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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 19, 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: **PETITION FOR CREATION OF DUCK CREEK MUNICIPAL UTILITY
DISTRICT OF DENTON COUNTY
TCEQ DOCKET NO. 2022-1631-DIS**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Sheldon P. Wayne".

Sheldon P. Wayne, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2022-1631-DIS

**PETITION FOR THE CREATION
OF DUCK CREEK MUNICIPAL
UTILITY DISTRICT
OF DENTON COUNTY**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL
QUALITY**

**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUESTS**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the Commission) files this Response to Hearing Requests in the above-entitled matter.

I. Introduction

A. Summary of Position

Preliminarily, OPIC notes that the TCEQ Chief Clerk's office received requests for a contested case hearing in this matter from the following individuals: Lisa and Scott Cody, Janis Massie, Glen and Cathy McDaniel, Stacy and Brian Rushing, Bryan and Christina Sipp, Marion Odom, Gray and Janell Shelton, Stephen and Jennifer Sutton, and Shaun and Colleen Wilson. For the reasons discussed herein, OPIC respectfully recommends that the Commission grant the hearing requests of Lisa and Scott Cody, Marion Odom, Stacy and Brian Rushing, and Bryan and Christina Sipp. OPIC further recommends that the Commission refer this matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing and deny all remaining hearing requests.

B. Background

Earthland Farms, LLC, Kenneth Zollinger, and Daphne Zollinger (Petitioners), filed a petition for the creation of Duck Creek Municipal Utility District of Denton County (the District)

pursuant to Article XVI, Section 59 of the Texas Constitution, Chapters 49 and 54 of the Texas Water Code (TWC), 30 Texas Administrative Code (TAC) Chapter 293, and the procedural rules of the TCEQ. The application was declared administratively complete on June 20, 2022. On August 14, 2022 and August 21, 2022, the Notice of District Petition was published in the *Denton Record-Chronicle*. On August 10, 2022, the Denton County Clerk posted the notice on the bulletin board used for posting legal notices in Denton County. According to the notice, the proposed District shall consist of approximately 320.41 acres and would be located within Denton County. The comment and contested case hearing request periods ended on September 20, 2022.

II. Applicable Law

A municipal utility district (MUD or a district) may be created under and subject to the authority, conditions, and restrictions of Article XVI, Section 59, of the Texas Constitution, TWC § 54.011. Chapters 49 and 54 of the TWC and the Commission's administrative rules found at Title 30, Chapter 293, of the TAC govern petitions to create a MUD. A district shall be created for the following purposes:

- (1) the control, storage, preservation, and distribution of its storm water and floodwater, the water of its rivers and streams for irrigation, power, and all other useful purposes;
- (2) the reclamation and irrigation of its arid, semiarid, and other land needing irrigation;
- (3) the reclamation and drainage of its overflowed land and other land needing drainage;
- (4) the conservation and development of its forests, water, and hydroelectric power;
- (5) the navigation of its inland and coastal water;
- (6) the control, abatement, and change of any shortage or harmful excess of water;
- (7) the protection, preservation, and restoration of the purity and sanitary condition of water within the state; and
- (8) the preservation of all natural resources of the state.

TWC § 54.012.

To create a MUD, a petition requesting creation shall be filed with the Commission. TWC

§ 54.014. The petition shall be signed by a majority in value of the holders of title of the land within the proposed district, as indicated by the tax rolls of the central appraisal district. *Id.* Among other things, the petition shall: (1) describe the boundaries of the proposed district by metes and bounds or by lot and block number; (2) state the general nature of the work proposed to be done, the necessity for the work, and the cost of the project as then estimated by those filing the petition; and (3) include a name of the district which shall be generally descriptive of the locale of the district. TWC § 54.015. *See also* 30 TAC § 293.11(a) and (d).

If all of the district is proposed to be located outside corporate limits of a municipality, the commissioners court of the county in which the district is to be located may review the petition for creation and other evidence and information relating to the proposed district that the commissioners consider necessary. TWC § 54.0161(a). If the commissioners court votes to make a recommendation to the Commission, the commissioners court shall submit to the Commission, at least 10 days before the date set for the hearing on the petition, a written opinion stating whether or not the county would recommend the creation of the proposed district and stating any findings, conclusions, and other information that the commissioners court thinks would assist the Commission in making a final determination on the petition. TWC § 54.0161(b). The Commission shall consider the written opinion submitted by the county commissioners. TWC § 54.0161(c).

The Commission shall grant the petition if it conforms to the requirements of § 54.015 and the project is feasible, practicable, necessary, and further, would be a benefit to the land to be included in the district. TWC § 54.021(a). In determining if the project is feasible, practicable, necessary, and beneficial to the land included in the district, the Commission shall consider:

- (1) the availability of comparable service from other systems, including but not limited to water districts, municipalities, and regional authorities;
- (2) the reasonableness of projected construction costs, tax rates, and water and sewer rates; and

- (3) whether or not the district and its system and subsequent development within the district will have an unreasonable effect on the following:
- (A) land elevation;
 - (B) subsidence;
 - (C) groundwater level within the region;
 - (D) recharge capability of a groundwater source;
 - (E) natural run-off rates and drainage;
 - (F) water quality; and
 - (G) total tax assessments on all land located within a district.

TWC § 54.021(b).

If the Commission finds that not all of the land proposed to be included in the district will be benefited by the creation of the district, it shall exclude all land not benefited and redefine the proposed district's boundaries accordingly. TWC § 54.021(c). If the petition does not conform to the requirements of TWC § 54.015 or the project is not feasible, practicable, necessary, or a benefit to the land in the district, the Commission shall deny the petition. TWC § 54.021(d). The rights, powers, privileges, authority, and functions of a district shall be subject to the continuing right of supervision by the Commission. TWC § 54.024.

The applicant must publish notice of the petition to create a district once a week for two consecutive weeks in a newspaper regularly published or circulated in the county where the district is proposed to be located not later than the 30th day before the date of the Commission's decision on the application. TWC §§ 49.011(b) and 54.018. Additionally, the applicant must post notice of the petition on the bulletin board used for posting legal notices in each county in which all or part of the proposed district is to be located. 30 TAC § 293.12(b)(2). The Commission shall hold a public hearing if requested by the Commission, Executive Director, or an "affected person" under the factors in 30 TAC, Chapter 55. TWC § 49.011(c). *See also* 30 TAC § 55.250 (applying rules governing contested case hearings to applications declared administratively complete after September 1, 1999). Affected persons must file their hearing requests during the 30 days following

the final notice publication date. TWC § 49.011(c). *See also* 30 TAC § 293.12(c).

A hearing requestor must make the request in writing within the time period specified in the notice and identify the requestor's personal justiciable interest affected by the application, specifically explaining the "requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public." 30 TAC § 55.251(b)–(d).

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." 30 TAC § 55.256(a). Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.256(b). Relevant factors to be considered in determining whether a person is affected include, but are not limited to:

- (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, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.256(c).

To confer standing on a group or association, § 55.252 states that a hearing request by a group or association may not be granted unless all of the following requirements are met:

- (1) one or more members of the group or association that would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and

(3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

The Commission shall grant a request for a contested case hearing if: (1) the request is made by the applicant or the ED; or (2) the request is made by an affected person, complies with the requirements of § 55.251, is timely filed with the chief clerk, and is made pursuant to a right to hearing authorized by law. 30 TAC § 55.255(b).

III. Discussion

Lisa and Scott Cody

On August 26, 2022, Lisa and Scott Cody timely submitted a request for a contested case hearing. In their request, they express concerns about impacts to groundwater quality, livestock, area roads, tax rates, and possible odor issues. The address provided by the Codys is approximately 0.6 miles from the proposed District's boundaries as confirmed by the map prepared by the ED's staff.

After considering their provided information, OPIC concludes that they possess a personal justiciable interest in this matter. When deciding on a petition for creation of a district, the Texas Water Code requires the Commission to consider whether the district and its system and subsequent development within the district will have an unreasonable effect on water quality. TWC § 54.021(b)(3)(F). Their concerns, in combination with the close proximity of their residence to the proposed District, increase the probability that they will be affected in a way not common to members of the general public. Finally, a reasonable relationship exists between their concerns and the creation of the proposed District. Therefore, OPIC concludes that Lisa and Scott Cody have successfully demonstrated that they qualify as affected persons in this matter.

Stacy and Brian Rushing

On September 6, 2022, Stacy and Brian Rushing timely submitted a request for a contested case hearing.¹ In their request, they state concerns about the creation of the MUD, including concerns regarding water quality, groundwater supply, drainage, wastewater, odors, health and fire hazards, and property taxes. According to the ED's map, their residence is located approximately 0.15 miles from the proposed District. Their articulated concerns include issues that are within the Commission's jurisdiction to consider in the context of a district's creation. For example, water quality, groundwater level and recharge capability, and drainage are all relevant and material to the Commission's consideration of this matter under TWC § 54.021(b)(3). Further, the Rushings' close proximity to the proposed District increases any likelihood that they will be affected in a way not common to members of the general public. Their location, taken in combination with their stated concerns, demonstrates that they possess a personal justiciable interest in this matter. Accordingly, OPIC respectfully recommends that Stacy and Brian Rushing be found as affected persons by the Commission.

Bryan and Christina Sipp, Marion Odom, and Gray and Janell Shelton

On August 26, 2022, Bryan and Christina Sipp, Marion Odom, and Gray and Janell Shelton jointly submitted a timely request for a contested case hearing. In their request, they explain that their cattle drink from the creek that runs through their properties, and these requestors are concerned about the proposed District's effects on water quality and their livestock. They also raise concerns about noise and odor associated with the proposed wastewater treatment plant, property taxes, flooding, and displacement of wildlife. Additionally, they question whether the

¹ OPIC notes that in addition to Stacy and Brian Rushing, the request was signed by "Stonecreek Residents" and "HOA." OPIC has analyzed this hearing request as an individual request, however, to the extent that it was also intended to be a group or associational request, and in accordance with 30 TAC § 55.252(b), OPIC requests that the requestors provide an explanation of how they meet the group or associational requirements of 30 TAC § 55.252(a).

proposed District is needed. According to the ED's map, Bryan and Christina Sipp are located approximately 0.4 miles from the proposed District. Marion Odom is located approximately 0.4 miles from the proposed District. Gray and Janell Shelton are located approximately 2 miles from the proposed District.

Their concerns include issues that are within the Commission's jurisdiction to address in the context of a district creation. The Commission is required to consider water quality and natural run-off rates and drainage. TWC § 54.021(b)(3)(E), (F). Regarding Bryan and Christina Sipp and Marion Odom, their concerns, combined with their close proximities to the proposed District, increase any probability that they will be affected in a way not common to members of the general public. Finally, a reasonable relationship exists between their concerns and the creation of the District. Therefore, OPIC concludes that Bryan and Christina Sipp and Marion Odom have successfully demonstrated that they qualify as affected persons.

Regarding Gray and Janell Shelton, they have stated interests that are within the Commission's jurisdiction to consider in this district creation matter, however, their location is approximately 2 miles from the proposed District's boundaries. While their concerns include interests which are protected by the law under which this application will be considered, because of the intervening distance between their residence and the proposed District, OPIC cannot conclude that the Sheltons would be impacted by the Facility in a manner which is not common to the general public. OPIC finds that they have failed to demonstrate that they possess a personal justiciable interest in the matter as required by 30 TAC § 55.256(a). Consequently, OPIC respectfully recommends denial of Gray and Janell Shelton's hearing request.

Janis Massie

On August 29, 2022, Janis Massie timely submitted a request for a contested case hearing. In her request, she raises concerns about property values and creation of odor issues associated

with the wastewater treatment facility proposed to be located within the District. Ms. Massie also states that traffic is going to be an issue. According to the ED's map, her residence is located approximately 0.7 miles from the proposed District.

OPIC recognizes that Ms. Massie lives near the proposed District, however, her concerns primarily relate to the proposed wastewater treatment facility, rather than the proposed District. Any Texas Pollutant Discharge Elimination System (TPDES) permit associated with the operation of a wastewater treatment facility will be subject to a separate Commission proceeding. Therefore, concerns about the wastewater treatment facility should not provide a basis for standing in the district creation matter now before the Commission. Requestors expressing concern about the impacts of the wastewater treatment plant may request a contested case hearing on the TPDES application if they so choose. Regarding her concern about traffic, TCEQ does not have jurisdiction to consider the proposed District's effects on traffic. As a result, OPIC finds that Janis Massie has not demonstrated that she possesses a personal justiciable interest in this matter, and concludes that she does not qualify as an affected person.

Glen and Cathy McDaniel

On August 26, 2022, Glen and Cathy McDaniel timely submitted a request for a contested case hearing. In their request, they express concerns about traffic, road durability, and the wastewater treatment facility's odor and its consequential effect on their property value. According to the ED's map, their residence is located approximately 0.6 miles from the proposed District. As previously discussed, the wastewater treatment facility would be the subject of a separate proceeding and concerns regarding it are better addressed in that proceeding. Additionally, TCEQ does not have jurisdiction to consider the proposed District's effects on property values, nor on traffic or the durability of area roads. Therefore, because they have not stated concerns that are

within the jurisdiction of TCEQ to address in the context of a district's creation, OPIC respectfully recommends denial of the hearing request of Glen and Cathy McDaniel.

Stephen and Jennifer Sutton

On August 29, 2022, Stephen and Jennifer Sutton timely submitted a request for a contested case hearing. In their request they state they are concerned that the proposed wastewater treatment facility will decrease their home's property value, raise their property taxes, and create odor issues. They also state that the area does not need more housing projects and that traffic will be an issue. According to the ED's map, the Suttons are located approximately 0.7 miles from the proposed District.

OPIC recognizes that the Suttons live near the proposed District, however, a requestor must articulate an interest that relates to a legal right, duty, privilege, power, or economic interest affected by the petition in their request. 30 TAC § 55.256(c). Stephen and Jennifer Sutton's stated interests are not protected by the law under which this petition will be considered and are not within TCEQ's jurisdiction to consider in the context of a district creation. Therefore, OPIC respectfully recommends denial of Stephen and Jennifer Sutton's hearing request.

Shaun and Colleen Wilson

On September 12, 2022, Shaun and Colleen Wilson timely submitted a request for a contested case hearing. In their request they state various concerns about the proposed wastewater treatment facility and the suitability of area roads. They also are concerned about the proposed District's effects on their beekeeping activities. According to the ED's map, the Wilsons' residence is adjacent to the proposed District.

While the Wilsons live near the proposed District, a requestor must articulate an interest that relates to a legal right, duty, privilege, power, or economic interest affected by the petition in their request. 30 TAC § 55.256(c). Their stated interests are not protected by the law under which

this petition will be considered and are not within TCEQ's jurisdiction to consider in the context of a district creation. Therefore, OPIC respectfully recommends denial of Shaun and Colleen Wilson's hearing request.

IV. Conclusion

For the reasons set forth above, OPIC respectfully recommends that the Commission grant the hearing requests of Lisa and Scott Cody, Marion Odom, Stacy and Brian Rushing, and Bryan and Christina Sipp. OPIC further recommends that the Commission refer this matter to SOAH for a contested case hearing and deny all remaining hearing requests.

Respectfully submitted,

Garrett T. Arthur
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CERTIFICATE OF SERVICE

I hereby certify that December 19, 2022, the original of the Office of Public Interest Counsel's Response to Hearing Requests 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, and/or by deposit in the U.S. Mail.



Sheldon P. Wayne

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DOCKET NO. 2022-1631-DIS; INTERNAL CONTROL NO. D-06142022-031

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See attached list.

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