOPMENT LLC FOR TPDES
PERMIT NO. WQ0016226001

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO HEARING REQUESTS

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 requests in the above-referenced matter.

I. Introduction

A. Summary of Position

Based on the information submitted in the requests and a review of the information available in the Chief Clerk's file on this application, OPIC recommends the Commission grant the hearing requests of Prairie Crossing Wastewater, LLC (Prairie Crossing), Prairie Crossing Municipal Utility Districts 1 & 2 (Prairie Crossing MUDs), 05 Ranch Investments (Ranch Investments), and Patricia Daffin. OPIC further recommends the Commission refer the issues specified in Section III.B for a contested case hearing at the State Office of Administrative Hearings (SOAH) with a maximum duration of 180 days.

B. Description of Application and Facility

Epitome Development LLC (Applicant) applied to TCEQ for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016226001 to authorize the discharge of treated domestic wastewater at an interim volume not

to exceed a daily average flow of 0.10 million gallons per day (MGD) and a final volume not to exceed a daily average flow of 0.30 MGD. The wastewater treatment facility (the facility) would be located 0.72 miles southeast of the intersection of Farm-to-Market Road 973 and Rio Grande Street, in Williamson County 76574.

The facility would be an activated sludge process plant operated in the single stage nitrification mode. Treatment units in the interim and the final phases would include a mechanical bar screen, an aeration basin, a final clarifier, cloth-media disk filters, a multi-stage aerobic digester, and a chlorine contact chamber. The treated effluent would be discharged via Outfall 001 to an unnamed tributary, then to an unnamed impoundment, then to an unnamed tributary, then to Battleground Creek, then to Soil Conservation Service Site 31 Reservoir, then to Battleground Creek, then to Brushy Creek in Segment 1244 of the Brazos River Basin.

C. Procedural Background

The TCEQ received the application on September 27, 2022, and declared it administratively complete on October 4, 2022. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in the *Austin American-Statesman* on October 6, 2022, and a Spanish language notice was published in *El Mundo Newspaper* on October 6, 2022. The Executive Director (ED) completed the technical review of the application on November 14, 2022. The Notice of Application and Preliminary Decision (NAPD) was published in the *Austin American-Statesmen* on December 20, 2022, and a Spanish language notice was published in *El Mundo Newspaper* on December 22, 2022. The public comment

period ended on January 23, 2023. The Chief Clerk mailed the ED's Decision and Response to Comments on March 22, 2023. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was April 21, 2023. The Commission received timely hearing requests from Prairie Crossing, Prairie Crossing MUDs, Ranch Investments, and Patricia Daffin.

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 Title 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;
- (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 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. Analysis of Hearing Requests

A. Whether the requestors are affected persons

Prairie Crossing

The Commission received a timely hearing request from Prairie Crossing during the public comment period.¹ The hearing request states that Prairie Crossing currently holds TPDES Permit No. WQ0015850001 (Prairie Crossing Permit) which authorizes Prairie Crossing to treat and discharge wastewater from the Prairie Crossing Wastewater Treatment Facility (Prairie Facility). The Prairie Facility is situated approximately one mile northeast of the intersection of County Road 485 and Farm-to-Market Road 9, in Williamson County, and its discharge route runs via pipe to Boggy Creek, then to Brushy Creek in Segment No. 1244 of the Brazos River Basin. The hearing request further states that Applicant's proposed discharge is located within a distance of less than two miles from the Prairie Facility's proposed outfall, and the areas covered under the application fall within the boundaries of the Prairie Facility's proposed service

¹ Identical hearing requests were submitted on behalf of Prairie Crossing, Prairie Crossing MUDs, and Ranch Investments.

area. The hearing request explains that Prairie Crossing has expressed its willingness to provide service to the Applicant, and there has been a correspondence exchange between Prairie Crossing and the Applicant, wherein Prairie Crossing made efforts to determine Applicant's needs in order to facilitate service. The hearing request also explains that Prairie Crossing's ability to provide service is further substantiated by its recent amendment, submitted on January 6, 2023, expanding its capacity specifically to provide regional wastewater treatment service, including the area covered by the application.

Prairie Crossing raises concerns that the application fails to meet the TCEQ's regionalization requirements, justify a need for the final phase of 0.3 MGD, satisfy water quality and antidegradation standard requirements, and include all of the information required in TCEQ application forms. These concerns are interests protected by the law under which this application is considered, and a reasonable relationship exists between those interests and regulation of the facility. The ED's map shows that Prairie Crossing is located approximately 1.58 miles from the proposed facility. Prairie Crossing's location within a three-mile radius of the proposed facility,² along with Prairie Crossing's economic interest in regionalization, provides a basis for affected person status. Therefore, OPIC finds that Prairie Crossing has a personal justiciable interest in this matter and qualifies as an affected person under 30 TAC § 55.203(c).

² See Application for a Domestic Wastewater Permit Technical Report 1.1, Section 1.B.3.

Prairie Crossing MUDs

The Commission received a timely hearing request from Prairie Crossing MUDs during the public comment period.³ The hearing request states that Prairie Crossing MUDs are political subdivisions of the State of Texas authorized by the TCEQ to provide services within an area of Williamson County. The hearing request also states that Prairie Crossing is authorized to build a wastewater treatment plant within the area of Prairie Crossing MUDs. As explained earlier, the Prairie Facility is situated in Williamson County and its discharge flows into Brushy Creek in Segment No. 1244 of the Brazos River Basin. The hearing request further states that the areas included under the Application fall within the service boundaries of the Prairie Crossing MUDs within Williamson County.

Prairie Crossing MUDs raise concerns that the application fails to meet the TCEQ's regionalization requirements, justify a need for the final phase of 0.3 MGD, satisfy water quality and antidegradation standard requirements, and include all of the information required in TCEQ application forms. These concerns are interests protected by the law under which this application is considered, and a reasonable relationship exists between those interests and regulation of the facility. The ED's map shows that Prairie Crossing MUD 1 and Prairie Crossing MUD 2 are located approximately 1.37 and 0.79 miles from the proposed facility. Prairie Crossing MUDs' location within a three-mile radius of the proposed facility,⁴ along with Prairie Crossing MUDs' economic interest in

³ As explained earlier, identical hearing requests were submitted on behalf of Prairie Crossing, Prairie Crossing MUDs, and Ranch Investments.

⁴ See Application for a Domestic Wastewater Permit Technical Report 1.1, Section 1.B.3.

regionalization, provides a basis for affected person status. Therefore, OPIC finds that Prairie Crossing MUDs have a personal justiciable interest in this matter and qualify as affected persons under 30 TAC § 55.203(c).

Ranch Investments

The Commission received a timely hearing request from Ranch Investments during the public comment period.⁵ The hearing request states that Ranch Investments is a Texas Limited Liability Company and holds ownership of land in Williamson County, on which Prairie Crossing has been granted a permit to construct a wastewater treatment plant. The hearing request also states that Ranch Investments is the underlying landowner of the Prairie Crossing Facility, and the areas included under the Application are serviceable within Prairie Crossing's proposed service area.

Ranch Investments raises concerns that the application fails to meet the TCEQ's regionalization requirements, justify a need for the final phase of 0.3 MGD, satisfy water quality and antidegradation standard requirements, and include all of the information required in TCEQ application forms. Ranch Investments also raises concerns regarding nuisance odor and potential impact on the quality of life of nearby residents and the public, including Ranch Investments as a neighboring landowner. These concerns are interests protected by the law under which this application is considered, and a reasonable relationship exists between those interests and regulation of the facility. The ED's

⁵ As explained earlier, identical hearing requests were submitted on behalf of Prairie Crossing, Prairie Crossing MUDs, and Ranch Investments.

map shows that Ranch Investments is located approximately 1.58 miles from the facility. Ranch Investments' location within a three-mile radius of the proposed facility,⁶ along with Ranch Investments' economic interest in regionalization, provides a basis for affected person status. Therefore, OPIC finds that Ranch Investments has a personal justiciable interest in this matter and qualifies as an affected person under 30 TAC § 55.203(c).

Patricia Daffin

Ms. Daffin timely submitted comments and a hearing request. Ms. Daffin expresses concerns regarding the adequacy of notice provided to adjacent landowners and any potential impact on the receiving waters that are utilized for livestock watering and recreational purposes. Ms. Daffin also raises concerns regarding the possibility of wastewater being discharged on or near her land and the potential overflow from the facility, particularly in conjunction with environmental factors such as heavy rains. Ms. Daffin incorporates, by reference, the comments made by Prairie Crossing, Prairie Crossing MUDs, and Ranch Investments. The ED's map shows that Ms. Daffin is located on the discharge route and approximately 0.14 miles from the facility.

Ms. Daffin's concerns are interests that are protected by the law under which this application is considered, and a reasonable relationship exists between those interests and regulation of the facility. Based on Ms. Daffin's concerns and her proximity to the proposed facility's location and the proposed

⁶ See Application for a Domestic Wastewater Permit Technical Report 1.1, Section 1.B.3.

discharge, OPIC finds that Ms. Daffin has a personal justiciable interest in this matter and qualifies as an affected person under 30 TAC § 55.203(c).

B. Which issues raised in the hearing requests are disputed

The affected persons discussed above raised the following disputed issues:

1. Whether the application and draft permit comply with TCEQ's regionalization policy. (Raised by Prairie Crossing, Prairie Crossing MUDs, Ranch Investments, and Patricia Daffin.)
2. Whether the Applicant adequately demonstrated a need for the draft permit's final phase. (Raised by Prairie Crossing, Prairie Crossing MUDs, Ranch Investments, and Patricia Daffin.)
3. Whether the draft permit complies with applicable antidegradation requirements. (Raised by Prairie Crossing, Prairie Crossing MUDs, Ranch Investments, and Patricia Daffin.)
4. Whether the draft permit is protective of water quality and the existing uses of the receiving waters in accordance with applicable Texas Surface Water Quality Standards. (Raised by Ms. Daffin.)
5. Whether the discharge route has been correctly characterized and described in the Application. (Raised by Prairie Crossing, Prairie Crossing MUDs, Ranch Investments, and Patricia Daffin.)
6. Whether the Application is complete and accurate. (Raised by Prairie Crossing, Prairie Crossing MUDs, Ranch Investments, and Patricia Daffin.)

7. Whether the draft permit complies with the buffer zone requirements. (Raised by Prairie Crossing, Prairie Crossing MUDs, Ranch Investments, and Patricia Daffin.)
8. Whether the draft permit adequately addresses nuisance odor in accordance with 30 TAC § 309.13(e). (Raised by Prairie Crossing, Prairie Crossing MUDs, Ranch Investments, and Patricia Daffin.)
9. Whether the Applicant substantially complied with all applicable notice requirements. (Raised by Ms. Daffin.)

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 the 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 requests are 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 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).

Regionalization and Need for the Final Phase

It is state policy to encourage regionalization, and TCEQ must consider regionalization when deciding whether to issue a discharge permit. Texas Water Code (TWC) §§ 26.081(a), 26.0282. Section 26.0282 also authorizes the Commission to alter or deny a wastewater discharge permit based on consideration of need. Therefore, Issue No. 1 regarding regionalization and Issue No. 2 regarding need for the final phase of the draft permit are relevant and material to a decision on this application.

Water Quality and Antidegradation Review

The Commission is responsible for the protection of water quality under TWC Chapter 26 and 30 TAC Chapters 307 and 309. 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. 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(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, 30 TAC § 307.5 requires the ED to conduct an antidegradation review of new discharge permit applications. Therefore, Issue Nos. 3 and 4 are relevant and material to the Commission's decision regarding this application.

Discharge Route

The affected persons are concerned that the Application does not identify an existing pond downstream of the proposed outfall. As discussed earlier, Ms. Daffin is also concerned regarding the possibility of wastewater being discharged on or near her land and the potential overflow from the facility, particularly in conjunction with environmental factors such as heavy rains. TCEQ lacks jurisdiction to address possible flooding. However, TCEQ rules require that if an applicant becomes aware that it failed to submit relevant facts or submitted incorrect information in a permit application, the applicant is required to promptly submit such facts and information. 30 TAC § 305.125(19). Therefore, Issue No. 5 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Complete and Accurate Application

The affected persons are concerned that the information provided under the Application's sewage sludge solids management plan is not complete and the Application's description of the stream physical characteristics, and discharge creek path is not accurate. As explained above, TCEQ rules require that if an

applicant becomes aware that it failed to submit relevant facts or submitted incorrect information in a permit application, the applicant is required to promptly submit such facts and information. 30 TAC § 305.125(19). Therefore, Issue no. 6 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Buffer Zone Requirements and Nuisance Odors

Buffer zone requirements and nuisance odor are 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 Nos. 7 and 8 are relevant and material.

Notice Requirements

The TCEQ's Chapter 39 notice rules for a new permit require that the NORI and NAPD be mailed to landowners named on the application map and persons on the mailing list maintained by the Office of the Chief Clerk. Therefore, Issue No. 9 regarding notice requirements is relevant and material.

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 grant the hearing requests of Prairie Crossing, Prairie Crossing MUDs, Ranch Investments, and Patricia Daffin. OPIC further recommends the Commission refer the issues 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

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 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.



Pranjal M. Mehta

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TCEQ DOCKET NO. 2023-0571-MWD

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