

Brooke T. Paup, *Chairwoman*
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

March 10, 2025

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 CEDAR CREEK MH,
LLC FOR TPDES PERMIT NO. WQ0016303001
TCEQ DOCKET NO. 2024-1724-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. 2024-1724-MWD

**APPLICATION BY CEDAR
CREEK MH, LLC FOR TPDES
PERMIT NO. WQ0016303001**

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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

Before the Commission is an application by Cedar Creek MH, LLC (Applicant) for a new Texas Pollutant Discharge Elimination System (TPDES) permit No. WQ0016303001 which would authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 150,000 gallons per day. The Commission received timely comments and hearing requests from Texas Department of Transportation (TxDOT) and Carr Family Partnership, Ltd (Carr Family). For the reasons detailed below, OPIC recommends the Commission grant the hearing request of Carr Family. OPIC further recommends the Commission refer the issues specified in Section III.B 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

As previously stated, the Cedar Creek MH, LLC submitted an application to the TCEQ for a new TPDES permit No. WQ0016303001 which would authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 150,000 gallons per day. The Applicant proposes to operate Cedar Creek Wastewater Treatment Plant (facility), which would serve the Cedar Creek Subdivision. The facility would be an activated sludge process plant operated in the conventional mode with nitrification. The facility would be located at 2883 State Highway 71, Bastrop County, 78612. The treated effluent would be discharged to an unnamed tributary of Dry Creek, then to Dry Creek, then to the Colorado River below Lady Bird Lake/Town Lake in Segment No. 1428 of the Colorado River Basin.

C. Procedural Background

The TCEQ received the application on February 22, 2023, and declared it administratively complete on April 4, 2023. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published on April 19, 2023, in the *Bastrop Advertiser*. The Notice of Application and Preliminary Decision was published on October 11, 2023, in the *Bastrop Advertiser*. The public comment period ended at the close of the public meeting on February 27, 2024. The Chief Clerk mailed the Executive Director (ED)'s decision and Response to Comments on August 29, 2024. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was September 30, 2024.

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 Request

A. Whether the requestors are affected persons

TxDOT

The Commission received timely comments and a hearing request on behalf of TxDOT. The hearing request stated that TxDOT denied Applicant's request to discharge proposed wastewater onto TxDOT's right-of-way due to unauthorized use of state property, the availability of alternative discharge options, infrastructure and safety concerns, and a pending reuse permit. TxDOT

asserted that feasible alternatives exist and that the discharge could potentially damage roadways.

Under Section 5.115(b) of the Texas Water Code (TWC), a state agency receiving notice under this subsection may submit comments to the commission but cannot contest the issuance of a permit or license by the commission.¹ This legislative intent is reflected in TCEQ's rules in 30 TAC § 55.103, which defines "affected person" and incorporates the statutory prohibition against other state agencies (except river authorities) challenging permits issued by the TCEQ. Therefore, regardless of any other law, state agencies like TxDOT cannot file a contested case hearing request, request for reconsideration, be considered an affected person, be named as a party in a contested case hearing, or otherwise contest a permit. Consequently, TxDOT cannot qualify as an affected person under TWC § 5.115(b) and 30 TAC § 55.103.

Carr Family

The Commission received timely comments and hearing requests submitted on behalf of the Carr Family. The hearing requests stated that Carr Family Partnership's property is adjacent to the western boundary of the proposed facility. The hearing requests raised concerns regarding water quality, nuisance odors, regionalization, and health impacts.

¹ For the purposes of this subsection, 'state agency' does not include a river authority. House Bill 2694, enacted by the 82nd Texas Legislature in 2011, includes a provision that prevents state agencies, except river authorities, from contesting the issuance of permits or licenses by TCEQ. Specifically, Section 10.01 of the bill amended Section 5.115(b) of the Texas Water Code. This amendment effectively prohibits state agencies, other than river authorities, from contesting TCEQ's issuance of permits or licenses.

The ED's GIS map indicates that Carr Family's property is located in close proximity to the facility, with the proposed discharge route running through Carr Family's property. Carr Family's concerns regarding water quality, health impacts, and regionalization are interests protected by the law under which the application will be considered. *See* 30 TAC § 55.203(c)(1). Given the proximity of Carr Family's property to Applicant's facility and the discharge route, OPIC finds that a reasonable relationship exists between the interests claimed and the activity regulated. *See* 30 TAC § 55.203(c)(3). Finally, the requestor's proximity increases the likelihood that the regulated activity will impact their health, safety, use of property, and use of the impacted natural resource. *See* 30 TAC § 55.203(c)(4), (5). Therefore, OPIC finds that Carr Family qualifies as an affected person in accordance with 30 TAC § 55.203.

B. Which issues raised in the hearing request are disputed

Carr Family raised the following disputed issues:

1. Whether the draft permit is protective of water quality and the existing uses of the receiving waters in the area in accordance with applicable Texas Surface Water Quality Standards in 30 TAC Chapter 307;
2. Whether the draft permit includes adequate provisions to protect the health of the requestor, their livestock, and aquatic and terrestrial wildlife;
3. Whether the draft permit complies with the applicable requirements to abate and control nuisance odors, as set forth in 30 TAC§ 309.13(e);
4. Whether the draft permit complies with TCEQ's regionalization policy;

5. Whether the draft permit includes adequate provisions to protect the requestor's use and enjoyment of their property;
6. Whether the draft permit contains sufficient provisions to ensure proper waste management to prevent accidents, spills, and runoff;
7. Whether the proposed discharge route is properly characterized in the application, and, as an operational feature of the facility, will function properly; and
8. Whether the application is accurate and complete.

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 Carr Family 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

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).

Water Quality and Health Effects

The Commission is responsible for the protection of water quality under TWC Chapter 26 and 30 TAC Chapters 307 and 309. 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. The Standards also require that "[a] permit must contain effluent limitations that protect existing uses and preclude degradation of existing water quality." 30 TAC § 307.2(d)(5)(D). Additionally, surface waters must not be toxic to humans from ingestion, consumption of aquatic organisms, or contact with the skin. 30 TAC § 307.4(d). Therefore, Issue Nos. 1, 2, 5, and 6 are relevant and material to the Commission's decision regarding this application.

Nuisance Odors

Nuisance odor is specifically addressed by TCEQ regulations concerning the siting of domestic wastewater plants. 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. *See* 30 TAC § 309.13(e). Therefore, Issue No. 3 is relevant and material.

Regionalization

It is state policy to encourage regionalization, and TCEQ must consider regionalization when deciding whether to issue a discharge permit. TWC §§ 26.081(a), 26.0282. Therefore, Issue No. 4 regarding regionalization is relevant and material to a decision on this application.

Suitability of the Discharge Route

Carr Family questioned the classification of the “unnamed tributary,” questioning whether it qualifies as a watercourse capable of carrying the effluent discharge proposed in the draft permit. This concern appears to be based on the suitability and functioning of the discharge route. Proper functioning of a discharge route as an operational feature of a wastewater treatment plant may be addressed under 30 TAC § 309.12, which contains requirements related to site selection in order to minimize possible contamination of water in the state.

Further, the Standards in 30 TAC 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. An inaccurate or inadequate representation of the effluent route could prevent ED staff from conducting a complete and accurate analysis. Therefore, Issue no. 7 is relevant and material to the Commission’s decision regarding this application and is appropriate for referral to SOAH.

Complete and Accurate Application

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. *See* 30 TAC § 305.125(19). Therefore, Issue No. 8 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

G. Maximum expected duration for the contested case hearing

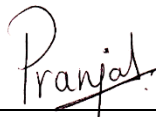
Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 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.

V. Conclusion

For the reasons discussed above, OPIC recommends the Commission grant Carr Family's hearing request and refer the issues specified in Section III.B 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 March 10, 2025, 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.


Pranjal M. Mehta

**MAILING LIST
CEDAR CREEK MH, LLC
TCEQ DOCKET NO. 2024-1724-MWD**

FOR THE APPLICANT

via electronic mail:

Shelley Young, P.E.
WaterEngineers, Inc.
17230 Huffmeister Road, Suite A
Cypress, Texas 77429
syoung@waterengineers.com

FOR THE EXECUTIVE DIRECTOR

via electronic mail:

Allie Soileau, 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
allie.soileau@tceq.texas.gov

Shaun Speck, Technical Staff
Texas Commission on Environmental
Quality
Water Quality Division MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4653 Fax: 512/239-4430
shaun.speck@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):

Diana Schulze
Texas Department of Transportation
174 Highway 21 East
Bastrop, Texas 78602

Sharon J. Smith
Armbrust & Brown PLLC
100 Congress Avenue, Suite 1300
Austin, Texas 78701