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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 1, 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: **IN THE MATTER OF THE APPLICATION BY TIMOTHY EDWARD
CARTER AND GILDEN B. BLACKBURN FOR TPDES PERMIT NO.
WQ0016124001
TCEQ DOCKET NO. 2023-0862-MWD**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Sheldon P. Wayne".

Sheldon P. Wayne, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-0862-MWD

APPLICATION BY	§	BEFORE THE
TIMOTHY EDWARD CARTER	§	
AND GILDEN B. BLACKBURN	§	TEXAS COMMISSION ON
FOR TPDES PERMIT	§	
NO. WQ00016124001	§	ENVIRONMENTAL QUALITY

**OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE TO
REQUESTS 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 the hearing requests and request for reconsideration received in the above-captioned matter.

I. Introduction

A. Summary of Position

Preliminarily, OPIC notes that the TCEQ Chief Clerk’s office received two timely hearing requests and one timely request for reconsideration from FM1189 LLC, Bartlett Ranch Brock LLC, Series A EGHB Investments LLC, and Series A 1189 Storage LLC, which are entities all under common ownership (collectively, the Requestors). For the reasons stated herein, OPIC respectfully recommends the Commission grant these requests for hearing, and refer this application for a 180-day hearing at the State Office of Administrative Hearings (SOAH) on Issue nos. 1-5 contained in §III.B. OPIC further recommends the Commission deny the pending request for reconsideration.

B. Description of Application and Facility

Gilden Blair Blackburn and Timothy Edward Carter (Applicants) applied to TCEQ for new Texas Pollutant Discharge Elimination System (TPDES) Permit no. WQ0016124001 to authorize the discharge of treated domestic wastewater, at a daily average flow not to exceed 75,000 gallons per day.

The wastewater treatment facility is proposed to be located at approximately 1,265 feet southeast from the intersection of Brock Spur Road and Quanah Hill Road, in Parker County.

The treated effluent would be discharged via a man-made ditch, then to a roadside ditch, then to an unnamed tributary, then to Price Lake, then to an unnamed tributary, then to Grindstone Creek, then to the Brazos River below Possum Kingdom Lake in Segment no. 1206 of the Brazos River Basin.

C. Procedural Background

TCEQ received the application on March 11, 2022. On June 7, 2022, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published on June 14, 2022 in English in the *Weatherford Democrat* and in Spanish in *La Presna Comunidad*. The ED completed the technical review of the application on July 27, 2022 and prepared the proposed permit, which if approved, would establish the conditions under which the facility must operate. The Notice of Application and Preliminary Decision was published on September 13, 2022 in English in the *Weatherford Democrat* and in Spanish in *La Presna Comunidad*. The public comment period closed on January 13, 2023. The Chief Clerk mailed the ED's

Decision and Response to Comments on April 11, 2023. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was May 11, 2023.

The Commission received requests for a contested case hearing and a request for reconsideration from the Requestors described above.

II. Applicable Law

A. Hearing Request

This application was filed on or 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, 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 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 (RFR) 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 Requests

A. Whether the requestor is an affected person

Through their representative, J. Andrew Scott, the Requestors jointly submitted two timely hearing requests, one of which was received during the public comment period in this matter.

The requests explain that the entities are under common ownership and own property located less than a quarter mile from the proposed facility. The requests state that the proposed discharge route will run directly through Requestors' property and will terminate in Price Lake, which sits on their property. The requests also detail a number of concerns regarding the proposed facility, including the creation of nuisance odor; classification of receiving water uses; impact to recreational activities; degradation of water quality, including groundwater; impact to human health, aquatic life, and wildlife; and noncompliance with regionalization requirements.

OPIC notes that the Requestors provided a narrative description of their location relative to the proposed facility and described how and why they expect to be adversely affected by the proposed facility as required by 30 TAC § 55.201(d). The requests do not provide a property address, and instead only include the P.O. Box address for their representative, J. Andrew Scott. As such,

the ED was unable to map the location of the Requestors' property, and thus, exact determination of the distance between their property and the proposed facility was unable to be ascertained. However, the affected landowners map included as part of the application identifies some of the Requestors as being located along the discharge route within one mile downstream of the proposed discharge.

To be granted a contested case hearing, the Requestors must show that they qualify as "affected persons," which are those who have personal justiciable interests related to a legal right, duty, privilege, power, or economic interest affected by the application, and must distinguish those interests from interests common to the general public. *See* 30 TAC § 55.203(a). Here, the Requestors have stated interests, for example, impacts to water quality, human health, and wildlife, which are protected by the law under which this application will be considered. *See* 30 TAC § 55.203(c)(1).

The lack of a property address may, at times, prevent assessment of the likelihood that a requestor will be affected by the proposed facility in a way that differs from the general public. However, here, the Requestors' description of their location and their inclusion on the affected landowners map demonstrates that they are near the proposed facility. Therefore, OPIC is reasonably able to find that their proximity to the proposed Facility sufficiently distinguishes their concerns from those shared by the general public. Further, OPIC concludes that a reasonable relationship exists between the interests the Requestors seek to protect and the Applicants' regulated activity—a relevant factor under 30 TAC §

55.201(c)(3). Finally, OPIC notes that there are no explicit distance restrictions imposed by law in this matter. *See* 30 TAC § 55.201(c)(2).

Taking all of this into consideration, OPIC concludes that the Requestors have demonstrated that they possess a personal justiciable interest in this matter and qualify as affected persons.

B. Which Issues Raised in the Hearing Requests Are Disputed

The Requestors raised the following disputed issues:

1. Whether the proposed facility and draft permit comply with Texas Surface Water Quality Standards and are adequately protective of water quality, including surface water and groundwater;
2. Whether the proposed facility and draft permit comply with TCEQ's antidegradation rules and regulations, including protection of the designated uses of receiving waters;
3. Whether the proposed facility and draft permit are adequately protective of human health and animal life, including livestock and aquatic life;
4. Whether the proposed facility and draft permit comply with TCEQ's regionalization policy, including demonstration of need;
5. Whether a nutrient limit in the draft permit is necessary to prevent nuisance odors;
6. Whether the design of the proposed facility is adequate to ensure that the effluent will meet permit requirements;
7. Whether the operator of the proposed facility is sufficiently qualified to operate the facility; and
8. Whether the application is complete and accurate.

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

Issue nos. 1-5 in Section III.B were raised by the Requestors during the public comment period. Issue nos. 6-8 were raised for the first time in a hearing request submitted to the Commission after the close of the public comment period. Thus, Issue nos. 6-8 are not appropriate for referral to hearing.

E. Whether the Hearing Requests are Based on Issues Raised Solely in a Withdrawn Public Comment

The Requestors submitted two hearing requests, one of which was received during the public comment period, and no public comments were withdrawn. Therefore, no issues in the hearing requests are based on a withdrawn public comment.

F. Whether the Issues are Relevant and Material to the Decision on the Application

The Requestors raise issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). 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 this permit. The Commission can only consider issues within its jurisdiction. Therefore, relevant and material issues include those governed by the substantive law of the permit at issue. *Anderson v. Liberty Mutual, Inc.*, 477 U.S. 242, 248-51 (1986).

Water Quality, Human Health, and Animal Life

The Commission is responsible for the protection of water quality under Texas Water Code (TWC) Chapter 26 and 30 TAC Chapter 307. 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, “Water 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).

Additionally, § 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...”

As Chapters 307 and 309 require the protection of water quality, human health, and animal life, Issue nos. 1 and 3 are relevant and material to the Commission’s decision regarding this Application and are appropriate for referral to SOAH.

Antidegradation

Antidegradation reviews are governed by 30 TAC § 307.5, which establishes the Commission's antidegradation policy and contains provisions for implementation of the policy. For this application, the ED performed an Antidegradation Review and preliminarily determined that existing water quality uses will not be impaired by this permit action. Therefore, Issue no. 2 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Regionalization and Need

Under TWC § 26.081(a), "[i]t is state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to prevent pollution and maintain and enhance state water quality." Further, "in considering the issuance...of a permit to discharge waste, the commission may deny or alter the terms of the proposed permit...based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection..." TWC § 26.0282. Therefore, Issue no. 4 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Nuisance Odor

With regard to wastewater treatment facilities, odor is specifically addressed by 30 TAC § 309.13(e), which requires that nuisance odor be abated and controlled. Further, § 307.4 delineates general criteria that surface waters

must meet, including aesthetic parameters which, in part, work to prevent nuisance conditions attributable to the proposed facility. Finally, one of Chapter 309's purposes is "to minimize the possibility of exposing the public to nuisance conditions." 30 TAC § 309.10. Therefore, Issue no. 5 is relevant and material to the Commission's decision regarding this Application and is appropriate for referral to SOAH.

G. Request for Reconsideration

The Commission received a timely filed request for reconsideration of the ED's decision from the Requestors. The RFR was included with their May 10, 2023 hearing request, and support for the different requests was not individualized or otherwise distinguished. OPIC will therefore assume that the reasons stated in support of the hearing request are also applicable to the RFR.

The issues raised in the RFR have been discussed in detail in the preceding sections, and include impact to human health, aquatic life, wildlife, and recreational activities; creation of nuisance odor; degradation of water quality; and noncompliance with regionalization requirements. However, an evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the ED's decision should be reconsidered for these reasons. As discussed above, OPIC is recommending a contested case hearing on the issues that Requestors raised in both timely comment and hearing request. Therefore, OPIC recommends denial of the request for reconsideration.

H. 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.

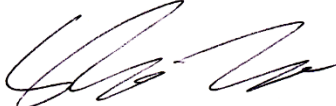
IV. Conclusion

For the reasons discussed above, OPIC finds that the Requestors have demonstrated that they qualify as affected persons. Therefore, OPIC respectfully recommends that the Commission grant their hearing request and refer Issue nos. 1-5 specified in Section III.B for a contested case hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,

[Signature on Next Page]

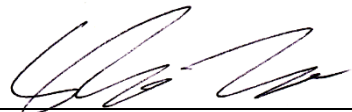
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CERTIFICATE OF SERVICE

I hereby certify that September 1, 2023, the original of the Office of Public Interest Counsel's Response to Requests for Hearing and Request for Reconsideration was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via electronic mail, and/or by deposit in the U.S. Mail.



Sheldon P. Wayne

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TCEQ DOCKET NO. 2023-0862-MWD

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