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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 11, 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 MOORE FARM WCID
NO. 1 FOR NEW TPDES PERMIT NO. WQ0016274001
TCEQ DOCKET NO. 2024-1581-MWD**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request for Hearing and Request 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. 2024-1581-MWD

APPLICATION BY MOORE	§	BEFORE THE
FARM WCID NO. 1 FOR NEW	§	
TPDES PERMIT NO.	§	TEXAS COMMISSION ON
WQ0016274001	§	
	§	ENVIRONMENTAL QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE
TO REQUEST 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 Request for Hearing and Request 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 Moore Farm Water Control and Improvement District (WCID) No. 1 (Moore Farm or Applicant) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016274001. The Commission received timely comments, a hearing request, and a request for reconsideration on behalf of the City of Terrell (Terrell or City). For the reasons stated herein, OPIC respectfully recommends that the Commission find that the City of Terrell is an affected person, and further recommends that the Commission grant its hearing request. OPIC recommends denial of the request for reconsideration.

B. Description of Application and Facility

Moore Farm 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 0.20 million gallons per day (MGD) in the Interim I phase, a daily average flow not to exceed 0.50 MGD in the Interim II phase, and a daily average flow not to exceed 1.60 MGD in the Final phase.

The Moore Farm WCID No. 1 Wastewater Treatment Facility would be a suspended growth activated sludge process plant operated in the single-stage nitrification mode. Treatment units in the Interim I phase would include an on-site lift station, a manual bar screen, two aeration basins, a final clarifier, two multi-stage aerobic digesters, and a chlorine contact chamber. Treatment units in the Interim II phase would include an on-site lift station, a manual bar screen, five aeration basins, two final clarifiers, six multi-stage aerobic digesters, a chlorine contact chamber, and dechlorination. Treatment units in the Final phase would include an on-site lift station, a manual bar screen, three aeration basins, three final clarifiers, three multi-stage aerobic digesters, a chlorine contact chamber, and dechlorination.

The proposed wastewater treatment facility would serve a residential subdivision with 5,250 residential connections, located approximately 1.5 miles north of the City of Terrell. The facility would be located approximately 0.35 miles southwest of the intersection of County Road 243 and County Road 245 in Kaufman County. The treated effluent would be discharged to Little High Point

Creek, then to High Point Creek, then to Big Brushy Creek, then to Kings Creek, then to Cedar Creek Reservoir in Segment No. 0818 of the Trinity River Basin. The unclassified receiving water uses are limited aquatic life use for Little High Point Creek, and high aquatic life use for High Point Creek and Big Brushy Creek. The designated uses for Segment No. 0818 are primary contact recreation, public water supply, and high aquatic life use.

C. Procedural Background

The application was received on December 14, 2022, and declared administratively complete on January 11, 2023. The Executive Director (ED) completed the technical review of the application on August 28, 2023. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published in English on January 18, 2023, in the *Dallas Morning News*, and in Spanish on January 18, 2023, in *Al Dia*. The Notice of Application and Preliminary Decision was published in English on December 20, 2023, in the *Dallas Morning News*, and in Spanish on December 20, 2023, in *Al Dia*. A public meeting was held on January 25, 2024, and the public comment period ended at the close of the public meeting. The ED's Response to Comments (RTC) was mailed on July 31, 2024. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was August 30, 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. As provided by § 55.203(b), governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons. 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

City of Terrell

The City of Terrell submitted timely comments and a hearing request. The request indicates that, based on its authority as a Texas home-rule city, Terrell has an interest in the general health, safety, and welfare of the residents within its corporate limits and extraterritorial jurisdiction (ETJ). Furthermore, the City has an interest in providing and maintaining wastewater treatment services to the area within its corporate limits and ETJ. This interest is directly related to TCEQ's regulation of wastewater permitting.

The facility, outfall, discharge route, and service area proposed by the draft permit are all in close proximity to the City and its ETJ. The City asserts that it shares a fence line with Applicant, and that the City's corporate limits are adjacent to a portion of the proposed facility's service area, which also overlaps with a portion of the City's ETJ. According to the map created by ED staff, the proposed facility would abut the City's ETJ, and the one-mile discharge route would be almost entirely within the City's ETJ. According to the City's request, the proposed plant would serve areas within the City's ETJ, and the proposed plant site is less than one mile from the City's nearest corporate boundary and less than three miles from the City's nearest existing wastewater infrastructure.

The issues raised in the request include concerns about regionalization, application accuracy, antidegradation, notice, water quality, nuisance odors, buffer zone requirements, operator information, EPA approval, TCEQ regional office approval, emergency services, and construction disturbances. Governmental entities, including local governments, with authority under state law over issues raised by the application, may be considered affected persons. 30 TAC § 55.203(b). Furthermore, when determining whether local governments are affected persons, factors related to their statutory authority over or interest in the issues relevant to the application should be considered. 30 TAC § 55.203(c). The City's concerns are protected by the law under which the application will be considered. Further, the City has demonstrated that it has authority under state law over the issues it has raised. Finally, the proposed facility would be in close proximity to the City and its ETJ. In combination, these factors give the City a personal justiciable interest and distinguish that interest from the general public. Therefore, OPIC finds that the City of Terrell qualifies as an affected person.

B. Which issues raised in the hearing request are disputed¹

The affected requestor raised the following disputed issues:

¹ The City asked whether the draft permit was approved by EPA. Based on the available record, including the RTC, it appears the draft permit was submitted to EPA on December 19, 2023, and on February 2, 2024, EPA approved the draft permit. Likewise, the City asked whether the TCEQ Region 4 office responded to the Request for Comments. Based on the available record, including the RTC, it appears that TCEQ Region 4 provided comments on the draft permit on August 30, 2024, which were addressed in the draft permit. Region 4 requested changing the *E. coli* testing frequency to once per week in the Final phase, and that frequency was changed accordingly. OPIC finds that these issues are no longer disputed and should not be referred to SOAH. Therefore, the disputed issues list in this subsection does not include these issues.

1. Whether the application adequately complied with regionalization requirements.
2. Whether the application was accurate.
3. Whether the draft permit adequately complied with antidegradation requirements.
4. Whether the applicable public notice requirements were met given the availability of the application at the public viewing location.
5. Whether the draft permit is adequately protective of water quality.
6. Whether the draft permit is adequately protective against nuisance odors.
7. Whether the application is adequately compliant with buffer zone requirements.
8. Whether the application provided adequate information about the plant operator.
9. Whether the application ensures that Terrell is able to provide emergency services.
10. Whether construction will cause vibration and disturbances of vegetation or wetlands.

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. 1-10 in Section III.B. were specifically raised by an affected requestor during the public comment period.

E. Whether the hearing request is based on issues raised solely in a withdrawn public comment

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

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

The hearing request 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).

Regionalization

TCEQ's regionalization policy comes from Section 26.081 of the Texas Water Code, which implements "the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state." TCEQ's wastewater permit application requires the applicant for a new permit to provide information concerning other wastewater treatment facilities that exist near the applicant's proposed treatment facility site. The applicant is required to state whether any portion of the applicant's proposed service area is located in an incorporated city, whether its proposed service area is located

within another utility's certificate of convenience and necessity area, and whether there is a facility, or any sewer collection lines located within the three-mile area surrounding the proposed facility site. Accordingly, Issue No. 1 is relevant and material to the Commission's decision on 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. 2 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Antidegradation

Antidegradation reviews are governed by 30 TAC § 307.5, which establishes the Commission's antidegradation policy and contains provisions for implementation of the policy. As part of the ED's antidegradation review, the existing uses of a waterbody are determined, and the draft permit is designed to protect those uses. Therefore, Issue No. 3 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Notice

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. 4 is appropriate for referral to SOAH.

Water Quality

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 human health and safety and terrestrial

and aquatic life, Issue No. 5 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Nuisance Odors and Buffer Zone Requirements

Buffer zone requirements and nuisance odors are 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, Issues No. 6 and 7 are relevant and material.

Operator Information

Both the operator and the owner of the facility are required to submit an application for a permit pursuant to 30 TAC § 305.43(a). The requestor disputes whether it has been demonstrated that this requirement has been met with respect to the application and proposed discharge. Accordingly, Issue No. 8 is appropriate for referral to SOAH.

Emergency Services and Construction Disturbances

The requestor raised concerns about disturbances related to the construction of the proposed facility. The construction process of the development is outside the jurisdiction of the TCEQ. The proposed permit addresses only the wastewater aspect of the development and operation. Likewise, the requestor raised concerns about the City's ability to provide emergency services. The provision of emergency services is outside the scope of

the evaluation of an application for a TPDES permit. Therefore, Issues No. 9-10 are not relevant and material and not appropriate for referral to SOAH.

G. Maximum expected duration for the contested case hearing

Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 1, 2015, the administrative law judge must conclude the hearing and provide a proposal for decision by the 180th day after the first day of the preliminary hearing, or a date specified by the Commission, whichever is earlier. 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

The City of Terrell submitted a request for reconsideration which articulated the same concerns as in its request for a contested case hearing.

While OPIC is recommending a hearing and referral of issues encompassing many of the requestor's concerns expressed in the request 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

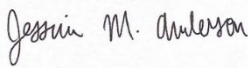
that the request for reconsideration be granted. As no such record currently exists, OPIC cannot recommend the request for reconsideration be granted at this time.

V. CONCLUSION

Having found that the City of Terrell is an affected person in this matter, OPIC respectfully recommends the Commission grant its hearing request and refer Issues No. 1-8 specified in Section III.B for a contested case hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,

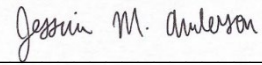
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By: 

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 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.

A handwritten signature in cursive script that reads "Jessica M. Anderson". The signature is written in dark ink on a light-colored background.

Jessica M. Anderson

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