

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

July 18, 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: **Dalasu 686 LP (Applicant)**
Docket No. 2022-0811-MWD

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2022-0811-MWD

**IN THE MATTER OF THE
APPLICATION BY DALASU 686
LP FOR WATER QUALITY
PERMIT NO. WQ0016004001**

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

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

To the Honorable 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 Hearing Request in the above-referenced matter and respectfully shows the following.

I. Introduction

A. Summary of Position

Based on the information submitted in the request and a review of the information available in the Chief Clerk's file on this application, OPIC recommends the Commission deny the hearing request of Thomas M. Hill.

B. Description of Facility

Dalasu 686 has applied to TCEQ for a new permit that would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 240,000 gallons per day (gpd) in the Interim I phase, 480,000 gpd in the Interim II phase, and 720,000 gpd in the Final phase. The proposed Cleveland Municipal Utility District No. 2 Wastewater Treatment Facility is an activated sludge process plant operated in the extended aeration mode. Treatment units in the Interim I phase include one bar screen, three aeration basins, one final clarifier, two sludge digesters, and one chlorine contact chamber. Treatment units in the Interim II phase include one bar screen,

six aeration basins, two final clarifiers, four sludge digesters, and two chlorine contact chambers. Treatment units in the Final phase include one bar screen, nine aeration basins, three final clarifiers, six sludge digesters, and three chlorine contact chambers. The proposed facility, which has not been constructed, will serve the Cleveland Tract residential development.

The wastewater treatment facility will be located approximately 2.06 miles southeast of Fostoria Road and Texas Highway 105 E and approximately 1.42 miles northeast of Fostoria Road and Morgan Cemetery Road, in Liberty County, Texas 77328. The treated effluent will be discharged to an unnamed tributary, thence to Red Gully, thence to East Fork San Jacinto River in Segment No. 1003 of the San Jacinto River Basin. The unclassified receiving water use is limited aquatic life use for the unnamed tributary and Red Gully. The designated uses for Segment No. 1003 are primary contact recreation, public water supply, and high aquatic life use.

C. Procedural Background

TCEQ received the application for a new TPDES permit on May 25, 2021, and declared it administratively complete on August 24, 2021. The Notice of Receipt of Application and Intent to Obtain Water Quality Permit was published on September 2, 2021, in *The Vindicator*. On October 7, 2021, the Executive Director (ED) completed technical review and issued a draft permit. The Notice of Application and Preliminary Decision for TPDES Permit for Municipal Wastewater was published on November 25, 2021, in *The Vindicator*. The public comment period ended on December 28, 2021. The Executive Director's Response to Comments (RTC) was mailed on March 8, 2022. The hearing request period ended April 7, 2022. Thomas M. Hill filed timely comments and a hearing request on September 16, 2021.

II. Request for Hearing

A. Applicable Law

The application was filed after September 1, 2015. Therefore, the application is subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015). Under Title 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 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 requestor is an affected person, 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), 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 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(d).

B. Determination of Affected Person Status

The Commission received timely comments and a hearing request from Mr. Thomas M. Hill. The comments and request raise concerns about flooding and “the environmental impact on discharging this water into a gully that flows into the East Fork of the San Jacinto River.” Other than flooding, the request does not specify further potential environmental impacts of concern. Nor does Mr. Hill describe how such environmental impacts would affect his personal interests. Mr. Hill concludes by requesting a hearing so the community will know about the potential flooding risk of the proposed facility.

Because general concerns about flooding are not protected by the law under which this application will be considered, OPIC cannot find that Mr. Hill is an affected person under 30 TAC § 55.203(a) and (c)(1).

C. Issue Raised

The following issue has been raised in the hearing request:

1. Whether the proposed facility will result in an increased risk of flooding?

D. Issue 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. 30 TAC § 55.211(c)(2)(A). The issue raised by the requestor is an issue of fact.

E. Issue Was Raised by the Affected Person During the Comment Period

The issue raised by the requestor was raised during the comment period and has not been withdrawn. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

F. Disputed Issue

There is no agreement between the requestor and the ED on the issue raised in the hearing request.

G. Relevant and Material Issue

Hearing requests must raise an issue relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–251 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs”).

While the Commission has jurisdiction under its Chapter 309 rules to regulate site suitability and the adequacy of operational features such as the discharge route, the

Commission does not have jurisdiction over general concerns about flooding. Therefore, the requestor's stated concern about flooding is not relevant and material to the Commission's decision on this application.

III. Conclusion

For the reasons stated above, OPIC respectfully recommends the Commission deny the hearing request of Thomas M. Hill.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: Eli Martinez

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2022, the original of the Office of Public Interest Counsel's Response to Hearing Request was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via electronic mail.

Eli Martinez
Eli Martinez

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TCEQ DOCKET NO. 2022-0811-MWD**

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