

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

April 1, 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 SCHREIBER FOODS,
INC. FOR TLAP PERMIT NO. WQ0003074000
TCEQ DOCKET NO. 2024-0133-IWD**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in cursive script that reads "Jessica M. Anderson".

Jessica M. Anderson, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2024-0133-IWD

APPLICATION BY SCHREIBER	§	BEFORE THE
FOODS, INC. FOR AN	§	
AMENDMENT TO TLAP NO.	§	TEXAS COMMISSION ON
WQ0003074000	§	
	§	ENVIRONMENTAL QUALITY

THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUEST 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 or Commission) files this Response to Request for Hearing on the application in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is an application by Schreiber Foods, Inc. (Schreiber Foods or Applicant) for an amendment to Texas Land Application Permit (TLAP) No. WQ0003074000. The Commission received a timely hearing request from Tandi Remy. For the reasons stated herein, OPIC respectfully recommends that the Commission find that Tandi Remy is an affected person, grant her hearing request, and refer the matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

B. Description of Application and Facility

Schreiber Foods applied for an amendment to its existing permit. The proposed amendment would authorize the increase of application acres from 50

acres to 61 acres, increase the permitted daily average flow from 132,000 gallons per day (gpd) to 192,000 gpd, and update the organic loading rate measured as biochemical oxygen demand (5-day) and the nitrogen loading rate measured as total nitrogen. Soybean hay, forage sorghum, and small grain crops have been included as alternative crops to the grasses (i.e., coastal Bermuda and ryegrass).

The plant and land application site are located at 923 County Road 176, near the City of Stephenville, Erath County. The facility and disposal site are located in the drainage area of Paluxy River/North Paluxy River in Segment No. 1229 of the Brazos River Basin. The designated uses for Segment No. 1229 are primary contact recreation, public water supply, and high aquatic life use.

C. Procedural Background

Schreiber Foods' application was received on February 6, 2023, and declared administratively complete on March 21, 2023. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit was published in English on March 29, 2023, in the *Stephenville Empire Tribune*, and in Spanish on March 28, 2023, in *La Prensa Comunidad*. The Executive Director (ED) completed technical review of the application on May 30, 2023. The Notice of Application and Preliminary Decision was published in English on August 24, 2023, in the *Stephenville Empire Tribune*, and in Spanish on August 22, 2023, in *La Prensa Comunidad*. The public comment period ended on September 25, 2023. The ED's Response to Comments (RTC) was mailed on October 23, 2023. The deadline for filing requests for contested case hearing and requests for reconsideration of the

ED's decision was November 22, 2023. The Commission received a timely hearing request from Tandi Remy.

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 Texas Administrative Code (TAC) § 55.21(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.

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 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.

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 REQUEST

A. Whether the requestor is an affected person

Tandi Remy submitted a timely comment and hearing request. Ms. Remy gave several addresses, one of which is 4710 North U.S. Highway 281, Stephenville. According to the map created by ED staff, this address is 0.51 miles from Applicant's site. This proximity is reiterated by Ms. Remy's presence on the

Applicant's adjacent landowner map. Ms. Remy raised concerns about nuisance odors associated with the site.

Tandi Remy's concerns about nuisance odors, when combined with her proximity to the site, give Ms. Remy a personal justiciable interest in this matter which is not common to the general public. Also, her concern is an interest protected by the law under which this application is considered, and a reasonable relationship exists between that interest and the regulation of the site. Finally, the location of Ms. Remy's property increases the likelihood of impacts to health, safety, and use of property. Therefore, OPIC finds that Tandis Remy qualifies as an affected person under 30 TAC § 55.203(a) and (c).

B. Which issue raised in the hearing request is disputed

Ms. Remy raised the following disputed issue:

1. Whether the operations under the draft permit would generate nuisance odors that will negatively affect the adjacent landowner.

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 issue raised here is an issue of fact.

D. Whether the issue was raised during the public comment period

Issue No. 1 in Section III.B was specifically raised by Ms. Remy during the public comment period.

E. Whether the hearing request is based on an issue raised solely in a withdrawn public comment

No public comments were withdrawn in this matter; therefore, the hearing request is not based on issues raised in withdrawn public comments.

F. Whether the issue is relevant and material to the decision on the application

Ms. Remy raised an issue that is 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 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 Odor

Ms. Remy expressed concern regarding nuisance odors. TCEQ regulates nuisance conditions under 30 TAC § 309.13(e) which requires applicants to implement a nuisance odor abatement plan. Further, permits issued by TCEQ do not allow the permit holder to create or maintain a nuisance that interferes with a landowner's use and enjoyment of his or her property. Because 30 TAC § 309.13 addresses nuisance conditions as described by the requestor, Issue No. 1 is 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. 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 should be 180 days from the first day of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

Having found that Tandi Remy qualifies as an affected person in this matter, OPIC respectfully recommends that the Commission grant her hearing request and refer the issue specified in Section III.B for a contested case hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

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Jessica M. Anderson
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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2024, the original of the Office of Public Interest Counsel's Response to Request 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 Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

Jessica M. Anderson
Jessica M. Anderson

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TCEQ DOCKET NO. 2024-0133-IWD**

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