

DOCKET NO. 2024-0596-MWD

APPLICATION BY THE PSALM	§	BEFORE THE
25:10 FOUNDATION, FOR	§	TEXAS COMMISSION ON
TPDES PERMIT NO.	§	ENVIRONMENTAL
WQ0016202001	§	QUALITY

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

I. INTRODUCTION

A. Summary of Position

Before the Commission is an application by The Psalm 25:10 Foundation (Applicant) for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016202001. The Commission received comments and a request for a contested case hearing from Richard Moore, Trennon Massengale, Paul Hess, Glen Guthrie, and Judy Raylene West Family Living Trust. In addition, the Commission received Requests for Reconsideration from several above-named Requestors. For the reasons stated herein, OPIC respectfully recommends the Commission find that Richard Moore, Trennon Massengale, Paul Hess, and Glen Guthrie are affected persons in this matter and grant their pending hearing requests. OPIC respectfully recommends denial of the remaining request for the

reasons detailed below. Finally, OPIC recommends denial of the pending Request for Reconsideration.

B. Background of Facility

The PSALM 25:10 Foundation (PSALM 25:10 or Applicant) has applied to the TCEQ for new TPDES Permit No. WQ0016202001. If issued, the draft permit would authorize discharge of treated domestic wastewater (effluent) at a daily average flow limit in the Interim Phase of 0.10 million gallons per day (MGD), and at a daily average flow limit in the Final Phase of 0.50 MGD from proposed Prairieview WWTP 1 (Prairieview facility).

If issued, the permitted facility would be located approximately 0.50 miles northwest of the intersection of West Farm-to-Market Road 4 and Farm-to-Market Road 2331, in Johnson County, and will be an activated sludge process plant operated in the extended aeration mode. Treatment units in the Interim Phase will include a bar screen, an aeration basin, a final clarifier, an aerobic sludge digester, and a chlorine contact chamber. Treatment units in the Final Phase will include a bar screen, two aeration basins, two final clarifiers, two aerobic sludge digesters, and two chlorine contact chambers. The discharge route for the proposed discharge is to an unnamed tributary, then to an unnamed impoundment, then to West Fork Nolan River, then to Nolan River, then to Lake Pat Cleburne in Segment No. 1228 of the Brazos River Basin (proposed discharge route). The unclassified receiving water uses are limited aquatic life use for the unnamed tributary and West Fork Nolan River, and high aquatic life use for the

unnamed impoundment. The designated uses for Segment No. 1228 are primary contact recreation, public water supply, and high aquatic life use.

C. Procedural Background

TCEQ received PSALM 25:10's application on August 12, 2022, and declared it administratively complete on September 27, 2022. The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in the *Cleburne Times Review* on October 27, 2022. The ED completed the technical review of the application on January 6, 2023, and prepared the proposed draft permit, which if approved, establishes the conditions under which the facility must operate. The Applicant published the Notice of Application and Preliminary Decision (NAPD) in the *Cleburne Times Review* on March 28, 2023. The public meeting for this application was held on September 19, 2023. The public comment period ended on September 19, 2023. The Executive Director's (ED) Response to Comments was mailed on December 5, 2023, and the deadline for submittal of a contested case hearing request or request for reconsideration was January 4, 2024.

II. APPLICABLE LAW

A. Request for Hearing

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. 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.

B. Request for Reconsideration

Any person may file a request for reconsideration of the ED's decision under 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

Richard Moore and Trennon Massengale

Attorneys John Reed Clay Jr. and J. Andrew Scott submitted a timely combined comment and hearing request on behalf of Richard Moore on September 19, 2023. In addition, Mr. Scott also submitted a timely hearing request on January 4, 2024 on behalf of Trennon Massengale incorporating Mr. Massengale's prior timely comments. The hearing requests further incorporate comments from Mr. Moore submitted on February 13, 2023. Mr. Moore's and Mr.

Massengale's requests express concern about effects on water quality, lack of proper notice, failure to conduct a Tier 2 Antidegradation analysis, and impacts to aquatic life. The map prepared by staff for the ED shows that Mr. Moore's property is located 1.0 mile from the proposed facility outfall and adjacent to the discharge route, and Mr. Massengale's property is located approximately 1.25 miles from the outfall along the discharge route.

Each of Mr. Moore's and Mr. Massengale's concerns described above are relevant and material to the Commission's decision on this application. Given the relevance of Requestors' concerns about water quality, notice, antidegradation, and aquatic life combined with the proximity of their properties to the outfall and discharge route, OPIC finds that Richard Moore and Trennon Massengale each have an interest in this application that is not common to members of the general public. Accordingly, OPIC recommends that the Commission find that Richard Moore and Trennon Massengale are affected persons in this matter pursuant to 30 TAC § 55.203(a).

Glen Guthrie

Glen Guthrie submitted a timely combined comment and hearing request on December 28, 2023. The request expresses concern about water quality, air quality, lack of proper notice, odor, and effects on animal life, including aquatic life. Mr. Guthrie states that his property is adjacent to the proposed facility on the north side, and the map prepared by ED staff confirms that his property is located 0.81 miles from the proposed facility outfall. In addition, according to

Applicant's Adjacent Landowner Map and corresponding list, Mr. Guthrie's property borders Applicant's property boundary.

As previously stated, concerns about impacts to the water quality, aquatic life (and animal life), and lack of proper notice are relevant and material to the Commission's decision on this application. In addition, the Commission may consider Mr. Guthrie's concerns about odor, as they are also relevant and material to this application. Finally, as explained further below, Mr. Guthrie's concerns about air quality are not relevant and material to the Commission's decision on this TPDES application. Given that most of Mr. Guthrie's concerns are relevant and material, and the fact that his property borders Applicants' and is within close proximity to the outfall, OPIC finds that Glen Guthrie has a personal justiciable interest in this application that is not common to members of the general public. Accordingly, OPIC recommends that the Commission find that Glen Guthrie is an affected person in this matter pursuant to 30 TAC § 55.203(a).

Paul Hess

Paul Hess submitted a timely hearing request on January 4, 2024 incorporating his prior comments submitted on December 12, 2023 and as part of his oral and written comments submitted at the public meeting held on September 19, 2023. The request expresses concern about water quality and lack of proper notice. Specifically, with respect to notice, Mr. Hess identifies concerns regarding compliance with requirements to send notice in Spanish, incorrect addresses, incorrect contact information provided by Applicant, and failure to

make the application available for viewing. The map prepared by ED staff shows that Mr. Hess' property is located 0.84 miles from the outfall.

Concerns about impacts to the water quality and lack of proper notice are relevant and material to the Commission's decision on this application. Given the relevance of Mr. Hess' concerns, and the proximity of his property to the outfall, OPIC finds that Paul Hess has a personal justiciable interest in this application that is not common to members of the general public. Accordingly, OPIC recommends that the Commission find that Paul Hess is an affected person in this matter pursuant to 30 TAC § 55.203(a).

Judy Raylene West Family Living Trust

The Commission received a combined comment and hearing request from Adam Friedman, attorney on behalf of the Judy Raylene West Family Living Trust (West Trust or the Wests) and its trustees on January 4, 2024. The Wests did not submit a comment during the formal comment period for this application, which ended on September 19, 2023. While the Wests may have satisfied the substantive requirements to demonstrate affectedness, the request is not based upon comments raised during the comment period as required by 30 TAC §55.201(d)(4) and 30 TAC § 55.211(c)(2)(A)(ii). Accordingly, OPIC must respectfully recommend denial of the Wests' pending request for hearing.

B. Which issues raised in the hearing requests are disputed

Affected persons raised the following issues:

1. Whether the draft permit is adequately protective of water quality and recreational use and enjoyment of Requestors' properties;

2. Whether the proposed discharge will adversely impact animal life, including aquatic life;
3. Whether the draft permit sufficiently complies with antidegradation requirements;
4. Whether the Applicant provided proper notice;
5. Whether the draft permit is sufficiently protective against nuisance odors; and
6. Whether the draft permit is adequately protective of air quality.

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 1-6 in Section III. B were specifically raised by affected persons during the public comment period.

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

With the exception of the request submitted on behalf of Judy Raylene West Family Living Trust, all hearing requests are based on timely comments 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).

Water Quality, Animal Life, and Recreation

Requestors raised concerns about adverse effects to water quality and the consequential impacts on aquatic life, animal life, and whether the draft permit will adequately maintain the recreational uses of the waterbodies in the route of the proposed discharge. The Commission is responsible for the protection of water quality under Texas Water Code 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..." 30 TAC § 307.1. 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." 30 TAC § 307.4(d). 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 307 designates criteria for the regulation of water quality and the protection of animal life, and recreational uses of relevant water bodies, Issues No. 1-2 are relevant and material to the Commission's decision regarding this application and are appropriate for referral to SOAH.

Antidegradation

The State's antidegradation policy is part of the Texas Surface Water Quality Standards (TSWQS) and is addressed in 30 TAC § 307.5. Antidegradation review is designed to ensure that although a proposed discharge will result in increased pollutant loading, the numerical and narrative criteria of the receiving water will be maintained, and existing uses will be protected. Accordingly, Requestors' concerns regarding antidegradation are relevant and material to the Commission's decision on this application.

Notice

Richard Moore and Trennon Massengale raised concerns that the contact number listed for Applicant's project manager is incorrect, resulting in the public being unable to timely and completely view the permit application. Requestors further state that interested persons were not able to reach a proper representative of the Applicant because of an error in the information provided by the Applicant, and that certain adjacent landowners were not sent proper notice in accordance with TCEQ rules. Finally, concerns were raised regarding compliance with requirements to provide notice in an alternate language. Each of these concerns regarding lack of proper notice is relevant and material to the

Commission's decision on this application and is appropriate for referral to SOAH.

Odor

Section 309.13(e) of the TCEQ's rules requires domestic facilities to meet buffer zone requirements for the abatement and control of nuisance odor by complying with one of three options: 1) ownership of the buffer zone area; 2) restrictive easements from the adjacent property owners for any part of the buffer zone not owned by the applicant; or 3) providing nuisance odor control. As these rules apply to the permit at issue, Requestors' concerns about odor are relevant and material to the Commission's decision on this application and are appropriate for referral to SOAH.

Air Quality

Requestors raised concerns regarding the proposed Facility's impact on air quality. TCEQ's jurisdiction is established by statute and does not include authority under the Texas Water Code or its regulations to address or consider air quality when making a decision on issuance of this TPDES permit, unless there is an associated water quality concern. Accordingly, Issue 6 is not relevant and material to the Commission's decision on this application.

G. Maximum Expected Duration of 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. REQUEST FOR RECONSIDERATION

Paul Hess, Trennon Massengale, and Richard Moore submitted a timely request for reconsideration asserting that the Applicant has through willful neglect failed to provide proper mailed and published notice of the Application, Draft Permit, and Public Meeting. While concerns about proper notice are relevant and material to the decision on this application, an evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the ED's decision should be reconsidered. OPIC cannot recommend reconsideration without the benefit of such a record and must therefore recommend denial of the requests for reconsideration.

V. CONCLUSION

Having found that Richard Moore, Trennon Massengale, Paul Hess, and Glen Guthrie qualify as affected persons in this matter, OPIC respectfully recommends the Commission grant their hearing requests and refer Issue Nos. 1-5 specified in Section III. B. for a contested case hearing at SOAH with a

maximum duration of 180 days. Finally, OPIC recommends denial of the Requests for Reconsideration.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By: *Jennifer Jamison*
Jennifer Jamison
Assistant Public Interest Counsel
State Bar No. 24108979
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-4104

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2024 the original of the Office of Public Interest Counsel's Response to Hearing Requests 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
Jennifer Jamison