

DOCKET NO. 2024-0136-MWD

APPLICATION BY	§	BEFORE THE
LGI HOMES-TEXAS, LLC FOR	§	TEXAS COMMISSION ON
PERMIT NO. WQ0016275001	§	ENVIRONMENTAL QUALITY

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

I. Introduction

A. Summary of Position

Before the Commission is an application by LGI Homes-Texas, LLC (Applicant or LGI Homes) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016275001 (the Application). The TCEQ Chief Clerk’s office received one timely hearing request and one timely request for reconsideration from Jason and Misty Filipp and Casey Tice, respectively. For the reasons stated herein, OPIC respectfully recommends the Commission grant the Filipp’s request for a contested case hearing 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. Additionally, OPIC recommends the Commission deny Casey Tice’s request for reconsideration.

B. Description of Application and Facility

LGI Homes has applied to the TCEQ for new TPDES Permit No. WQ0016275001. If issued, the permit would authorize discharge of treated domestic wastewater from the proposed Cottonwood Terrace wastewater treatment facility (the Facility) at a daily average flow not to exceed 210,000 gallons per day (gpd) in the Interim Phase and a daily average flow not to exceed 420,000 gpd in the Final Phase. The Facility would be located approximately one-half of a mile south of the intersection of Boone Road and Meyer Road, in Fort Bend County. The proposed Facility would be an activated sludge plant operated in the conventional mode. Treatment units in the Interim Phase would include a lift station, a bar screen, one aeration basin, one final clarifier, one sludge holding tank, and one chlorine contact basin. Treatment units in the Final Phase would include a lift station, a bar screen, two aeration basins, two final clarifiers, two sludge holding tanks, and two chlorine contact basins.

The treated effluent would be discharged to a storm sewer, then to a detention pond, then to an unnamed tributary, then to Snake Creek, and then to the San Bernard River Above Tidal in Segment No. 1302 of the Brazos-Colorado Coastal Basin. The designated water quality uses for Segment No. 1302 are primary contact recreation, public water supply, and “high” aquatic life use (ALU). The unnamed tributary is assigned a “minimal” ALU, and the detention pond is assigned a “limited” ALU. The Executive Director’s (ED) staff performed a Tier I Antidegradation Review and preliminarily determined that the Facility would not

impair existing water quality uses. No Tier II Antidegradation Review was performed.

C. Procedural Background

The TCEQ received the Application on December 15, 2022, and declared it administratively complete on February 27, 2023. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published in English in the *Houston Chronical* on March 15, 2023, and in Spanish in *El Perico* on March 9, 2023. The ED completed the technical review of the Application on June 14, 2023. The Applicant published the Notice of Application and Preliminary Decision in English in the *Houston Chronical* on July 26, 2023, and in Spanish in *El Perico* on July 20, 2023. The public comment period for this Application ended on August 25, 2023. The Chief Clerk mailed the ED's Decision and Response to Public Comment on December 7, 2023. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was January 8, 2024. The TCEQ Chief Clerk's office received a timely hearing request from Jason and Misty Filipp and a timely request for reconsideration from Casey Tice.

II. Applicable Law

A. Requests for a Contested Case 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, 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

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

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.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. Relevant factors to be considered in determining whether a person is affected include:

² 30 TAC § 55.201(d).

- (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.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

³ 30 TAC § 55.203(c).

⁴ 30 TAC § 55.203(d).

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. Requests 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 Request

A. Whether the Requestors are Affected Persons

The Commission received a timely, combined hearing request from Jason and Misty Filipp. Both also submitted timely comments individually. The Filipp's both raise concerns about water quality, public health, livestock, property use, odor, and the potential impact on area wildlife. According to the map provided by ED staff, the Filipp's live within a mile directly downstream from the proposed outfall. Moreover, the Application's Landowner Map shows that the discharge route, specifically the unnamed tributary, runs directly across their property—

effectively splitting the property in two. The Filippis claim that when this unnamed tributary is flowing it floods or blocks access to half of their property—creating what they describe as a “tremendous detrimental impact” to their land. Additionally, the Filippis currently rely on their property for cattle raising and hay production.

The Filippis worry that the proposed Facility and related discharge through their property would block access to much of their property and potentially impact their water quality and the health of their grass, their cattle, and themselves. These concerns are interests which are protected by the law under which this Application will be considered.⁵ Further, a reasonable relationship exists between those interests and the Applicant’s regulated activity.⁶ Due to their downstream proximity to the proposed Facility and the nature of their concerns, OPIC finds that there is a reasonable likelihood that the Filippis could be affected by the Facility in a way not common to members of the general public. Therefore, OPIC concludes that Jason and Misty Filipp qualify as affected persons.

B. Which Issues Raised in the Hearing Request are Disputed

The affected persons discussed above raised the following issues:

1. Whether the Facility and draft permit would negatively affect water quality and human health.
2. Whether the Facility and draft permit would negatively affect local wildlife.

⁵ See 30 TAC § 55.203(c)(1).

⁶ See 30 TAC § 55.201(c)(3).

3. Whether the Facility and draft permit would negatively affect existing land uses.

4. Whether the Facility and draft permit would create nuisance odor.

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 Request is Based on Issues 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 comments.

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

The affected persons' hearing request raises 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 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.⁷

⁷ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

Water Quality, Human Health, Wildlife, and Existing Land Uses

Affected persons in this matter are concerned with potential adverse effects to water quality and its impacts on human health, wildlife, and existing land uses—specifically livestock and hay production. The Commission is responsible for the protection of water quality under Texas Water Code 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.”⁸ 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.”⁹ Agricultural water supply must also be maintained and protected.¹⁰ Therefore, Issue nos. 1-3 are relevant and material to the Commission’s decision regarding this Application and are appropriate for referral to SOAH.

⁸ 30 TAC § 307.1.

⁹ 30 TAC § 307.4(d).

¹⁰ 30 TAC § 307.7(b)(5).

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 of Chapter 309 is “to minimize the possibility of exposing the public to nuisance conditions.”¹¹ Therefore, Issue no. 4 is relevant and material to the Commission’s decision regarding this Application and is 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.¹² 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

¹¹ 30 TAC § 309.10.

¹² 30 TAC § 50.115(d)(2).

180 days from the first date of the preliminary hearing until the proposal for decision is issued.

IV. Analysis of Request for Reconsideration

Casey Tice submitted a timely request for reconsideration raising concerns regarding the discharge route, livestock, and water quality. 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 Jason and Misty Filipp qualify as affected persons. Therefore, OPIC respectfully recommends that the Commission grant their hearing request 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. Finally, OPIC recommends that the Commission deny the pending request for reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that April 29, 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 on all persons listed on the attached mailing list via electronic mail, and/or by deposit in the U.S. Mail.



Josiah T. Mercer