

August 5, 2024

Ms. Laurie Gharis, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, TX 78711-3087

**RE: TPDES Permit No. WQ0005417000 Leprino Foods Company; Applicant's
Response to Request for Reconsideration and Requests for Contested
Case Hearing**

Dear Ms. Gharis:

Applicant Leprino Foods Company, submits its response, organized as two briefs, to the Request for Reconsideration and Requests for Contested Case Hearing in the above named and numbered matter.

Sincerely yours,



Dorothy E. Watson

DEW

TPDES PERMIT NO. WQ0005417000

APPLICATION BY	§	BEFORE THE
LEPRINO FOODS COMPANY	§	TEXAS COMMISSION ON
LUBBOCK, LUBBOCK COUNTY	§	ENVIRONMENTAL QUALITY

**OPPOSITION TO REQUEST FOR A CONTESTED CASE HEARING OF
APPLICANT, LEPRINO FOODS COMPANY**

By and through its counsel, Foley & Lardner LLP, Leprino Foods Company (Leprino) requests that the Texas Commission on Environmental Quality (Commission) deny the requests of Stop the Oppression of Our People (STOP) and Kathyl Anderson (Anderson) for a contested case hearing regarding TCEQ Permit No. WQ0005417000 (Permit) to the State Office of Administrative Hearings (SOAH).¹ The Commission should not refer the issues raised by Anderson or STOP (collectively, Requestors) for a contested case hearing because: (1) neither of the Requestors is an “affected person;” (2) neither of the Requestors have raised a disputed issue of fact; and (3) the Requestors have not challenged issues that are relevant and material to the issuance of the Permit.

I. BACKGROUND

Leprino has applied for Texas Pollutant Discharge Elimination System (TPDES) permit related to the construction and operation of a state-of-the-art dairy products manufacturing facility (Facility) and associated wastewater treatment facility in Lubbock, Texas. The Facility is expected to substantially contribute to the economy of the West Texas region and—once fully operational—will generate approximately 600 new jobs in Lubbock, Texas (with average wages above the median). Moreover, in a part of the state where scarce water resources are an

¹ This opposition to request for contested case hearing is properly filed on August 5, 2024, in accordance with 30 Tex. Admin. Code § 55.209 and the TCEQ notice dated July 24, 2024 regarding Docket No. 2024-1181-IWD.

increasing concern, the Facility will be a net-generator of water. Because the Facility is expected to process approximately 8 million pounds of milk per day, and because approximately 88% of milk is water, the Facility will contribute substantially more high-quality water to Lubbock's Canyon Lake #6 than the amount of water that the Facility takes in from municipal sources. This net contribution of water is an incredible opportunity for the City of Lubbock to increase its municipal-source water supply in the future without tapping into additional ground or surface water sources with finite capacity.

The proposed wastewater treatment facility at issue will be located to the north of the main Facility, just south of 4th Street in Lubbock. Accordingly, nearly all aspects of the proposed wastewater treatment facility will be constructed and operated on land that is located—at the closest point—approximately 2 miles east of Canyon Lake #6 as the crow flies. See below.



The pipeline conveying clean, treated effluent to Canyon Lake #6 is the only aspect of Leprino's proposed wastewater treatment system that will have any direct connection to the lake. To minimize any visible impact of the outfall, the actual discharge point has been designed to discharge near the lake bottom. In the unlikely event of any potential upset conditions, Leprino has various options that will prevent the discharge of non-compliant effluent. For example, Leprino has approximately seven (7) days of onsite effluent storage at the 4th Street site, and also has the ability to divert water to the City of Lubbock's wastewater treatment facility for further treatment, if necessary.

On September 30, 2022, Leprino Foods Company applied for the Permit. The Permit application was declared administratively complete on October 17, 2022. A Combined Notice of Receipt of Application Intent to Obtain Water Quality Permit and Notice of Application and Preliminary Decision for TPDES Permit for Industrial Wastewater New (Combined NORI and NAPD) was published on May 18, 2023. Requests for a public hearing were filed by STOP on June 16 and June 17, 2023, and the public comment period remained open until the end of the public meeting held October 24, 2023.

On June 10, 2024, TCEQ published the Executive Director's (ED) Response to Public Comment (RTC). No changes were made to the draft Permit in response to comments. STOP submitted Contested Case Hearing Requests on June 16, 2023, June 17, 2023, and July 10, 2024 (the STOP Hearing Requests). Ms. Kathyl Anderson submitted a Contested Case Hearing Request (the Anderson Hearing Request) on October 24, 2023, during the Public Meeting held that day. The STOP Hearing Requests and the Anderson Hearing Request shall be collectively referred to as the Hearing Requests. No other individual or group submitted a contested case hearing request.

II. APPLICABLE LAW

Under Texas law, a Contested Case Hearing may only be requested by the Commission, the Executive Director, the applicant and affected persons. 30 TAC 55.201(b). Pursuant to 30 TAC 55.103, affected person is defined as “[a] person 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.” In determining whether a person is an affected person, the Commission must consider the following:

- (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.

30 TAC 55.203(c).

So that the Commission may properly evaluate whether an applicant is an affected person as described above, it requires that a request for public hearing “comply substantially” with its description of required elements. 30 TAC 55.201(d). In relevant part, the Commission requires that the requestor:

- (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; [and]

...

(4)(B) [l]ist 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.

30 TAC 55.201(d). The Combined NORI and NAPD described all of these are requirements for making a contested case hearing request. Combined NORI and NAPD, p. 2-3.

The Commission cannot grant a request by a group or association for a contested case hearing unless, among other things, the request "identifies, by name and physical address . . . a member of the group or association who would be an affected person in the person's own right." Tex. Water Code § 5.115(a-1)(2)(A); see also 30 Tex. Admin. Code § 55.205(b)(2).

In turn, an affected person must have a "personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." Tex. Water Code § 5.115(a); 30 Tex. Admin. Code § 55.203(a). An interest common to members of the general public does not qualify as a personal justiciable interest. *Id.* In determining whether a person is an affected person, the Commission must consider the factors identified above including whether a claimed interest is "protected by the law under which [the Permit is issued]" and "whether a reasonable relationship exists between the interest and [the permitted activity], 30 Tex. Admin. Code § 55.203(c)(1-5). In assessing whether someone is an affected person, the Commission may also consider:

(1) the merits of the underlying application and supporting documentation in the commission's 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 Tex. Admin. Code §55.203(d)(1-3).

Ultimately The Commission may not refer an issue to SOAH unless the Commission determines that the issue:

- (1) involves a disputed question of fact;
- (2) was raised during the public comment period; and
- (3) is relevant and material to the decision on the application.

Tex. Water Code § 5.556(d)

III. ANALYSIS

- A. Ms. Anderson’s request for Contested Case Hearing must be denied because she has not met the basic requirements of 30 TAC 55.201(d), she has not asserted a relevant and material issue of fact, and because she is not an affected person.*

Ms. Anderson submitted a contested case hearing request in writing during the October 24, 2023, public meeting.² In the Anderson Hearing Request, Ms. Anderson failed to include a statement describing her justiciable interest and her location and distance relative to the Leprino facility or outfall. Similarly, Ms. Anderson did not describe why she believes she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public. Instead, the Anderson Hearing Request merely included the statement “I raise all concerns raised during the public comment period.” Because the Anderson Hearing Request did not comply substantially—or otherwise—with the requirement of 30 TAC 55.201(d) that she identify a justiciable interest, how and why she will be allegedly affected, and any relevant and material disputed issues of fact, Ms. Anderson is not entitled to a contested case

² Ms. Anderson also filled out a Public Meeting Request form, dated 3/23/2023, but did not write her address or additional comments or request a contested case hearing on that form.

hearing on the incredibly ambiguous issue she has alleged. Accordingly, the Commission should deny the Anderson Hearing Request.

Furthermore, even considering the public comments made by Ms. Anderson would not entitle her to a contested case hearing. At the October 24, 2023 public meeting, Ms. Anderson said, “My question still is, I’m concerned about the brine that’s going to be disposed of. I would like to get a clearer understanding of that. I would also like to request a contested hearing.” She did not make other public comments. The Executive Director responded to Ms. Anderson’s public comment in its Response to Comments, stating that the brine will be sent to evaporation ponds. RTC 66. Other comments by the Executive Directors note that brine-containing water will not be discharged into Canyon Lake #6 via the outfall pipe.³ Neither Ms. Anderson nor STOP challenged this explanation of the handling of brine as described in the Permit. Thus, there are no material issues of fact as to the handling of brine raised by Ms. Anderson.

Finally, even if there were remaining material issues of fact to be resolved arising out of this incredibly vague comment, Ms. Anderson’s stated address (2974 Ute Avenue, Lubbock) is over two miles as the crow flies from the boundary of the Leprino Facility property where the only discharge of brine will occur. As such, Ms. Anderson has not and can not demonstrate that she is an affected person related to the ponds that would receive any brine as described in the Permit.

B. STOP’s request for contested case hearing must be denied because STOP lacks associational standing and because STOP has failed to raise relevant and material issues of fact.

1. STOP lacks associational standing to request a contested case hearing because the only member STOP has identified by name and address in its contested

³ For example, the response to STOP’s Supplemental Question 11 states, “Wastewater high in total dissolved solids (TDS), such as brine water from the cheese making process . . . will be kept separate and will be sent for disposal to two on-site evaporation ponds with optional enhanced evaporation.” RTC p. 38.

case hearing request, Ms. Sonya Fair, is not an affected person in her own right.

The only member of STOP identified by name and physical address in its contested case hearing requests,⁴ Ms. Sonya Fair, is not an affected person. STOP has raised no personal justiciable interest concerning Ms. Fair.

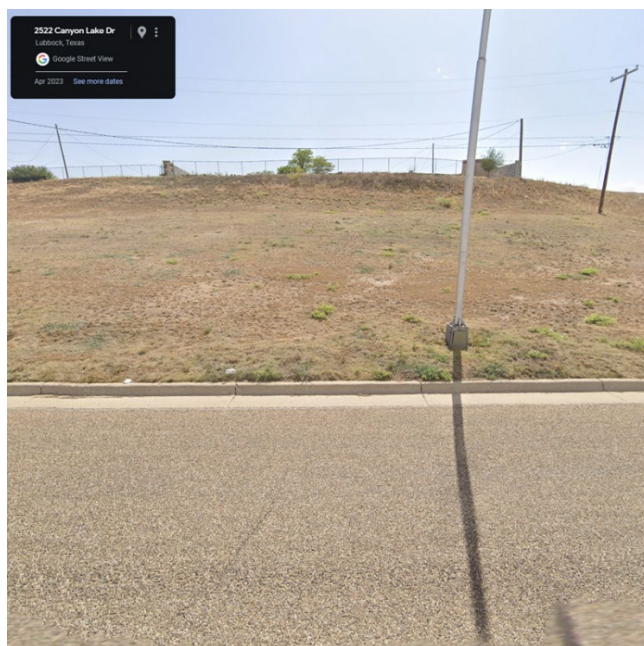
According to STOP, Ms. Fair's backyard overlooks Canyon Lake #6. Her property line is approximately 300 feet from the water and less than ¼ mile from the outfall pipe. *Id.* STOP asserts that Ms. Fair "is concerned that the wastewater discharge will interfere with her use and enjoyment of her property, will harm wildlife in and around the lake, and will severely impact the use and enjoyment of the [lake] as a beloved recreation area for the community." *Id.* None of these issues lead to the conclusion that Ms. Fair an affected person, as required to demonstrate associational standing by Tex. Water Code § 5.115(a); 30 Tex. Admin. Code § 55.203(a).

The very general concern that the proposed discharge into Canyon Lake #6 will impact the use and enjoyment of the lake for the community is not a personal justiciable interest affording Ms. Fair affected person status because it is a common interest amongst the general public. A right "to enjoy the charm and beauty" of a body of water within a city "is a right shared in common with all the people of [the city] and with the public in general" and "any impairment of this right is an injury or damage sustained by appellants in common with the general public." *San Antonio Conservation Soc. v. City of San Antonio*, 250 S.W.2d 259, 263 (Tex. Civ. App. 1952), writ refused. Since the concern regarding impacts to the use and enjoyment of Canyon Lake #6 is an interest common to the members of the general public, it

⁴ STOP identified Ms. Fair in its Contested Case Hearing Requests dated June 16, 2023, and July 10, 2024. STOP's explanation of Ms. Fair's standing as an affected person was verbatim the same in each request.

does not qualify as a personal justiciable interest under Tex. Water Code § 5.115(a), and therefore is not a basis for Ms. Fair to be considered an affected person.

Similarly, the very general concern that the proposed discharge will harm wildlife in and around the lake is not a personal justiciable interest that makes Ms. Fair an affected person. Concerns about harm to wildlife must be tied to a riparian interest to be personally justiciable. *Save Our Springs All., Inc. v. City of Dripping Springs*, 304 S.W.3d 871 (Tex. App. 2010) (holding environmental, scientific, and recreational interest without connection to real property interest was indistinguishable from general public's concerns). STOP admits that Ms. Fair's property is not waterfront property, given its statement that her property line is approximately 300 feet from the water's edge. STOP July Comments p. 7. Publicly available maps also reveal that Canyon Lake Drive separates Ms. Fair's property from Canyon Lake #6. See e.g., Google Maps. To illustrate the issue, here is a photo from Google Street View opposite the outfall showing the view from the lake facing in the direction of the back of Ms. Fair's property (which lies past the fence line):



Ms. Fair's concern regarding harm to wildlife is therefore not tied to any riparian interest vested in Ms. Fair. See *Save Our Springs*, 304 S.W.3d at 879-80. Accordingly, Ms. Fair's concern regarding harm to wildlife is no basis for her to be considered an affected person.

Ms. Fair's unsupported concern that the discharge will interfere with her use and enjoyment of her property is also insufficient for the Commission to determine that she is an affected person. Given that Ms. Fair's property is approximately 300 feet from the water's edge and is located at a substantial topographic height above the lake, water from the outfall would neither discharge onto nor wash upon her property (and Ms. Fair has not alleged as much). And neither Ms. Fair nor STOP have described any specific impacts that they expect the discharge to have upon her property.

Finally, Ms. Fair entered public comments about odor into the record at the public meeting held on October 24, 2023. In her comments, Ms. Fair stated that she had "put up with all kinds of odors" from a local wastewater treatment center, a railroad, and a manure company.⁵ Recording of Public Meeting. Given that Leprino's water treatment facilities are not yet operational, Ms. Fair's concern seems limited to odors from existing, nearby sources. Accordingly, the Commission should conclude that this generalized allegation does not constitute a justiciable interest relating to the Permit application. Furthermore, even if Ms. Fair's comments could somehow be interpreted to apply to Leprino's wastewater treatment facility, her property is unlikely to be affected by odors since it is over two miles from the proposed treatment facility. 30 Tex. Admin. Code § 55.203(c)(4). By comparison, the minimum buffer for waste ponds for a domestic wastewater treatment facility is 150 feet. 30 Tex. Admin. Code §

⁵ None of Ms. Fair's other comments at the October 24, 2023 meeting are relevant or material to the TPDES Permit at issue or raise factual disputes.

309.13(e)(1). As such, Ms. Fair cannot be considered an affected person based on generalized allegations of odor coming from a facility over two miles away, which does not even exist yet.

2. Even if STOP had identified Kathyl Anderson as a member, STOP would still lack associational standing as Ms. Anderson is not an affected person in her own right.

While it is not clear that Kathyl Anderson is a member of STOP, identifying her as such would still not provide STOP with associational standing. For the reasons described above, Ms. Anderson failed to identify any justiciable issues of fact that are affected by the Permit.

Accordingly, Ms. Anderson is not an affected person in her own right or on behalf of STOP.

3. Even if STOP had associational standing, the Commission cannot refer any issue propounded by STOP to SOAH because none of the identified issues raise material and relevant questions of fact.

Even if STOP were able to properly assert associational standing, STOP's request for a contested case hearing should be denied because STOP cannot meet the requirements of Tex. Water Code §5.556(d) for any of the issues it attempts to raise. Under that provision, the Commission cannot refer an issue to the SOAH for a hearing "unless the commission determines that the issue (1) Involves a disputed question of fact; (2) Was raised during the public comment period; **and** (3) Is relevant and material to the decision on the application." Tex. Water Code § 5.556(d) (emphasis added). As a conjunctive test, if even one element is missing, then the issue cannot be referred to the SOAH.

Each of STOP's three contested case hearing requests identifies the same 18 issues. These issues are listed in the below Table 1. Table 1 also lists why each of these 18 issues fail to meet the requirements of Tex. Water Code § 5.556(d).

Issue Number	STOP Issue	Reason why issue cannot be referred to contested case hearing.		
		No disputed question of fact Tex. Water Code § 5.556(d)(1)	Posed as a question, not raised as a fact issue Tex. Water Code § 5.556(d)(1)	Not relevant or material Tex. Water Code § 5.556(d)(3)
1	Whether the public notice fails to comply with applicable federal and state laws, rules and regulations.	X	X	
2	Whether the application or proposed permit would violate the provisions of any state or federal law, rule or regulation.	X	X	
3	Whether the application or draft permit fails to require the use of all reasonable methods to implement and prevent interference with the purpose of Chapter 5 and 26 of the Texas Water Code	X	X	X (irrelevant standard)
4	Whether the application or draft permit fails to maintain the quality of water in the state consistent with public health and enjoyment.	X	X	X (irrelevant standard)
5	Whether the application or draft permit fails to maintain the propagation and protection of terrestrial and aquatic life	X	X	X (irrelevant standard)
6	Whether the application or draft permit fails to maintain the quality of water in the state consistent with the operation of existing industries, including but not limited to, protecting the public from cumulative risks in an area of concentrated operations.	X	X	X (irrelevant standard)

Issue Number	STOP Issue	Reason why issue cannot be referred to contested case hearing.		
7	Whether the application fails to include the requisite information necessary to determine compliance with applicable federal and state laws, rules, regulations and policies	X	X	
8	Whether Applicant has commenced construction of a treatment facility prior to the issuance of a permit authorizing discharge of waste from Applicant's facility.	X	X	X
9	Whether the application or draft permit fails to properly consider the Applicant's and its operator's compliance history	X	X	
10	Whether the application or draft permit fails to properly consider the need for this proposed permit.	X	X	X (irrelevant standard)
11	Whether any former TCEQ employees participated personally and substantially as a TCEQ employee in the commission's review, evaluation, or processing of the application before leaving TCEQ employment, and after leaving TCEQ employment, the former TCEQ employee then provided assistance with the application for its issuance.	X	X	X

Issue Number	STOP Issue	Reason why issue cannot be referred to contested case hearing.		
12	Whether the application or draft permit fails to properly specify the maximum quantity of waste that may be discharged under the permit to determine compliance with all applicable federal and state laws, rules, regulations and policies	X	X	
13	Whether the application or draft permit fails to properly specify the character and quality of waste that may be discharged under the permit to determine compliance with all applicable federal and state laws, rules, regulations and policies.	X	X	
14	Whether the application, draft permit or Executive Director fails to consider any unpleasant odor quality of the effluent and possible adverse effects that it might have on the receiving body of water and related recreational value, including the recreational value of the surrounding area	X	X	X (irrelevant standard)
15	Whether the application or draft permit fails to establish all monitoring, sampling, record-keeping and reporting requirements necessary to determine compliance with all applicable federal and state laws, rules, regulations and policies.	X	X	

Issue Number	STOP Issue	Reason why issue cannot be referred to contested case hearing.		
16	Whether TCEQ failed to properly use an approved water quality management plan (or a plan in progress but not completed or approved) when reviewing Applicant's application and issuing the draft permit.	X	X	
17	Whether the application or draft permit fails to prevent a discharge of waste that is injurious to public health.	X	X	
18	Whether the application is inadequate, incomplete, inaccurate and/or fails to include all necessary and required information	X	X	

a. **STOP has failed to identify disputed issues of fact**

All of the 18 issues identified by STOP fail to state supporting facts or law sufficient to demonstrate a disputed question of fact as required by Tex. Water Code § 5.556(d)(1). None of the issues identified by STOP allege any facts, let alone a disputed question of fact. Without a disputed question of fact, the Commission cannot refer an issue to SOAH. Tex. Water Code § 5.556(d). Comments that contain only unsubstantiated opinions cannot raise disputed questions of fact in other contexts and the Commission should so determine here. *See In re Lipsky*, 460 S.W.3d 579, 592 (Tex. 2015) (Stating that “[o]pinions must be based on demonstrable facts and a reasoned basis” and “[b]are, baseless opinions do not create fact questions”). Nor can conclusory statements create fact disputes. *See Boley v. Boley*, 506 S.W.2d 934, 939 (Tex. Civ. App.-Ft. Worth, 1974) (“Statement of opinion and conclusions are insufficient, even if sworn to, to raise an issue of fact.”); *Andreaccio v. Weaver*, 674 F. Supp. 3d 1011, 1016 n.1 (D. Nev.

2023) (“Merely . . . observing that the facts are disputable does not create a genuine issue of disputed fact.”).

For example, STOP Issue 7 asserts that “[w]hether the application fails to include the requisite information necessary to determine compliance with applicable federal and state laws, rules, regulations and policies” is a disputed question of fact. However, this merely suggests that the facts are disputable without describing the dispute in any discernable way – STOP does not identify which, if any, “requisite information” was not included in the application or what laws this supposed omission contravened. Similarly, STOP Issue 15 suggests that the Permit may fail to establish monitoring requirements that would be necessary to comply with federal and state laws but fails to positively assert that to be the case, and also fails to state which laws are contravened or which monitoring requirements are necessary.

All 18 issues identified by STOP similarly fail to state which specific facts are in dispute.

b. STOP has posed questions, not raised issues

Tellingly, all 18 issues identified by STOP begin with “whether” and are expressed in the form of a question. Questions cannot raise a factual dispute since questions function to elicit a response and are not affirmative statements in themselves. *See Collins v. Abbott Lab’ys, Inc.*, No. 17-CV-4534 (NEB/SER), 2019 WL 2718323 at *8 (D. Minn. June 28, 2019) (“An answer to this hypothetical question is not sufficient to create a material factual dispute”), *aff’d* 972 F.3d 976 (8th Cir. 2020). For example, Issue 1 above asks whether the public notice failed to comply with applicable laws, but does not assert which, if any, laws the public notice fails to comply with or how. There can be no disputed question of fact arising from STOP Issue 1 because STOP Issue 1 fails to actually allege that the public notice does not comply with applicable federal and state laws, rules and regulations, nor the manner in which it does. All 18 issues

identified by STOP similarly fail to allege whether even STOP has identified a material issue of fact.

c. Many of STOP's Issues are not relevant or material

Some issues raised by STOP, such as Issues 8 and 11, do not raise issues that are relevant or material to the approval of the Permit at all. See Tex. Water Code §5.556(d)(3). To be relevant and material, an issue must be reasonably related to the Permit conditions in question. *Sierra Club v. Texas Comm'n on Env't Quality*, 455 S.W.3d 214 (Tex. App. 2014).

STOP Issue 8, questioning whether Applicant has already commenced construction of a facility, does not relate to the issuance of the Permit by TCEQ. There are no TPDES permitting requirements, actual or alleged, that turn on whether Applicant had previously commenced construction of the facility.

Similarly, STOP's Issue 11, questioning whether any former TCEQ employee participated in the review of the application and then assisted Leprino with the application, does not impact any Commission decision on the Permit. Even if STOP had alleged that TCEQ employees had acted in such a way, such actions are not material or relevant to the issuance of a Permit and thus cannot form the basis for a referral to SOAH.

As such, neither Issues 8 or 11 are material and relevant such that they can be referred to SOAH for contested case hearing.

Further, other issues raised by STOP, such as Issue 3, appear to reference standards not required by law to be applied to the Permit. Since they do not exist, questioning the application of such standards cannot not raise material or relevant questions for consideration by SOAH.

d. Other Issues raised by STOP do not entitle it to a contested case hearing

STOP has raised other issues that it did not specifically tie to its requests for a contested case hearing. However, even if these other issues were properly before the Commission for referral for a contested case hearing --which they are not -- none of these issues raise disputed questions of fact or are relevant and material to the decision on the application.

For example, STOP has previously raised the issue of environmental discrimination in its comments and in attachments submitted on October 24, 2023. Such comments included a “complaint”⁶ regarding zoning against the City of Lubbock and what appears to be the U.S. Department of Energy’s policy statements regarding its environmental justice strategy. But these concerns are not material or relevant to the Permit application because TCEQ does not have jurisdiction over how Texas cities implement zoning laws. Nor does Texas have a legal duty to implement Department of Energy policy objectives. *Sierra Club v. Texas Comm’n on Env’t Quality*, 455 S.W.3d 214 (Tex. App. 2014) (affirming denial of contested case because concerns outside of TCEQ’s jurisdiction were irrelevant). As such, STOP’s comments regarding environmental justice do not give rise to a statement of disputed fact of a type that is justiciable by SOAH.

STOP also made equivocal assertions in many of the issues they raised, which therefore do not raise disputed questions of fact. For example, STOP asserted that “[m]odeling *may* not be effective in ensuring the safety of those who recreate on Lake Six”, “[t]he modeling *may* be ineffective for BOD5 limits”, “[t]he safety of the large evaporation ponds *may* not have been sufficiently studied”, and “[t]he sampling *may* not be adequate for Lake Six having been rated as contaminated with bacteria.” June 16, 2023 Submission at 6-7 (emphasis added). But in none of

⁶ The “complaint” is not a formal litigation complaint filed in court but an appears to be a document emailed and sent via certified mail return receipt requested to the U.S. Department of Housing and Urban Development, the U.S. Department of Treasury, and the U.S. Department of Justice.

these instances does STOP state a claim that such activities are insufficient or provide facts that would support this position. This is insufficient to raise a question of fact because an equivocal assertion does not, by definition, assert the existence of a fact but only posits the potential existence of fact. *Andreaccio v. Weaver*, 674 F. Supp. 3d 1011, 1016 n.1 (D. Nev. 2023) (“Merely...observing that the facts are disputable does not create a genuine issue of disputed fact.”)

In other filings, STOP claims that TCEQ has failed to meet the requirements of the Clean Water Act because it does not effectively implement the requisite antidegradation policy. Supplemental Public Comments (June 17, 2023) at page 103. However, STOP has not alleged this as part of its request for contested case hearing. Nor has it stated how TCEQ failed to implement an anti-degradation policy, given that the Permit states on its face that TCEQ did in fact perform an antidegradation review. Due to this lack of specificity regarding the alleged failure by TCEQ, this comment does not raise a disputed question of fact.

Finally, to the extent that the Commission intends to consider treating any public comments made by STOP as issues raised for a contested case hearing, Leprino would request the opportunity to brief the commission on such comments.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny STOP’s and Ms. Anderson’s requests for contested case hearing and issue the permit as prepared by the Executive Director and TCEQ staff.

Dated: August 5, 2024



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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he/she/they served a copy of the foregoing Opposition to Request for Reconsideration to the following via hand delivery, facsimile transmission, electronic mail, or by deposit in the U.S. Mail, on August 5, 2024.

A handwritten signature in blue ink, appearing to read "Dorothy E. Watson", is positioned above a horizontal line.

Dorothy E. Watson

TPDES PERMIT NO. WQ0005417000

APPLICATION BY	§	BEFORE THE
LEPRINO FOODS COMPANY	§	TEXAS COMMISSION ON
LUBBOCK, LUBBOCK COUNTY	§	ENVIRONMENTAL QUALITY

OPPOSITION TO REQUEST FOR RECONSIDERATION

By and through its counsel, Foley & Lardner LLP, Leprino Foods Company (Leprino) requests that the Texas Commission on Environmental Quality (Commission) deny the request of Stop the Oppression of Our People (STOP) for the Commission to reconsider the Executive Director's decision to issue TCEQ Permit No. WQ0005417000 to Leprino.¹ For the reasons stated below, the Commission should deny STOP's improper and unsupported request for reconsideration.

I. BACKGROUND

Leprino has applied for Texas Pollutant Discharge Elimination System (TPDES) permit related to the construction and operation of a state-of-the-art dairy products manufacturing facility (Facility) and associated wastewater treatment facility in Lubbock, Texas. The permit application, No. WQ0005417000 (Permit), was received by the TCEQ on September 30, 2022. TCEQ declared the permit application administratively complete on October 17, 2022. During a public comment period that ended in June 2023, a number of commenters submitted a request for a Public Meeting. Two commenters submitted a request for a Contested Case Hearing.

In response to the requests for a Public Meeting, TCEQ issued a Notice of Public Meeting on September 11, 2023. The Notice of Public Meeting stated that, consistent with

¹ This response to request for reconsideration (Response) is properly filed on August 5, 2024, in accordance with 30 Tex. Admin. Code § 55.209.

Texas law, the period during which TCEQ would accept public comments on the Permit would close at the conclusion of the public meeting held by TCEQ on October 24, 2023. On June 3, 2024, the Executive Director responded to all public comments timely and properly received in this matter and filed its Response to Public Comments with TCEQ's Office of the Chief Clerk on that same day. On June 10, 2024, TCEQ published the Executive Director's Response to Public Comments (RTC) contemporaneously with the Executive Director's issuance of a decision that Leprino's Permit meets all requirements of applicable law. No changes were made to the draft Permit in response to comments. Interested parties had until July 10, 2024 to file a request for reconsideration. Only one party, STOP, filed a request for reconsideration on July 10, 2024.

II. ARGUMENT

STOP has filed a Request for Reconsideration based on spurious allegations of procedural deficiencies. STOP's Request for Reconsideration should be denied. STOP asserted only one basis for reconsideration: that the Executive Director "failed to properly respond to public comments." Specifically, STOP alleges that the Executive Director failed to properly respond to the following comments: (i) an SD card containing an audio file (Recording) of the *informal discussion* period of the October public meeting, (Request for Reconsideration (July 10, 2024) at p. 2); (ii) STOP's comments related to Total Maximum Daily Loads (TMDL) for relevant waterbodies, *id.* at 8; (iii) STOP's comments related to environmental justice "in the area surrounding the proposed facility," *id.* at 8-9; and (iv) generally raised comments regarding odor, *id.* at 9. However, STOP's allegations are wrong, as supported by the record.

Texas regulations require the Executive Director to respond to "all timely, relevant and material, or significant public comments." 30 Tex. Admin. Code § 55.156(b)(1). As described below, the Executive Director responded to each category of comments identified by STOP as required by law.

- A. *The Executive Director is not required to respond to a recording of discussions occurring during the Informal Portion of the October 24, 2023, public meeting (Recording) and to do so would be contrary to public policy.*

First, the Executive Director was not required to respond to the Recording because it was not a public comment properly submitted to the Executive Director during the formal comment period. TCEQ clearly articulated how public comments must be provided to TCEQ in various notices provided to the public regarding the permit. TCEQ required that public comments be submitted to TCEQ in writing or made orally during the public meeting. See e.g., Notice of Application dated May 18, 2023 and Notice of Public Meeting issued September 11, 2023.

As discussed by TCEQ at the meeting, the Recording did not constitute public comments submitted during the Formal Comment Period.² Therefore, the Executive Director acted properly by not responding to the Recording as a public comment submitted during the Formal Comment Period.

Indeed, had the Executive Director treated the Recording as “public comment,” TCEQ would have run afoul of its own rules and guidance, and would have had the practical effect of unfairly elevating the “informal discussion” period into something entirely different. Moreover, consideration of informal comments and discussion would be patently unfair and unjust to those who spoke during the informal discussion period and who did not consent to having such discussion considered as “formal comments.” Any individuals commenting during the informal discussion period were put on notice—multiple times—that they were not providing formal public comments when they spoke. Not only did the prior notice explain this, but this distinction was conveyed on sign-in materials provided at the meeting. These individuals intentionally

² Notably, STOP could have orally or in writing presented what it believed to be unresolved issues identified during the discussion period as part of its own formal comments during the Public Meeting.

elected to speak (and ask questions) during the informal discussion period and not during the formal public comment period.

Further, it would contravene the important purpose of having an informal discussion period if the Commission were to allow STOP to submit other persons' recorded discussions as public comments. The Public Meeting included an informal discussion period specifically to provide an opportunity for the public to have free and open discussions to resolve concerns. Allowing parties to circumvent this by recording and submitting this discussion as formal comments could chill the very discussions such an informal discussion period is intended to foster.

Second, even if the Recording could have been construed as public comment, STOP's attempt to incorporate only portions of the recorded informal comments is unreasonable and renders the request invalid. At the hearing, STOP requested to "incorporat[e] by . . . all of the recorded informal public comments and questions *not supporting the issuance* of Applicant's permit application," Request for Reconsideration (July 10, 2024) p. 2 (emphasis added).

Nothing in the regulations directs or allows the Executive Director to conduct such an assessment to identify public comments. The Executive Director is merely required to respond to public comments. However, even if the Executive Director could parse a recording for public comments, to do so would be arbitrary and capricious. STOP's instructions do not set forth criteria by which to identify or categorize the comments as favorable or unfavorable.

B. The Executive Director met its obligation to respond to STOP's comments regarding TMDLs

STOP's complaint regarding TMDLs appears to be solely borne out of STOP's own failure to make an adequate public comment on this issue. In its Request for Reconsideration, STOP complains that the Executive Director failed to respond to "the issue of TCEQ's failure to

develop a Total Maximum Daily Load for the waterbodies that may be impacted by Leprino's discharge. (*See, e.g.*, RTC 2-3).” But STOP's actual comment on this issue—which TCEQ unequivocally responded to—was as follows:

[B]y failing to timely develop an EPA approved TMDL for the water bodies impacted by Applicant's permit application . . . , TCEQ has inappropriately abandoned its duty and shifted most, if not all, of TCEQ's regulatory review burden onto a low-income, minority-majority community

STOP Supplemental Public Comments (June 17, 2023). TCEQ responded to this comment directly, but STOP has tried to obfuscate this issue in its Motion for Reconsideration by reframing the comment. Such reframing makes it appear as if STOP had raised a specific issue about TCEQ's failure to develop a TMDL, when in fact it merely stated how non-permitting issue allegedly results in a burden on STOP. And it was to this original comment that the Executive Director responded.

Finally, even if STOP does not like the response to comments that it received, that is not enough to prove that the Executive Director had not met its burden. Texas law requires only that a response is given prior to the approval of the relevant permit application. 30 Tex. Admin. Code § 55.156(b)(1). The permitting authority is only required to consider significant comments, not to act on them. *In re NE Hub Partners*, 7 E.A.D. 561, 582-84 (EAB). Further, the Executive Director does not need to guess at what a comment means when the comments are not clear on their face. *See e.g., In re FutureGen Indus. All., Inc.*, 16 E.A.D. 717, 754 (EAB 2015) (holding that “[a] permitting authority's response to a comment need only be commensurate with the comprehensiveness of the comment itself.”).

C. The Executive Director met its obligation to respond to STOP's comments regarding the Issue of Environmental Justice

Once again STOP's complaint that the Executive Director failed to address STOP's comment on environmental justice is meritless. The Executive Director did respond to STOP's

comments in RTC 5. This response meets the Executive Director's requirement under the law to consider significant comments. 30 Tex. Admin. Code § 55.156. See e.g., *In re NE Hub Partners*, 7 E.A.D. 582-84.

Further, STOP is incorrect in asserting that Executive Order 12898, related to environmental justice, applies to this Permit. Executive Order 12898, by its own terms applies only to federal agencies and federal action. Because TCEQ is not required to address Executive Order 12898 to issue the Permit, STOP's complaint is not relevant and the Executive Director need not have responded differently than it already had.

D. The Executive Director met its obligation to respond to STOP's comments regarding the issue of odor

Again, despite STOP's claims otherwise, the Executive Director did respond to STOP's misguided comments regarding odor. See e.g., RTC 8. While the law requires the Executive Director to respond to public comments, it does not require that TCEQ act on such comments. *In re NE Hub Partners*, 7 E.A.D. 582-84. Further, the Executive Director is not required to respond to comments that are not relevant to the Permit. 30 Tex. Admin. Code § 55.156. As such, the Executive Director has no obligation to address existing odors as part of its response to comments.

III. CONCLUSION

For the foregoing reasons, the Commission should deny STOP's request for reconsideration.

Dated: August 5, 2024



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he/she/they served a copy of the foregoing Opposition to Request for Reconsideration to the following via hand delivery, facsimile transmission, electronic mail, or by deposit in the U.S. Mail, on August 5, 2024.

A handwritten signature in blue ink, appearing to read "Dorothy E. Watson", is positioned above a horizontal line.

Dorothy E. Watson

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LEPRINO FOODS COMPANY**

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