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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 20, 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 LVTP HOLDINGS, LLC
FOR TPDES PERMIT NO. WQ0015964001
TCEQ DOCKET NO. 2023-1558-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 black ink, appearing to read "Sheldon P. Wayne".

Sheldon P. Wayne, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-1558-MWD

APPLICATION BY	§	BEFORE THE
LVTP HOLDINGS, LLC	§	TEXAS COMMISSION ON
FOR TPDES PERMIT	§	ENVIRONMENTAL QUALITY
NO. WQ0015964001	§	

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 (Commission or TCEQ) files this response to requests for hearing in the above-captioned matter and would respectfully show as follows:

I. Introduction

A. Summary of Position

Before the Commission is an application by LVTP Holdings, LLC (Applicant or LVTP) for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015964001. OPIC notes that the TCEQ Chief Clerk's office received timely hearing requests from Ellis County, the City of Waxahachie, and Clay and Sheila Allison. For the reasons stated herein, OPIC respectfully recommends the Commission grant the requests of Ellis County and the City of Waxahachie, and refer this application for a 180-day hearing at the State Office of Administrative Hearings (SOAH) on Issue nos. 1-4 contained in §III.B.

B. Description of Application and Facility

LVTP applied to the TCEQ for new TPDES Permit No. WQ0015964001. If issued, the permit would authorize discharge of treated domestic wastewater

from the proposed Lakeview MUD Wastewater Treatment Facility (the Facility) at a daily average flow not to exceed 1.2 million gallons per day. The Facility is proposed to be located approximately two miles northeast of the intersection of Rex Odom Drive and West U.S. Highway 287, in Ellis County 75165.

The Facility would be an activated sludge process plant operated in the extended aeration mode. Treatment units in the Interim phase will include a bar screen, an aeration chamber, a final clarifier, a sludge digester, a chlorine contact chamber, and a dechlorination chamber. Treatment units in the Final phase will include an additional aeration chamber, a final clarifier, a sludge digester, a chlorine contact chamber, and a dechlorination chamber. The Facility has not been constructed.

The proposed discharge route for the treated effluent is to an unnamed tributary of Long Branch, then to an unnamed impoundment on Long Branch, then to Long Branch, then to an unnamed impoundment on Long Branch, then to Long Branch, then to Waxahachie Creek, then to Bardwell Reservoir in Segment No. 0815 of the Trinity River Basin. The unclassified receiving water uses are minimal aquatic life use for the unnamed tributary and Long Branch, presumed high aquatic life use for the unnamed impoundments, and intermediate aquatic life use for Waxahachie Creek. The designated uses for Segment No. 0815 are primary contact recreation, public water supply, and high aquatic life use.

The effluent limitations in the Interim phase of the draft permit, based on a 30-day average, are 5 milligrams per liter (mg/l) five-day carbonaceous biochemical oxygen demand (CBOD₅), 5 mg/l total suspended solids (TSS), 1.2

mg/l ammonia-nitrogen (NH₃-N), 1 mg/l Total Phosphorus (TP), 126 colony forming units (CFU) or most probable number (MPN) of Escherichia coli (E. coli) per 100 ml, and 6.0 mg/l minimum dissolved oxygen (DO). The effluent limitations in the Final phase of the draft permit, based on a 30-day average, are 5 mg/l CBOD₅, 5 mg/l TSS, 1.1 mg/l NH₃-N, 1 mg/l TP, 126 CFU or MPN of E. coli per 100 ml, and 6.0 mg/l DO. For both phases, the effluent is required to contain a total chlorine residual of at least 1.0 mg/l after a detention time of at least 20 minutes (based on peak flow). The chlorinated effluent must be dechlorinated to less than 0.1 mg/l total chlorine residual.

C. Procedural Background

The TCEQ received the application on February 11, 2021, and declared it administratively complete on May 5, 2021. On May 13, 2021, the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in English in *The Dallas Morning News* and in Spanish in the *TexMex News*. The ED completed the technical review of the application on June 13, 2022. On July 26, 2022, the Applicant published the Combined NORI and Notice of Application and Preliminary Decision (NAPD) in English in *The Dallas Morning News* and in Spanish in the *La Presna Comunidad*.¹ The Combined NORI and NAPD was issued to correct the Applicant's address contained in the original NORI. The public comment period ended on August 25, 2022. The Chief Clerk mailed the ED's

¹ Applicant published the original NORI and the combined NORI and NAPD in different Spanish language newspapers. TCEQ rule § 39.419(b) directs an applicant to publish the NAPD in the same newspaper as the NORI. Although the available record does not explain Applicant's use of different newspapers, OPIC notes that no public comments or requests raised any notice issues.

Response to Public Comment on August 21, 2023. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was September 20, 2023. The TCEQ Chief Clerk's office received timely hearing requests from Ellis County, the City of Waxahachie, and Clay and Sheila Allison.

II. Applicable Law

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) (SB 709). 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. As provided by § 55.203(b), governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons. Section 55.203(c) provides relevant factors to be considered in determining whether a person is affected. These factors 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, safety, and 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 ED; and
- (3) any other expert reports, affidavits, opinions, or data submitted by the ED, 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. Analysis of Hearing Requests

A. Whether the requestors are affected persons

Ellis County

Ellis County submitted multiple timely comments and hearing requests to TCEQ raising issues including those related to water quality, compliance with state water quality standards, impairment of Lake Bardwell, regionalization, and the Applicant's inexperience as an operator. Ellis County stresses that Lake Bardwell has been designated as the City of Waxahachie's sole source drinking water supply lake and is impaired for sulfate. It states that Ellis County has authority under state law over various County functions and services, including transportation, emergency services, and public health and safety, that may be affected by the proposed Facility's operations. The County also explains that it has statutory authority to assess whether water in its area meets state water quality standards and to bring civil suit against violators of Chapter 26 of the Texas Water Code or any permit thereunder. *See* Tex. Water Code §§ 7.351, 26.171, and 26.173. The County contends that this authority uniquely positions it in a way that is not common to the general public. The map prepared by the ED's staff shows that the proposed Facility and one downstream mile along its discharge route are located completely within Ellis County.

Governmental entities with authority under state law over issues raised by the application may be considered affected persons. 30 TAC § 55.203(b). Additionally, a relevant factor in determining whether a governmental entity qualifies as an affected person is its statutory authority over or interest in issues

relevant to the application. 30 TAC § 55.203(c)(7). Here, Ellis County has identified its statutory authority over and interest in issues related to the application, such as water quality and regionalization, and explained how those interests may be affected by operation of the proposed Facility.

Therefore, OPIC concludes that Ellis County has successfully demonstrated that it qualifies as an affected person.

City of Waxahachie

The City of Waxahachie submitted multiple timely comments and hearing requests that raise various issues, including those regarding water quality, compliance with state water quality standards, impairment of Lake Bardwell, regionalization, the Applicant's inexperience as an operator, and the need for sulfate requirements in the draft permit. The City also maintains public health and safety concerns and explains that various city functions and services, including water, sewer, and emergency services, may be affected by operation of the proposed Facility. Waxahachie further explains that the proposed Facility and its discharge will be located entirely within its extraterritorial jurisdiction (ETJ), and, additionally, that the City operates a wastewater treatment facility that also discharges to Lake Bardwell and is located less than ten miles from the proposed Facility. The City highlights that it has authority to protect public health and safety, and to regulate development within its ETJ. *See* Tex. Loc. Gov't Code §§ 42.001, 212.044.

Based on the information provided by the City, OPIC concludes that Waxahachie qualifies as an affected person. It has shown that it has authority

under state law over issues raised by the application. *See* 30 TAC § 55.203(b). Additionally, it has shown it has statutory authority over and interest in issues relevant to the application. *See* 30 TAC § 55.203(c)(7). Therefore, OPIC finds that the City of Waxahachie has successfully demonstrated that it qualifies as an affected person.

Clay and Sheila Allison

Clay and Sheila Allison jointly submitted a timely hearing request during the public comment period. The request details concerns related to the subdivision the Facility is planned to serve, including increases in traffic and crime, overcrowding of schools, decrease of property values, and flooding. According to the ED's map, the Allisons are located 0.64 miles from the proposed Facility.

To be granted a contested case hearing, a requestor must show that they are an "affected person" who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application, and they must distinguish that interest from an interest common to the general public. 30 TAC § 55.203(a). Among other things, a hearing request must explain how and why a requestor believes that they will be adversely affected by a proposed facility in a manner not common to members of the general public. 30 TAC § 55.201(d)(2).

While the Allisons reside in close proximity to the proposed Facility, OPIC must also note that they do not reside adjacent to the proposed plant site and do not reside on the proposed discharge route. Further, they did not explain how

they believe they will be directly affected by the Facility, as required by 30 TAC § 55.201(d)(2). These requestors did not raise or discuss any substantive issues concerning the proposed Facility or its discharge. Instead, their request focuses only on effects of the residential development that the Facility will provide service for rather than concerns related to operation of the proposed wastewater treatment plant. The absence of this information hinders OPIC's assessment of the likelihood that they could be affected by the proposed Facility in a way that differs from the general public. Additionally, the issues raised by the Allisons are not within the jurisdiction of TCEQ to address in the context of a TPDES permitting matter.

Consequently, in light of their location and lack of stated concerns specific to the proposed Facility, OPIC is unable to conclude that Clay and Sheila Allison have demonstrated that they qualify as affected persons.

B. Which issues raised in the hearing requests of affected persons are disputed

1. Whether the proposed Facility and draft permit are adequately protective of water quality, including the water quality of Lake Bardwell, and the existing uses of the receiving waters?
(Raised by: Ellis County and the City of Waxahachie)
2. Whether the proposed Facility and draft permit will cause or contribute to a violation of state water quality standards?
(Raised by: Ellis County and the City of Waxahachie)
3. Whether the proposed Facility and draft permit are consistent with the state's regionalization policy and demonstration of need pursuant to TWC § 26.081 and 26.0282?
(Raised by: Ellis County and the City of Waxahachie)

4. Whether permit provisions related to sulfate are needed in the draft permit before issuance of a TPDES permit?
(Raised by: City of Waxahachie)
5. Whether the Applicant has the requisite experience to operate the proposed Facility?
(Raised by: Ellis County and the City of Waxahachie)

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. The issues raised here are issues of fact.

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

All issues were specifically raised by requestors who qualify as affected persons during the public comment period.

E. Whether the hearing requests are based on issues raised solely in a withdrawn public comment

No public comments were withdrawn in this matter. Therefore, the hearing requests are not based on issues raised in withdrawn comments.

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

The affected persons' hearing requests raise 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) as well as an issue that is not relevant and material. 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. Relevant and material issues are those governed by the substantive law

under which this permit is to be issued. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

Water Quality, Surface Water Quality Standards, and the Existing Uses of Receiving Waters

The affected persons in this matter are concerned with adverse effects to water quality and its resultant impacts to City and County services. The Commission is responsible for the protection of water quality under 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 § 307.4(d) of the Standards, “Surface 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.” Section 307.5 of the Standards also requires an antidegradation review be performed to ensure that existing uses of receiving waters are protected. Therefore, Issue nos. 1 and 2 are relevant and material to the Commission’s decision regarding this application and are appropriate for referral to SOAH.

Regionalization

The affected persons in this matter are concerned that the proposed Facility would not comply with Texas’ Regionalization Policy. Under TWC § 26.081(a), it 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, treatment, and disposal systems not designated as such by commission order pursuant to provisions of this subchapter.” TWC § 26.0282. Therefore, Issue no. 3 is relevant and material to the Commission’s decision on the application and is appropriate for referral to SOAH.

Need for Sulfate Limits in the Draft Permit

The City of Waxahachie has argued that if it is to be ultimately issued, the draft permit requires sulfate limits to be protective of the water quality of the receiving waters. Lake Bardwell is in Segment No. 0815 of the Trinity River Basin, which is currently included on the Clean Water Act’s Section 303(d) list of impaired and threatened waters for sulfate. The proposed Facility has the potential to discharge sulfate as part of its effluent stream, thus the need for the permit to contain sulfate requirements is relevant and material to the Commission’s decision on the application. Therefore, Issue no. 4 is appropriate for referral to SOAH.

Applicant’s Experience

The affected persons in this matter are concerned that the Applicant lacks the experience to competently operate the proposed Facility. However, TCEQ

rules do not require an Applicant for a TPDES permit to have prior experience operating a wastewater treatment facility. Further, this issue does not appear to be based on concerns about the Applicant's compliance history or the class of operator required. Therefore, OPIC cannot find that Issue no. 5 is relevant and material to the Commission's decision on the application.

G. Maximum expected duration for the contested case hearing

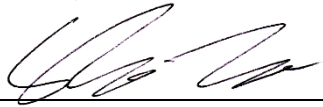
Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 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 stated above, OPIC respectfully recommends that the Commission grant the hearing requests of Ellis County and the City of Waxahachie, deny the hearing request of Clay and Sheila Allison, and refer this application for a contested case hearing at SOAH on Issue nos. 1-4 contained in §III.B with a maximum duration of 180 days.

Respectfully submitted,

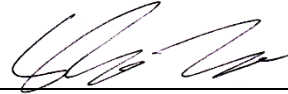
Garrett T. Arthur
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By:  _____

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2023, the Office of Public Interest Counsel's Response to Requests for Hearing 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. 2023-1558-MWD

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