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Kelly Keel, *Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 29, 2024

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 PRESERVE HUTTO,
LLC FOR NEW TPDES PERMIT NO. WQ0016145001
TCEQ DOCKET NO. 2023-1566-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 that reads "Josiah Mercer".

Josiah T. Mercer, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-1566-MWD

APPLICATION BY PRESERVE HUTTO, LLC FOR NEW TPDES PERMIT NO. WQ0016145001	§ § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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**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 (Commission or TCEQ) files this response to the requests for hearing and request for reconsideration in the above-captioned matter.

I. Introduction

A. Summary of Position

Before the Commission is an application by Preserve Hutto, LLC (Applicant or Preserve Hutto) for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016145001 (the Application). OPIC notes that the TCEQ Chief Clerk’s office received timely hearing requests from two government entities and six individuals. For the reasons stated herein, OPIC respectfully recommends the Commission grant the requests of Megan McMillin, Judy Scogin, Karen Blakey, the City of Hutto, and Williamson County Water, Sewer, Irrigation, and Drainage District No. 3—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. OPIC recommends denial of all other hearing requests and the request for reconsideration.

B. Description of Application and Facility

Preserve Hutto applied to the TCEQ for new TPDES Permit No. WQ0016145001. If issued, the permit would authorize discharge of treated domestic wastewater from the proposed Preserve at Star Ranch wastewater treatment facility (the Facility) at a daily average flow not to exceed 48,000 gallons per day. Additionally, the average discharge during any two-hour period would not be authorized to exceed 133 gallons per minute. The Facility would be an activated sludge process plant operated in the extended aeration mode. Treatment units would include a bar screen, two aeration basins, a final clarifier, two sludge digesters, and a chlorine contact chamber.

The facility would be located at 4428 Priem Lane, Pflugerville, in Travis County. The treated effluent from the Facility would be discharged via pipe to an unnamed tributary, then to Wilbarger Creek, then to the Colorado River above La Grange in Segment No. 1434 of the Colorado River Basin. The unclassified receiving water use is limited aquatic life use for the unnamed tributary. The designated uses for Segment No. 1434 are primary contact recreation, public water supply, and exceptional aquatic life use. In accordance with 30 Texas Administrative Code (TAC) § 307.5, the Executive Director's (ED) office performed an antidegradation review of the receiving waters. The ED's Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action.

The permit, if granted, would allow a total chlorine residual of at least 1.0 milligrams per liter (mg/l), not to exceed a total chlorine residual of 4.0 mg/l

after a detention time of at least 20 minutes—to be monitored five times per week by grab sample. The pH would not be permitted to be less than 6.0 standard units or greater than 9.0 standard units—to be monitored once per month by grab sample. There would be no permitted discharge of floating solids or visible foam in other than trace amounts and no permitted discharge of visible oil. The effluent would be permitted to contain a minimum dissolved oxygen of 4.0 mg/l—to be monitored once per week by grab sample.

Sludge generated from the Facility would be hauled by a registered transporter and disposed of at Mount Houston Road Municipal Utility District, Permit No. WQ0011154001—in Harris County—to be digested, dewatered, and then disposed of with the bulk of the sludge from the plant accepting the sludge. The draft permit also authorizes the disposal of sludge at a TCEQ-authorized land application site, co-disposal landfill, wastewater treatment facility, or facility that further processes sludge.

C. Procedural Background

The TCEQ received the Application on April 8, 2022, and declared it administratively complete on June 14, 2022. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in English in the *Austin Chronicle* on June 24, 2022; and in Spanish in *La Prensa Comunidad* on June 28, 2022. The Executive Director completed the technical review of the Application on September 14, 2022. The Notice of Application and Preliminary Decision was published in Spanish in *La Prensa Comunidad* on October 28, 2022; and in English in the *Austin Chronicle* on November 4, 2022. The Notice of the Public

Meeting was published in the *Austin Chronicle* on April 07, 2023. A public meeting was held on May 11, 2023. The public comment period ended at the conclusion of the public meeting. The Chief Clerk mailed the ED's Decision and Response to Public Comment on September 19, 2023. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was October 19, 2023. The TCEQ Chief Clerk's office received timely hearing requests from two government entities and six individuals as well as one request for reconsideration.

II. Applicable Law

A. Requests for Hearing

This Application was filed on or after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709.¹ 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

¹ Tex. S.B. 709, 84th Leg., R.S. (2015).

- 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.²

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. 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;

² 30 TAC § 55.201(d).

- (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.³

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.⁴

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.

³ 30 TAC § 55.203(c).

⁴ 30 TAC § 55.203(d).

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, 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 Requestors are Affected Persons

City of Hutto

The City of Hutto (Hutto) submitted a timely hearing request and comments through attorney Joe Freeland of Mathews & Freeland LLP. According to 30 TAC § 55.203(c)(7), a government entity can be considered an affected person if they have statutory authority over or interest in the issues relevant to the Application. In their comments, Hutto claims that the service area for the Facility is located wholly within Hutto's certificated sewer service area and that they are willing and able to provide wastewater service to the area. Hutto asserts that according to Texas Water Code (TWC) § 13.242(a), they have the right to be the exclusive provider of retail sewer utility service to much of the area sought to be served by the Facility. Additionally, Hutto claims that the Facility and

service area are wholly located within their extra-territorial jurisdiction. Texas Water Code § 26.0282 and TCEQ's Regionalization Policy are intended to promote development and use of regional and areawide wastewater collection, treatment, and disposal. As a local municipality with the ability to provide wastewater service, Hutto claims a legal right and economic interest in providing service to the proposed development. OPIC therefore finds that Hutto does qualify as an affected person.

Williamson County Water, Sewer, Irrigation, and Drainage District No. 3

Williamson County Water, Sewer, Irrigation, and Drainage District No. 3 (the District) submitted timely comments through Anand Patel with Murfee Engineering and a timely hearing request through attorney Sharon J. Smith with Armbrust & Brown, PLLC. According to 30 TAC § 55.203(c)(7), a government entity can be considered an affected person if they have statutory authority over or interest in the issues relevant to the Application. The District has the duties provided by general law applicable to a municipal utility district.⁵ This includes statutory authority over the protection, preservation, and restoration of water within the state and the development of integrated area-wide wastewater collection whenever feasible.⁶ Additionally, the District is directly adjacent to the proposed Facility and—according to their comments—could provide retail wastewater service to the development proposed to be served by the Facility. The District therefore does have statutory authority over and an economic interest in

⁵ Spec. Dist. Local Laws Code § 8486.101.

⁶ Texas Water Code § 54.012(7). *See also* Texas Water Code § 49.230.

issues relevant to the Application and consequently qualifies as an affected person.

Requestors Located Less than One-Half of a Mile from the Outfall

The Commission received timely hearing requests and comments from two individual requestors who are located at distances within one-half of a mile from the proposed outfall: Megan McMillin (0.22 miles)⁷ and Judy Scogin (0.29 miles).⁸ Both of these requestors live north of the potential Facility location, on the opposite side of the Facility from the outfall. Ms. McMillin is directly adjacent to the Facility's proposed fence-line and Ms. Scogin is only several hundred feet from that same fence-line. 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.⁹

Both requestors raise concerns about need, location, nuisance odor, effect on human health, and delayed availability of the draft permit for review and copying. These are interests which are protected by the law under which this Application will be considered.¹⁰ Further, as these requestors' properties are both near the fence-line of the proposed Facility, a reasonable relationship exists between the interests expressed in their comments and the Applicant's regulated

⁷ This distance is based on the closer of the two addresses provided by Ms. McMillin.

⁸ Travis Scogin also lives in this area. His request is handled in a later section.

⁹ See 30 TAC § 55.203(a).

¹⁰ See 30 TAC § 55.203(c)(1).

activity—a relevant factor under 30 TAC § 55.201(c)(3). These requestors' proximity—in combination with their stated interests—demonstrates that they are likely to be affected in a way not common to members of the general public. Therefore, OPIC concludes that Megan McMillin and Judy Scogin have demonstrated that they possess a personal justiciable interest in this matter and qualify as affected persons.

Karen Blakey

The agency received a timely hearing request and comments from Karen Blakey (0.54 miles). Ms. Blakey raises concerns about nuisance odor, human health, and the location of the Facility. These concerns are interests which are protected by the law under which this Application will be considered.¹¹ Further, a reasonable relationship exists between those interests and the Applicant's regulated activity.¹²

Ms. Blakey lives just over one-half of a mile from the proposed outfall. However, her residence is north and slightly west of the proposed Facility—on the opposite corner from the outfall. She therefore lives less than one-half of a mile from the potential fence-line of the Facility at its closest point. She is concerned that there is no need for the Facility at that location, that it could negatively affect human health, that it could create nuisance odors, and that it could affect local ecology. Due to her proximity to the proposed Facility and the nature of her concerns, OPIC finds that there is a reasonable likelihood that Ms.

¹¹ See 30 TAC § 55.203(c)(1).

¹² See 30 TAC § 55.201(c)(3).

Blakey could be affected by the Facility in a way not common to members of the general public. OPIC notes that there are no explicit distance restrictions imposed by law in this matter.¹³ Therefore, OPIC concludes that Karen Blakey qualifies as an affected person.

Mohammed Hallak

The commission received a timely hearing request and comments from Mohammed Hallak (0.74 miles). Mr. Hallak lives southwest of the proposed Facility, around one-half of a mile west of the discharge route. He raises concerns about the appropriateness of the proposed discharge route and proposed location for the Facility. He also raises concerns about the Facility's potential negative effect on human health—especially of his children and the children who attend Dearing Elementary School, which is located directly across the street from the potential location of the Facility. However, he does not specify that his children attend Dearing Elementary or raise any other fact that suggests a personal tie between Mr. Hallak and the Facility.

Based on his distance from the proposed Facility and discharge route, as well as the broad nature of his concerns, OPIC finds that Mr. Hallak has not demonstrated any likelihood that he would be affected by the Facility in a way not common to members of the general public. Therefore, OPIC cannot find that Mohammed Hallak is an affected person.¹⁴

¹³ See 30 TAC § 55.201(c)(2).

¹⁴ OPIC notes that under 30 TAC § 55.211(e), a person whose hearing request is denied may still seek to be admitted as a party under § 80.109 if any hearing request is granted on an application.

Requestors that Failed to Raise Issues in their Comments

The Commission also received timely comments and hearing requests from Travis Scogin (0.29 miles) and Charlie Adler (0.57 miles). However, both of these requestors do not raise any specific concerns in their requests. Their hearing requests and comments consist solely of requests for a hearing and contain no information about how the requestors would be personally affected by the Facility. Because they raise no specific concerns in their comments, Mr. Scogin and Mr. Adler fail to assert a personal justiciable interest, and OPIC cannot find that they qualify as affected persons.

B. Which Issues Raised in the Hearing Requests are Disputed

The affected persons discussed above raised the following issues:

1. Whether the Facility and draft permit would negatively affect water quality, human health, and local wildlife.
(Raised by: Karen Blakey, Megan McMillin, and Judy Scogin)
2. Whether the Facility and draft permit would create nuisance odor.
(Raised by: Karen Blakey, Megan McMillin, Judy Scogin, and the District)
3. Whether the draft permit complies with the state's regionalization policy and required demonstration of need for the Facility at that location.
(Raised by: Karen Blakey, Judy Scogin, the District, and Hutto)
4. Whether the Applicant complied with the requirement to provide the draft permit for viewing and copying.
(Raised by: Megan McMillin, Judy Scogin, and the District)
5. Whether the Facility would affect local property values.
(Raised by: Megan McMillin)
6. Whether the Facility would cause increased traffic.
(Raised by: Karen Blakey)

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 other issues that are 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.¹⁵

Water Quality, Human Health, and Wildlife

Affected persons in this matter are concerned with potential adverse effects to water quality and its impacts on human health as well as local wildlife

¹⁵ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

and ecosystems. 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.”¹⁶ 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.”¹⁷ Therefore, Issue no. 1 is relevant and material to the Commission’s decision regarding this Application and is appropriate for referral to SOAH.

Nuisance Odor

Affected persons in this matter are concerned that the proposed Facility could potentially cause nuisance odor conditions. Odor is specifically addressed by 30 TAC § 309.13(e), which requires that nuisance odor be abated and controlled. Further, 30 TAC § 307.4 provides general criteria that surface waters must meet—including aesthetic parameters which work, in part, to prevent nuisance conditions associated with TPDES permits. Finally, one of the purposes

¹⁶ 30 TAC § 307.1.

¹⁷ 30 TAC § 307.4(d).

of Chapter 309 is “to minimize the possibility of exposing the public to nuisance conditions.”¹⁸ 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

Affected persons in this matter are concerned that the proposed Facility would not comply with Texas’ Regionalization Policy and required demonstration of need for the Facility at that location. 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.”¹⁹ Therefore, Issue no. 3 is relevant and material to the Commission’s decision on the application and is appropriate for referral to SOAH.

Public Notice

Affected persons in this matter claimed that the draft permit and Application were not initially available at the North Village Branch of the Austin Public Library as the NORI stated it would be. They claim that, despite the NORI’s

¹⁸ 30 TAC § 309.10.

¹⁹ TWC § 26.0282.

statement that it was already available at that location, the draft permit was not available until a resident had the library request it—well after the publication of the NORI. They also describe difficulty in getting a digital copy of the draft permit from Preserve Hutto. According to 30 TAC § 39.405(g)(1), a copy of the Application should have been available for review and copying at a public place in the county beginning on the first day of newspaper publication of the NORI. If the requestors are correct that the Application was not available at that time, then the Applicant failed to meet public notice requirements. Therefore, Issue no. 4 is relevant and material to the Commission’s decision on the Application and is appropriate for referral to SOAH.

Property Values and Vehicular Traffic

Finally, affected persons raised concerns about potential increase in vehicular traffic from the proposed Facility and associated development as well as potential effects on local property values. The Texas Legislature, which establishes the jurisdiction of TCEQ, has not given the Commission the authority to consider issues related to traffic or property values when deciding whether to issue a TPDES permit. Therefore, Issue nos. 5 and 6 are not relevant and material to the Commission’s decision regarding this Application and are not appropriate for referral to SOAH.

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.²⁰ 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. Analysis of Request for Reconsideration

In addition to his hearing request, Mohammed Hallak submitted a timely request for reconsideration raising concerns regarding human health, property values, and bad planning. At this time, OPIC is recommending a hearing—but prior to development of an evidentiary record, OPIC cannot recommend to the Commission that the ED’s decision should be reconsidered. Therefore, OPIC respectfully recommends denial of the pending request for reconsideration.

V. Conclusion

For the reasons stated above, OPIC finds that the following qualify as affected persons: Megan McMillin, Judy Scogin, Karen Blakey, the City of Hutto, and Williamson County Water, Sewer, Irrigation, and Drainage District No. 3. Therefore, OPIC respectfully recommends that the Commission grant these hearing requests, deny all other hearing requests, and refer this Application for

²⁰ 30 TAC § 50.115(d)(2).

a contested case hearing at SOAH on Issue nos. 1-4 contained in §III.B with a maximum duration of 180 days. OPIC also recommends denial of the pending request for reconsideration.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By: Josiah Mercer
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CERTIFICATE OF SERVICE

I hereby certify that January 29, 2024, 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.

Josiah Mercer
Josiah T. Mercer

**MAILING LIST
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TCEQ DOCKET NO. 2023-1566-MWD**

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See attached list.

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