

Jon Niermann, *Chairman*
Bobby Janecka, *Commissioner*
Catarina R. Gonzales, *Commissioner*
Kelly Keel, *Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 18, 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 PETER H. SCHOUTEN,
SR. AND NOVA D. SCHOUTEN FOR NEW TPDES PERMIT NO.
WQ0005387000
TCEQ DOCKET NO. 2023-1586-AGR**

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 cursive script that reads "Jennifer A. Jamison".

Jennifer A. Jamison, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-1586-AGR

APPLICATION BY PETER H.	§	BEFORE THE
SCHOUTEN SR. AND NOVA D.	§	TEXAS COMMISSION ON
SCHOUTEN, FOR NEW TPDES	§	ENVIRONMENTAL
PERMIT NO. WQ0005387000	§	QUALITY

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 (TCEQ) files this Response to Requests for Hearing in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is an application by Peter Henry Schouten Sr. and Nova Darlene Schouten for new for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0005387000. The Commission received timely comments and requests for a contested case hearing from Clifford Norris and James Karels. For the reasons stated herein, OPIC respectfully recommends the Commission find that Clifford Norris and James Karels are affected persons in this matter and grant their pending hearing requests.

B. Background of Facility

Peter Henry Schouten Sr. and Nova Darlene Schouten applied to the TCEQ for new TPDES Permit No. WQ0005387000 to operate under an individual Confined Animal Feeding Operation (CAFO) permit to confine a maximum of

2,000 head of dairy cattle replacement heifers, none of which will be milking, within 43 acres -- making up the total land application area. No discharge of pollutants into Water in the State is authorized by the proposed permit except as allowed by the provisions in the proposed permit and 40 Code of Federal Regulations (CFR) Chapter 412, which is adopted by reference in 30 Texas Administrative Code (TAC) § 305.541.

The CAFO facility is located roughly 1.55 miles east of the intersection of County Road 2480 and State Highway (SH) 6, on the north side of SH 6 on County Road 2495, which is nearly 5.5 miles east of the intersection of SH 6 and US Highway 281 in Bosque County. The CAFO facility is in the drainage area of the North Bosque River in Segment No. 1226 of the Brazos River Basin and is subject to Texas Water Code (TWC) §§ 26.502 and 26.503(d) that relates to a feeding operation confining cattle in a major sole source impairment zone that have been or may be used for dairy purposes, or otherwise associated with a dairy, including cows, calves, and bulls. The CAFO facility includes one retention control structure (RCS) with 16.85 acre-feet without freeboard of required capacity, and one domestic water well with the required 150-foot buffer.

In addition, the Applicant is required to obtain and operate under an individual permit because the CAFO facility is in a watershed of a river segment listed on the current Environmental Protection Agency (EPA) approved Clean Water Act § 303(d) list of impaired waters where a Total Maximum Daily Load (TMDL) implementation plan has been adopted by the TCEQ that establishes

additional water quality protection measures for CAFOs as required by 33 United States Code (USC) § 1313(d).

C. Procedural Background

This CAFO facility was previously permitted as a State-only dairy cattle facility with 480 head, all of which were milking cows under CAFO individual TPDES permit No. WQ0003656000. This permit was canceled on October 12, 2021. The TCEQ received the current application on May 12, 2022, and declared it administratively complete on July 1, 2022. The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in Bosque County in the *Meridian Tribune* on July 13, 2022. The Executive Director (ED) completed technical review of the application on March 10, 2023, and prepared the proposed permit that, if approved, would establish the conditions under which the CAFO facility must operate. The Applicant published the Notice of Application and Preliminary Decision (NAPD) in Bosque County in the *Meridian Tribune* on June 7, 2023. The public comment period ended on July 7, 2023. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on September 28, 2023, and the deadline for filing requests for a contested case hearing was October 28, 2023.

II. APPLICABLE LAW

The Application was filed after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015). Under 30 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 requestor'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.

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;
- (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.

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. DISCUSSION

A. Determination of Affected Person Status

Clifford Norris and James Karels (Requestors) each submitted timely combined comments and hearings requests raising issues relevant to the Commission's decision on this application. In their requests, Mr. Norris and Mr. Karels each raised concerns about nuisance conditions such as odor and flies, in addition to concerns about negative effects on groundwater, air quality, and human health. The requests further represent that Requestors' properties are located near the facility, and the map prepared by the ED confirms that Mr. Norris' and Mr. Karels' properties are located 327 ft. and 2312 ft. from the large pond on Applicant's property, respectively.

The Requestors' stated concerns relating to nuisance conditions, air quality, groundwater, and effects on human health are protected by the law

under which this application may be granted. Additionally, the close proximity of the Requestors' properties to the Applicant's facility and pond demonstrates that a reasonable relationship exists between the interests claimed and the activity regulated. OPIC therefore finds that Clifford Norris and James Karels are affected persons in this matter and respectfully recommends granting their pending hearing requests.

B. Issues raised in the hearing requests that remain disputed:

Requestors raised the following issues:

1. Whether the proposed permit will adequately address nuisance conditions, including odor and flies;
2. Whether the draft permit is adequately protective of air quality and human health; and
3. Whether the draft permit is protective of groundwater.

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. All issues raised by Requestors are issues of fact.

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

Issues 1-3 in Section III. B were specifically raised by Requestors during the public comment period.

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

All issues are based on timely public comments period that have not been withdrawn.

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

The 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). To refer an issue to the State Office of Administrative Hearings (SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny the permit. Relevant and material issues are those governed by the substantive law under which the permit is to be issued. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

Nuisance Conditions and Air Quality and Human Health

Several requirements in TCEQ's CAFO Rules (30 TAC Chapter 321, Subchapter B) are designed to address the potential for nuisance odors or air pollution conditions. For example, 30 TAC § 321.43(j)(1)(A) requires the CAFO facility be operated in such a manner as to prevent the creation of a nuisance or air pollution conditions as defined by the definitions section of the TCEQ CAFO Rules (30 TAC § 321.32(32)) and Texas Health and Safety Code (THSC) § 341.011, and as prohibited by the TCEQ Air Rules (30 TAC § 101.4) (relating to nuisance). The THSC also requires the CAFO facility to be operated in such a manner as to prevent a condition of air pollution as defined by THSC § 382.003(3). Additionally, TCEQ rules require an operator to take necessary action to identify any nuisance conditions that occur and to take action to abate such conditions as soon as practicable, or as specified by the ED. Accordingly, OPIC finds that

Requestors' concerns regarding nuisance conditions and air quality are relevant and material to the Commission's decision on this application.

Groundwater

TCEQ's CAFO rules (30 TAC § 321.31) require that all manure and wastewater generated by the heifer facility be retained and utilized in an appropriate and beneficial manner. The CAFO rules further require that Retention Control Structures (RCS) be designed and operated to contain all process generated wastewater and any contaminated runoff from the facility resulting from a 25-year, 10-day (25-year frequency/10-day duration) rainfall event. As such, issues related to the effects of groundwater contamination are relevant and material to the Commission's decision on this 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

Having found that Clifford Norris and James Karels qualify as affected persons in this matter, OPIC respectfully recommends the Commission grant their hearing requests and refer Issue Nos. 1-3 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

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2024 the original of 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 to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Jennifer Jamison

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TCEQ DOCKET NO. 2023-1586-AGR

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