

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Toby Baker, *Executive Director*



Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 21, 2022

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: THE DEVELOPMENT CORPORATION OF TARRANT COUNTY
TCEQ DOCKET NO. 2022-0271-MWD**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Amanda D. Pesonen", with a long horizontal flourish extending to the right.

Amanda D. Pesonen
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2022-0271-MWD

APPLICATION BY THE	§	BEFORE THE
DEVELOPMENT	§	TEXAS COMMISSION ON
CORPORATION OF TARRANT	§	ENVIRONMENTAL
COUNTY FOR TPDES PERMIT	§	QUALITY
NO. WQ0015954001	§	

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUEST FOR HEARING**

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 in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is The Development Corporation of Tarrant County's (Applicant) application for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015954001. The Commission received a timely comment and request for a contested case hearing from John Kevin Ward on behalf of the Trinity River Authority (TRA). For the reasons stated herein, OPIC recommends the Commission find TRA is an affected person in this matter and grant its hearing request as detailed below.

B. Background of Facility

On December 30, 2020, Applicant applied to the TCEQ for new TPDES Permit No. WQ0015954001. If issued, this permit would authorize the disposal of treated domestic wastewater at the proposed Willow Branch Wastewater Treatment Facility at an annual average flow not to exceed 57,000 gallons per day (GPD).

The facility is proposed to be located approximately 1,201 feet east northeast of the intersection of Bennett Lawson Road and Willow Creek Circle in Tarrant County, Texas. The treated effluent will be discharged to Willow Branch, then to Walnut Creek, then to Joe Pool Lake in Segment No. 0838 of the Trinity River Basin. The unclassified receiving water uses are minimal aquatic life use for Willow Branch and high aquatic life use for Walnut Creek. The designated uses for Segment No. 0838 are primary contact recreation, public water supply, and high aquatic life use.

The facility, which has not yet been constructed, will be an activated sludge process plant operated in the extended aeration mode. Treatment units will include a bar screen, an aeration basin, a final clarifier, an aerobic sludge digester, and a chlorine contact chamber.

The effluent limitations in the draft permit, based on a 30-day average, are 20 milligrams per liter (mg/l) five-day biochemical oxygen demand (BOD₅), 20 mg/l total suspended solids (TSS), 126 colony forming units (CFU) or most probable number (MPN) of *E. coli* per 100 milliliters, and 2.0 mg/l minimum dissolved oxygen (DO). The effluent shall contain a chlorine residual in the range of 1.0 to 4.0 mg/l after a detention time of at least 20 minutes based on peak flow. The pH must be in the range of 6.0 to 9.0 standard units.

C. **Procedural Background**

The TCEQ received the permit application on December 30, 2020, and declared it administratively complete on February 10, 2021. Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English in the *Star-Telegram* on March 8, 2021, and in Spanish in the *La Prensa Comunidad* on February 23, 2021. Applicant published the Notice of Application and Preliminary Decision (NAPD) in English in the *Star-Telegram* on August 13, 2021, and in Spanish in *La Prensa Comunidad* on August 24, 2021. The public comment period

for the application closed on September 23, 2021. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on November 23, 2021. The deadline for filing requests for a contested case hearing was December 23, 2021.

The Commission received a timely comment and request for a contested case hearing from TRA. For the reasons stated herein, OPIC recommends the Commission grant TRA's hearing request.

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 30 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.

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.

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 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.

III. DISCUSSION

A. Determination of Affected Person Status

The Commission received a timely public comment and hearing request from TRA. The request raises issues related to water quality, regionalization, and need. These interests are protected by the law under which this application will be considered.

In accordance with 30 TAC § 55.203(c)(7), governmental entities may be affected persons based on their statutory authority over or interest in the issues relevant to the application. TRA states that it owns and operates the Central Regional Wastewater System which provides wholesale wastewater collection and treatment services to, among others, the City of Mansfield. TRA asserts the City of Mansfield's nearest collection system assets are 2.8 miles from the proposed facility site. TRA further contends that Mansfield's collection system could provide the wastewater services proposed to be provided by Applicant's facility. OPIC therefore finds that TRA has an interest in issues which are relevant to the application and further finds that the remaining § 55.203

affected person determination factors indicate that TRA has unique justiciable interests related to a legal right, duty, privilege, power, or economic interest affected by the application. First, its concerns are interests protected by the law under which this application is being considered. Second, a reasonable relationship exists between those interests and the regulation of water quality. Finally, the proximity of TRA's Mansfield facility to Applicant's proposed facility increases the likelihood of impacts to TRA's stated interests.

For these reasons, OPIC finds TRA has successfully demonstrated that it is an affected person in this matter.

B. Issues Raised in the Hearing Request

TRA raised the following issues in its timely comment and hearing request:

1. Whether the draft permit is protective of water quality under the applicable surface water quality standards; and
2. Whether the Commission should deny or alter the terms and conditions of the draft permit based on consideration of need under Texas Water Code (TWC) § 26.0282 and the general policy to promote regional or area-wide systems under TWC § 26.081.

C. Issues Raised in the Hearing Request Remain Disputed

There is no agreement between TRA and the ED on the issues raised in the hearing request; thus, they remain disputed.

D. The Disputed Issues Are Issues of Fact

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. Both of the issues raised are issues of fact.

E. Issues Were Raised by the Requestor During the Comment Period

Both of the issues were raised by TRA during the public comment period.

F. The Hearing Request is Based on Issues Raised in a Public Comment Which Has Not Been Withdrawn

The hearing request is based on a timely comment that has not been withdrawn.

G. Issues That 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 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).

Water Quality

TRA is concerned about water quality in Joe Pool Lake, the terminus of the proposed discharge route, from which TRA furnishes municipal water supply. The TCEQ is responsible for the protection of water quality under TWC Chapter 26 and 30 TAC Chapters 305, 307 and 309. The Texas Surface Water Quality Standards (TSWQS) contained in 30 TAC Chapter 307 require a proposed permit "to maintain the quality of water in the state consistent with public health and enjoyment..." 30 TAC § 307.1. 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). The TSWQS further provide that "[t]he commission may not issue a permit for a new facility ... unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of water in the state." 30 TAC § 309.12. As TCEQ regulations designate extensive criteria for the regulation of water quality, Issue No. 1 is relevant and material to the Commission's decision on the application and is appropriate for referral to SOAH.

Regionalization and Need

As explained above, TRA contends its City of Mansfield wastewater treatment facility could provide the wastewater treatment services proposed to be provided by Applicant's facility. Under TWC § 26.081(a), it is "state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems ... to prevent pollution and maintain and enhance the quality of the water in the state." Further,

[i]n considering the issuance ... of a permit to discharge waste, the commission may deny or alter the terms of the proposed permit ... based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order....

TWC § 26.0282. Therefore, Issue No. 2 regarding regionalization and need is relevant and material to the Commission's decision on the application and is appropriate for referral to SOAH.

H. Issues Recommended for Referral

As set forth above, OPIC recommends referral of Issues No. 1 and 2 specified in Section III.B to SOAH because they are relevant and material to the Commission's decision on this application.

I. Maximum Expected Duration of 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

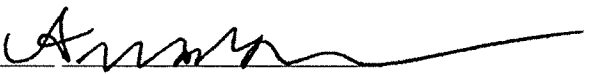
as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC respectfully recommends the Commission find that TRA qualifies as an affected person in this matter, grant its hearing request, and refer Issues No. 1 and 2 specified in Section III.B for a contested case hearing at SOAH with a maximum duration of 180 days.

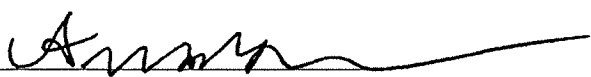
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2022, the Office of Public Interest Counsel's Response to Request for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.


Amanda D. Pesonen

MAILING LIST
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TCEQ DOCKET NO. 2022-0271-MWD

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