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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

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 BL 12 HOLDINGS LLC
FOR TPDES PERMIT NO. WQ0016297001
TCEQ DOCKET NO. 2024-0414-MWD**

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. 2024-0414-MWD

APPLICATION BY BL 12
HOLDINGS LLC FOR NEW
TPDES PERMIT NO.
WQ0016297001

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BEFORE THE
TEXAS COMMISSION ON
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 BL 12 Holdings LLC (BL 12 Holdings or Applicant) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016297001. The Commission received a hearing request from the San Marcos River Foundation (SMRF). For the reasons stated herein, OPIC respectfully recommends the Commission find that SMRF is an affected person, grant its 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

BL 12 Holdings applied for a new permit to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 850,000

gallons per day. The proposed JK Ranch Wastewater Treatment Facility would be an activated sludge process plant operated in the conventional mode. Treatment units in the Interim I phase would include a bar screen, two aeration basins, one final clarifier, one aerobic sludge digester, and a chlorine contact basin. Treatment units in the Interim II phase would include a bar screen, four aeration basins, two final clarifiers, two aerobic sludge digesters, and a chlorine contact basin. Treatment units in the Final phase would include a bar screen, nine aeration basins, five final clarifiers, six aerobic sludge digesters, and three chlorine contact basins.

The facility is proposed approximately 3,450 feet northeast of the intersection of Political Road and San Marcos Highway, in Caldwell County. The treated effluent would be discharged to Callihan Creek, then to Lower San Marcos River Segment No. 1808 of the Guadalupe River Basin. The unclassified receiving water use is limited aquatic life use for Callihan Creek. The designated uses for Segment No. 1808 are primary contact recreation, public water supply, and high aquatic life use.

C. Procedural Background

BL 12 Holdings' application was received on February 15, 2023, and declared administratively complete on March 29, 2023. The Notice of Application and Intent to Obtain a Water Quality Permit was published in English on April 6, 2023, in the *Lockhart Post Register* and in Spanish on April 6, 2023, in *El Mundo*. The Executive Director's (ED) staff completed technical review of the application

on May 9, 2023. The Notice of Application and Preliminary Decision for TDPEs Permit for Municipal Wastewater was published in English on July 20, 2023, in the *Lockhart Post Register* and in Spanish on July 20, 2023, in *El Mundo*. The Public Meeting Notice was published July 20, 2023. A public meeting was held on August 29, 2023. The public comment period ended on August 29, 2023, at the close of the public meeting. The ED's Response to Comments (RTC) was mailed on October 10, 2023. The deadline for filing requests for contested case hearing and requests for reconsideration of the ED's decision was November 9, 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 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 § 55.205(b), a hearing request by a group or association may not be granted unless all of the following requirements are met:

- (1) comments on the application are timely submitted by the group or association;
- (2) the request identifies, by name and physical address, one or more members of the group or association that would otherwise have standing to request a hearing in their own right;
- (3) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (4) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

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

SMRF

Victoria Rose submitted a timely hearing request on behalf of SMRF, a non-profit organization that was established to protect public access to the San Marcos River, and to preserve the San Marcos River itself. SMRF raises concerns regarding water quality, groundwater, antidegradation requirements, human health, wildlife, recreational use, nuisance odors, and notice. Because the hearing request states that SMRF seeks to carry out its mission by protecting the flow of aquifer fed springs into the San Marcos River, improving the water quality of the river, protecting the beauty of the river and nearby parks, and protecting streams flowing into the San Marcos River, OPIC finds that SMRF's stated purpose is germane to the interests it seeks to protect.

For an association's hearing request to be granted, the request must also identify one or more members, by name and physical address, that would otherwise have standing for a contested case hearing in their own right. Here,

SMRF identified Joe Banda, who owns real property and lives at 120 Honey's Trail, Fentress. According to the map created by ED staff, the facility's outfall is 0.33 miles away from Mr. Banda's property boundary. Mr. Banda's proximity to the facility is confirmed by the Applicant's affected landowners map.

While the concerns raised on behalf of the SMRF are protected by the law under which the application will be considered, a reasonable relationship must exist between those interests and the regulation of wastewater discharges under the permit. As required for group standing under 30 TAC § 55.205, SMRF timely submitted comments; the interests the group seeks to protect are germane to its purpose; neither the claim asserted nor the relief requested requires the participation of individual members; and SMRF's hearing request identifies, by name and address, a member of the group that would otherwise have standing to request a hearing in his own right. Given Mr. Banda's proximity to the facility, the fact that SMRF's concerns are specific and protected by the law under which this application is considered, and a reasonable relationship exists between its concerns and the regulation of this facility, OPIC finds that SMRF has a personal justiciable interest in this matter and qualifies as an affected person.

B. Which issues raised in the hearing request are disputed

The affected requestor raised the following issues:

1. Whether the permit is adequately protective of water quality.
2. Whether the permit is adequately protective of recreational use.
3. Whether the permit is adequately protective of human health.
4. Whether the permit is adequately protective of wildlife.

5. Whether the permit is adequately protective of groundwater.
6. Whether the permit complies with antidegradation requirements.
7. Whether the permit is adequately protective against nuisance odors.
8. Whether the notice for the permit was adequate.

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 by the affected requestor are issues of fact.

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

Issues No. 1-8 in Section III.B were specifically raised by an affected requestor 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 public comments.

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

The affected requestor raised 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 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).

Water Quality, Recreation, Human Health, and Animal Life

The requestor raised concerns about adverse effects to water quality and the consequential impacts on recreation, human health, and animal life. The Commission is responsible for the protection of water quality under Texas Water Code (TWC) Chapter 26 and 30 TAC Chapters 307 and 309. 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...”¹ 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.”² Finally, 30 TAC § 307.4(e) requires that nutrients from permitted discharges or other controllable sources shall not cause excessive growth of aquatic vegetation which impairs an existing, designated, presumed, or attainable use. As Chapter

¹ 30 TAC § 307.1.

² 30 TAC § 307.4(d).

307 designates criteria for the regulation of water quality, the protection of human health and safety, and the protection of animal life, Issues No. 1-4 are relevant and material to the Commission's decision regarding this application.

Groundwater

The requestor expressed concerns regarding the impact on groundwater near the proposed facility. As discussed above, the Commission is responsible for the protection of water quality under TWC Chapter 26 and 30 TAC Chapters 307 and 309. Section 309.10(b) states, in part, that “[t]he purpose of this chapter is to condition issuance of a permit and/or approval of construction plans and specifications for new domestic wastewater treatment facilities ... on selection of a site that minimizes possible contamination of ground and surface waters....” Under 30 TAC § 309.12, the Commission considers several factors relating to a facility's proposed design, construction, and operational features to evaluate a facility's potential to cause surface water and groundwater contamination. The rule further provides for consideration of active geologic processes and groundwater conditions such as groundwater flow rate, groundwater quality, length of flow path to points of discharge, and aquifer recharge and discharge conditions. Therefore, Issue No. 5 is relevant and material to the Commission's decision on this Application.

Antidegradation

Antidegradation reviews are governed by 30 TAC § 307.5, which establishes the Commission's antidegradation policy and contains provisions for

implementation of the policy. As part of the ED's antidegradation review, the existing uses of a waterbody are determined, and the draft permit is designed to protect those uses. Therefore, Issue No. 6 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Nuisance Odor

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, Issue No. 7 is relevant and material to the Commission's decision on this Application.

Notice

The requestor raised concerns about notice, particularly its adequacy as it relates to the Alternative Language Notice and a change to the outfall location that would potentially render the Notice of Receipt of Application insufficient. Chapter 39 contains requirements relating to notice publication, alternative language publication, mailing of notice, and posting of the application in a public place within the county. The issue of whether the Applicant complied with all applicable notice requirements is relevant and material to the Commission's decision on this application. Therefore, Issue No. 8 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. 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 SMRF qualifies as an affected person in this matter, OPIC respectfully recommends that the Commission grant its hearing request and refer Issues No. 1-8 specified in Section III.B for a contested case hearing at SOAH with a maximum duration of 180 days.


Respectfully submitted,

Garrett T. Arthur
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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 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

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TCEQ DOCKET NO. 2024-0414-MWD

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