

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

September 16, 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 THE CITY OF
JOSEPHINE FOR TPDES PERMIT NO. WQ001088003
TCEQ DOCKET NO. 2024-1228-MWD**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing and Requests for Reconsideration 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. 2024-1228-MWD

**APPLICATION BY THE CITY
OF JOSEPHINE FOR TPDES
PERMIT NO. WQ001088003**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUESTS FOR HEARING AND REQUESTS 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 Requests for Reconsideration 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 the City of Josephine (City or Applicant) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0010887003. The Commission received timely comments, hearing requests, and requests for reconsideration from Jane E. Ridgway and James M. Ridgway. The Commission received timely comments and a request for reconsideration from Kevin Christensen. For the reasons stated herein, OPIC respectfully recommends that the Commission find that Jane E. Ridgway and James M. Ridgway are affected persons, and further recommends that the Commission grant their hearing requests. OPIC recommends the denial of all requests for reconsideration.

B. Description of Application and Facility

The City of Josephine applied to the TCEQ for a new TPDES permit to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.75 million gallons per day (MGD). The draft permit authorizes the disposal of sludge at a TCEQ-authorized land application site, co-disposal landfill, wastewater treatment facility, or facility that further processes sludge. The proposed facility would be an activated sludge process plant using sequencing batch reactors (SBRs). Treatment units would include a mechanical and a manual bar screen, a grit chamber, an influent lift station, three SBR basins, three aeration basins, a digester basin, two disk filters, and an ultraviolet disinfection chamber.

The proposed wastewater treatment facility would be located at 601 East Caddo Street in Collin County. The proposed discharge route would go to an unnamed tributary, then to Brushy Creek, then to West Caddo Creek, then to Lake Tawakoni in Segment No. 0507 of the Sabine River Basin.

C. Procedural Background

The application was received on May 1, 2023, and declared administratively complete on June 6, 2023. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published in the *Collin County Commercial Record* on June 15, 2023. The Executive Director (ED) completed the technical review of the application on September 26, 2023. The Notice of Application and Preliminary Decision was published in the *Collin County Commercial Record* on

December 5, 2023, in the *Harald Banner-Collin County* on January 18, 2024, and in the *Farmersville Times/C&S Media-Collin County* on January 18, 2024. The public comment period ended on February 20, 2024. The ED's Response to Comments (RTC) was mailed on June 17, 2024. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was July 17, 2024.

II. APPLICABLE LAW

A. Hearing Requests

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) § 55.201(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.

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 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.

B. Requests 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 REQUEST

A. Whether the requestor is an affected person

Jane E. Ridgway

Jane E. Ridgway submitted timely comments and a hearing request. Ms. Ridgway gave her address as 5754 FM 6, Josephine. According to the map created by ED staff, this address is 0.36 miles from the proposed facility. Ms. Ridgway raised concerns about flooding, air pollution, nuisance odors, notice, and wildlife.

Jane E. Ridgway's concerns about nuisance odors, notice, and wildlife, when combined with her proximity to the proposed site, give Ms. Ridgway a personal justiciable interest in this matter which is not common to the general public. Also, her concerns are interests protected by the law under which this application is considered, and a reasonable relationship exists between those interests and the regulation of the site. Finally, the location of Ms. Ridgway's property increases the likelihood of impacts to health, safety, and use of property. Therefore, OPIC finds that Jane E. Ridgway qualifies as an affected person under 30 TAC § 55.203(a) and (c).

James M. Ridgway

James M. Ridgway submitted timely comments and a hearing request. Mr. Ridgway gave his address as 5754 FM 6, Josephine. According to the map created by ED staff, this address is 0.36 miles from the proposed facility. Mr. Ridgway raised concerns about air pollution, nuisance odors, the accuracy of the application, and wildlife.

James M. Ridgway's concerns about nuisance odors, application accuracy, and wildlife, when combined with his proximity to the proposed site, give Mr. Ridgway a personal justiciable interest in this matter which is not common to the general public. Also, his concerns are interests protected by the law under which this application is considered, and a reasonable relationship exists between those interests and the regulation of the site. Finally, the location of Mr. Ridgway's property increases the likelihood of impacts to health, safety, and use of property. Therefore, OPIC finds that James M. Ridgway qualifies as an affected person under 30 TAC § 55.203(a) and (c).

B. Which issues raised in the hearing requests are disputed

The affected requestors raised the following disputed issues:

1. Whether the draft permit is adequately protective against nuisance odors.
2. Whether there was adequate notice of the application and draft permit.
3. Whether the draft permit is adequately protective of wildlife.
4. Whether the application was accurately completed.

5. Whether the proposed facility will increase the likelihood of flooding.
6. Whether the draft permit is adequately protective against air pollution.

C. Whether the dispute involves questions of fact or of law

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. The issues raised here are issues of fact.

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

Issues No. 1-6 in Section III.B. were specifically raised by affected requestors during the public comment period.

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

No public comments were withdrawn in this matter. Therefore, the hearing requests are not based on issues raised in withdrawn public comments.

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

The hearing requests 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 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).

Nuisance Odors

Affected requestors raised concerns about the proposed facility's emission of nuisance odors. 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 as described by requestors, Issue No. 1 is relevant and material to the Commission's decision on this Application.

Notice

A requestor raised concerns about notice. Her concerns focused on whether all required, nearby landowners were properly notified. 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. 2 is appropriate for referral to SOAH.

Wildlife

Requestors raised concerns about adverse effects to water quality and the consequential impacts on wildlife. 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...” 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). As Chapter 307 designates criteria for the regulation of water quality and the protection of animal life, Issue No. 3 is relevant and material to the Commission’s decision regarding this application.

Application Accuracy

TCEQ rules require that if an applicant becomes aware that it failed to submit relevant facts or submitted incorrect information in a permit application, the applicant is required to promptly submit such facts and information. 30 TAC § 305.125(19). Therefore, Issue No. 4 is relevant and material to the Commission’s decision regarding this application and is appropriate for referral to SOAH.

Flooding

TCEQ's jurisdiction is established by statute and does not include authority under the Texas Water Code or its regulations to address or consider flooding when making a decision on issuance of this permit. Therefore, Issue No. 5 is not relevant and material to the Commission's decision on this application.

Air Pollution

Requestors raised concerns regarding the proposed facility's emission of air pollutants. 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 No. 6 is not relevant and material to the Commission's decision on this application.

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. 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. REQUESTS FOR RECONSIDERATION

Jane E. Ridgway submitted a request for reconsideration which articulated concerns about runoff, application accuracy, flooding, notice, air pollution, and wildlife.

James M. Ridgway submitted a request for reconsideration which articulated concerns about runoff, application accuracy, flooding, notice, air pollution, and wildlife.

Kevin Christensen submitted a request for reconsideration which articulated concerns regarding odor, runoff, flooding, and site selection.

While OPIC is recommending a hearing and referral of issues encompassing many of requestors' concerns expressed in the requests for reconsideration, a record establishing the evidentiary basis for reconsidering the ED's decision based on these issues would need to exist in order to recommend that the requests for reconsideration be granted. As no such record currently exists, OPIC cannot recommend the requests be granted at this time.

V. CONCLUSION

Having found that Jane E. Ridgway and James M. Ridgway qualify as affected persons in this matter, OPIC respectfully recommends the Commission

grant their hearing requests and refer Issues No. 1-4 specified in Section III.B for a contested case hearing at SOAH with a maximum duration of 180 days. OPIC further recommends the Commission deny all pending requests for reconsideration

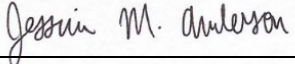
Respectfully submitted,

Garrett T. Arthur
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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2024, the original of the Office of Public Interest Counsel's Response to Request for Hearing and Request for Reconsideration 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. 2024-1228-MWD**

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