

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

July 22, 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 MTR MATTERN
RANCH LLC FOR TPDES PERMIT NO. WQ0016233001
TCEQ DOCKET NO. 2024-0666-MWD**

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 black ink that reads "Pranjal".

Pranjal M. Mehta, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2024-0666-MWD

**APPLICATION BY MTR
MATTERN RANCH LLC FOR
TPDES PERMIT NO.
WQ0016233001**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**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) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this response to requests for hearing in the above-referenced matter.

I. Introduction

A. Summary of Position

Based on the information submitted in the requests and a review of the information available in the Chief Clerk's file on this application, OPIC recommends the Commission grant the hearing requests of Donald Dickerson, Marsha Nienhaus, and Richard Nienhaus. OPIC further recommends to refer the issues specified in Section III.G for a contested case hearing at the State Office of Administrative Hearings (SOAH) with a maximum duration of 180 days.

B. Description of Application and Facility

MTR Mattern Ranch LLC (Applicant) applied to TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016233001 to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 240,000 gallons per day. The MTR Mattern Ranch Wastewater Treatment Facility will be an activated sludge process plant operated in the

conventional aeration mode. Treatment units in the Interim I phase will include a bar screen, one aeration basin, one final clarifier, one sludge digester, and a chlorine contact chamber. Treatment units in the Interim II phase will include a bar screen, two aeration basins, one final clarifier, two sludge digesters, and a chlorine contact chamber. Treatment units in the Final phase will include an additional treatment train similar to the Interim II phase.

The facility would be located at 46238 Farm-to-Market Road 1774, Plantersville, in Grimes County 77363. The treated effluent would be discharged via pipe to an unnamed tributary, then to Mill Creek, then to Neidigk Lake, then to Mill Creek, then to Spring Creek in Segment No. 1008 of the San Jacinto River Basin.

C. Procedural Background

The TCEQ received the application on September 23, 2022, and declared it administratively complete on January 20, 2023. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in English in *The Examiner* on January 25, 2023, and in Spanish in *El Perico* on January 26, 2023. The Executive Director (ED) completed the technical review of the application on April 24, 2023. A combined NORI and Notice of Application and Preliminary Decision (NAPD) was published in English in *The Examiner* on September 27, 2023, and in Spanish in *El Perico* on September 28, 2023. The public comment period ended on October 30, 2023. The Chief Clerk mailed the ED's Decision and Response to Comments on December 29, 2023. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was

January 29, 2024. The Commission received timely hearing requests from Donald Dickerson, Marsha Nienhaus, and Richard Nienhaus.

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 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 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.

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 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 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 Requests

A. Whether the requestors are affected persons

Donald Dickerson

The Commission received two timely hearing requests from Donald Dickerson during the comment period. Mr. Dickerson stated that he is a resident

of the Lake Hollyhill Acres Subdivision and president of the Lake Hollyhill Owners Association. He expressed concerns about wastewater potentially being discharged into a tributary that runs along his property and several others in the subdivision. He also raised concerns about potential groundwater contamination, traffic, odor, pollution, erosion, and the overall impact on the quality of life. He argued that there is no need for the facility in the area. He also expressed concerns about the possible formation of a municipal utility district and residents being forced to pay taxes for services that they do not need.

The Landowners Map included with the application shows that Mr. Dickerson's property is adjacent to Applicant's property, placing him in close proximity to the facility. The map also indicates that the proposed discharge route runs near his property. The ED's map shows that Mr. Dickerson is located approximately 0.16 miles from the facility and adjacent to applicant's property. Mr. Dickerson's concerns regarding suitability of the discharge route, nuisance odors, and groundwater contamination are interests that are protected by the law under which this application is considered, and a reasonable relationship exists between those interests and regulation of the facility. Based on these concerns and Mr. Dickerson's proximity to the facility's location and the proposed discharge, OPIC finds that he has a personal justiciable interest in this matter and qualifies as an affected person under 30 TAC § 55.203(c).

Marsha & Richard Nienhaus

Marsha & Richard Nienhaus filed separate hearing requests during the comment period.¹ Mr. Nienhaus expressed concerns about wastewater potentially being discharged into a tributary that flows through private properties. Additionally, he raised concerns about flooding, potential malfunctions or overflows of raw sewage in the discharge, odor, and other potential environmental impacts. Ms. Nienhaus expressed concerns about wastewater potentially flowing through personal properties, impacting both the properties and the already challenging road maintenance. She also raised concerns about potential groundwater contamination and nuisance odors.

Marsha & Richard Nienhaus are not included in the Landowners Map attached with the application. However, the ED's map shows that they are located approximately 0.25 miles from the facility. With the exception of flooding, all of the concerns raised by Marsha & Richard Nienhaus are interests protected by the law under which the application will be considered, and a reasonable relationship exists between those interests and regulation of the facility. Based on the nuisance odor concerns and their proximity to the facility's location and the proposed discharge, OPIC finds that Marsha & Richard Nienhaus have a personal justiciable interest in this matter and qualify as affected persons under 30 TAC § 55.203(c).

¹ Their hearing requests listed the same address.

B. Which issues raised in the hearing requests are disputed

The affected persons discussed above raised the following issues:

1. Whether the discharge route has been properly characterized. (Raised by Mr. Dickerson and Marsha & Richard Nienhaus.)
2. Whether the draft permit adequately addresses nuisance odor in accordance with 30 TAC § 309.13(e). (Raised by Mr. Dickerson and Marsha & Richard Nienhaus.)
3. Whether the draft permit will adversely affect groundwater in violation of applicable requirements. (Raised by Mr. Dickerson and Marsha & Richard Nienhaus.)
4. Whether there is a need for the proposed facility. (Raised by Mr. Dickerson.)
5. Whether the draft permit contains adequate measures to prevent any impacts resulting from malfunctions or overflow of effluents in the discharge. (Raised by Mr. Nienhaus.)
6. Whether the operations under the draft permit would increase the flooding in the area. (Raised by Mr. Nienhaus.)
7. Whether the draft permit would contribute to soil erosion in the surrounding area. (Raised by Mr. Dickerson.)

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. 30 TAC § 55.211(c)(2)(A). The issues listed above are issues of fact.

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

All of the issues were 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

The 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

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 a permit. The Commission can only consider issues within its jurisdiction. Therefore, relevant and material issues include those governed by the substantive law relating to the permit at issue. *Anderson v. Liberty Mutual, Inc.*, 477 U.S. 242, 248-51 (1986).

Discharge Route

The affected persons raised concerns regarding the proposed discharge flowing through the tributary which passes through private properties. The purposes of 30 TAC Chapter 309, Subchapter B, Domestic Wastewater Effluent Limitation and Plant Siting requirements, include goals "to minimize the possibility of exposing the public to nuisance conditions" and "to prohibit issuance of a permit for a facility to be located in an area determined to be unsuitable or inappropriate, unless the design, construction, and operational features of the facility will mitigate the unsuitable site characteristics." 30 TAC

§309.10(b). Additionally, 30 TAC § 309.12 provides that "the commission may not issue a permit for a new facility or for the substantial change of an existing facility unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface water and groundwater." Therefore, concerns regarding the discharge route are relevant and material.

Nuisance Odor

Nuisance odor is specifically addressed by TCEQ regulations concerning the siting of domestic wastewater plants. *See* 30 TAC § 309.13. The Commission's rules require domestic wastewater treatment facilities to meet buffer zone requirements for the abatement and control of nuisance odors prior to construction. 30 TAC § 309.13(e). Therefore, Issue No. 2 is relevant and material.

Groundwater

Under 30 TAC § 309.13, a wastewater treatment plant must comply with site location restrictions and buffer zone requirements. Further, 30 TAC § 309.13(c) states that a wastewater treatment plant unit may not be located closer than 500 feet from a public water well, nor 250 feet from a private water well. Therefore, the issue regarding groundwater protection is relevant and material to the Commission's decision regarding this application.

Need for the Facility

Texas Water Code (TWC) § 26.0282 authorizes the Commission to alter or deny a wastewater discharge permit based on consideration of need. Therefore,

Issue No. 4 regarding the need for the facility is relevant and material to a decision on this application.

Impacts from Any Malfunction

The TCEQ does not have jurisdiction to consider general flooding issues in the wastewater permitting process. However, any malfunction or accidents could result in unauthorized discharges or contaminated runoff. The potential for these events at the facility affects water quality and the Commission is responsible for the protection of water quality under TWC Chapter 26 and 30 TAC Chapters 307 and 309. Therefore, Issue No. 5 is relevant and material to the Commission's decision on this application.

Flooding

As explained above, TCEQ lacks jurisdiction to address possible flooding. Therefore, Issue No. 6 is not relevant and material to the Commission's decision regarding this application.

Erosion

The Commission has concluded in other proceedings that the issue of soil erosion is not within TCEQ's jurisdiction, therefore, Issue No. 7 regarding erosion is not relevant and material.

G. Issues Recommended for Referral

For the reasons stated above, OPIC recommends referral of the following issues:

1. Whether the discharge route has been properly characterized.
2. Whether the draft permit adequately addresses nuisance odor in

accordance with 30 TAC § 309.13(e).

3. Whether the draft permit will adversely affect groundwater in violation of applicable requirements.
4. Whether there is a need for the proposed facility.
5. Whether the draft permit contains adequate measures to prevent any impacts resulting from malfunctions or overflow of effluents in the discharge.

H. 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.

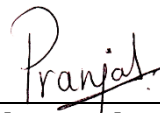
V. Conclusion

For the reasons discussed above, OPIC recommends the Commission grant the hearing requests of Donald Dickerson, Marsha Nienhaus, and Richard

Nienhaus, and refer the issues specified in Section III.G for a contested case hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By: 
Pranjal M. Mehta
Assistant Public Interest Counsel
State Bar No. 24080488
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-0574

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2024, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

A handwritten signature in black ink, reading "Pranjal", with a horizontal line drawn through the middle of the letters.

Pranjal M. Mehta

MAILING LIST
MTR MATTERN RANCH LLC
TCEQ DOCKET NO. 2024-0666-MWD

FOR THE APPLICANT

via electronic mail:

Michael Salinsky
MTR Mattern Ranch LLC
4742 North 24th Street, Suite 325
Phoenix, Arizona 85016
msalinsky@inspirecommunities.com

Jerry G. Ince, P.E.
Ward, Getz & Associates
2500 Tanglewilde Street, Suite 120
Houston, Texas 77063
jince@wga-llp.com

FOR THE EXECUTIVE DIRECTOR

via electronic mail:

Bradford Eckhart, Staff Attorney
Texas Commission on Environmental
Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606
bradford.eckhart@tceq.texas.gov

John Hearn, Technical Staff
Texas Commission on Environmental
Quality
Water Quality Division MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-5239 Fax: 512/239-4430
john.hearn@tceq.texas.gov

Ryan Vise, Director
Texas Commission on Environmental
Quality
External Relations Division
Public Education Program MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678
pep@tceq.texas.gov

FOR ALTERNATIVE DISPUTE

RESOLUTION

via electronic mail:

Kyle Lucas, Attorney
Texas Commission on Environmental
Quality
Alternative Dispute Resolution MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0687 Fax: 512/239-4015
kyle.lucas@tceq.texas.gov

FOR THE CHIEF CLERK

via eFiling:

Docket Clerk
Texas Commission on Environmental
Quality
Office of Chief Clerk MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311
<https://www14.tceq.texas.gov/epic/eFiling/>

REQUESTER(S):

Donald Wayne Dickerson, Jr.
12101 Huckleberry Drive
Plantersville, Texas 77363

Marsha L. Nienhaus
12189 Huckleberry Drive
Plantersville, Texas 77363

Richard John Nienhaus
12189 Huckleberry Drive
Plantersville, Texas 77363