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Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 3, 2023

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 VANTAGE AUSTIN LLC (APPLICANT)**
TCEQ DOCKET NO. 2023-0386-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 cursive script that reads "Pranjal".

Pranjal M. Mehta, Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2023-0386-MWD

**APPLICATION BY THE
VANTAGE AUSTIN LLC
FOR TPDES PERMIT NO.
WQ0016132001**

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**BEFORE THE
TEXAS COMMISSION
ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE
TO REQUESTS FOR HEARING**

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 Requests for Hearing in the above-referenced matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

For the reasons detailed below, OPIC recommends the Commission grant the hearing requests of Jonah Water Special Utility District and Lt. Col. Mark Shipman. OPIC further recommends the Commission refer the issues specified in Section III.H for a contested case hearing at the State Office of Administrative Hearings (SOAH) with a maximum duration of 180 days.

B. Background of Facility

The Vantage Austin LLC (Applicant) applied for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016132001, to authorize a discharge of treated domestic wastewater at a daily average flow limit in Interim Phase I of 150,000 or 0.15 million gallons per day (MGD), at a daily average flow limit in Interim Phase II of 0.30 MGD, and at a daily average flow limit in the Final Phase of 0.45 MGD from the proposed Williamson County Municipal Utility District No. 44 Wastewater Treatment Facility (the facility). Sludge generated

at the facility will be authorized to be disposed of at any TCEQ-authorized land application site, co-disposal landfill, the facility, or any facility that further processes sludge.

The facility would be located approximately 1.0 mile north of the intersection of County Road 140 and County Road 194, in Williamson County. The treated effluent would be discharged to East Fork Ranger Branch, then to Ranger Branch, then to Berry Creek, then to the San Gabriel River/North Fork San Gabriel River in Segment No. 1248 of the Brazos River Basin.

C. Procedural Background

The TCEQ received the application on March 25, 2022, and declared it administratively complete on April 28, 2022. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in English on May 8, 2022, in the *Williamson County Sun*, and in Spanish on May 12, 2022, in *El Mundo*. The Executive Director (ED) completed the technical review of the application on July 8, 2022, and prepared the proposed draft permit, which if approved, would establish the conditions under which the facility must operate. A Combined Notice of Application and Preliminary Decision (NAPD) and NORI was published in English in the *Williamson County Sun* on August 28, 2022, and in Spanish in *El Mundo* on September 15, 2022.¹ The public comment period ended on October 14, 2022. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on December 28, 2022. The deadline for filing requests for a contested case hearing was January 27, 2023. The Commission received timely filed hearing requests from Jonah Water Special Utility District, Marvin Mueller², and Lt. Col. Mark Shipman.

¹ The RTC explained that initial NORI included an incorrect description of the proposed discharge route, therefore, Applicant published a combined notice of NORI and NAPD.

² On March 23, 2023, Marvin Mueller withdrew his comments and request for a contested case hearing.

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 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).

As provided by 30 TAC § 55.205(a), a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association 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.

For applications filed on or after September 1, 2015, § 55.205(b) states that a hearing request by a group or association may not be granted unless all of the following requirements are met:

- (1) comments on the application are timely submitted by the group or association;
- (2) the request identifies, by name and physical address, one or more members of the group or association that would otherwise have standing to request a hearing in their own right;
- (3) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (4) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

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. DISCUSSION

A. Whether the requesters are affected persons

Jonah Water Special Utility District

Attorney John Carltron timely submitted comments and a hearing request on behalf of Jonah Water Special Utility District (Jonah). Jonah is the holder of Certificates of Convenience and Necessity (CCN) for water and sewer, numbers 10970 and 21053, in Williamson County and operates under ~~the~~ Texas Water Code (TWC) Chapter 65. Jonah stated that the facility would be located entirely within its corporate boundaries and the facility's proposed service area would also probably be located within the territories where Jonah provides sewer service. Jonah also stated that it has substantial interest in maintaining its service areas and protecting the quality of water sources it uses to serve its customers which would be adversely affected by the outcome of this application. Jonah further stated that the application does not indicate if the Applicant requested wastewater service from Jonah or Jonah is unable to or unwilling to provide such service, and the facility does not comply with TCEQ's regionalization policy. Jonah also explained that it provides water to its customers obtained from surface water and wells, and also from Lake Granger which is fed by the San Gabriel River. Jonah expressed concerns that Applicant's proposed discharge of wastewater will adversely affect the water quality of the receiving waters, thereby potentially impacting Jonah's use of the water for its customers.

The ED's map shows that the distance between the facility and Jonah Wastewater Special Utility District CCN No. 10970 is 2.41 miles. Based on Jonah's CCN location relative to the proposed facility, it has an interest in regionalization that is not common to the general public, and

it should be considered under TWC Section 26.0282. Further, Jonah's water quality concerns indicate an interest protected by the law under which the application will be considered, and a reasonable relationship exists between water quality and the regulation of wastewater discharge. Therefore, OPIC finds that Jonah qualifies as an affected person under 30 TAC § 55.203 (c).

Lt. Col. Mark Shipman

Mr. Shipman timely submitted comments and a hearing request. Mr. Shipman raised concerns regarding water quality, air quality, nuisance odors, potential impact on human health, and use and enjoyment of his property. Other than nuisance odor concerns, issues relating to air quality are not addressed by the statutes and rules that apply to this application, but Mr. Shipman's remaining concerns are interests that are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and regulation of the facility. The ED's map shows that Mr. Shipman is within a half mile of the proposed facility. Based on Mr. Shipman's proximity to the proposed facility and his concerns regarding nuisance odor, health, water quality, and use and enjoyment of property, OPIC finds that Mr. Shipman has a personal justiciable interest in this matter which is not common to members of the general public. Therefore, OPIC finds that Mr. Shipman is an affected person.

B. Issues Raised in the Hearing Requests of Affected Persons

The affected persons discussed above raised the following issues.

1. Whether the draft permit complies with TCEQ's regionalization policy (Jonah).
2. Whether the draft permit is protective of water quality and the uses of the receiving waters under the applicable Texas Surface Water Quality Standards (Jonah).
3. Whether the draft permit would impact any nearby water wells (Jonah).

4. Whether the draft permit is adequately protective of human health and safety (Mr. Shipman).
5. Whether the draft permit adequately addresses nuisance conditions, including odor, in accordance with 30 TAC § 309.13(e). (Mr. Shipman)
6. Whether the draft permit includes appropriate provisions to protect against excessive growth of algae blooms (Jonah).
7. Whether the draft permit contains adequate provisions to protect Mr. Shipman's use and enjoyment of his property (Mr. Shipman).
8. Whether the facility will adversely affect air quality. (Mr. Shipman)
9. Whether the proposed facility will negatively affect nearby property values (Mr. Shipman).

C. Issues Raised in the Hearing Requests Remain Disputed

There is no agreement between the hearing requestors and the ED on the issues raised in the hearing requests. Therefore, they remain disputed.

D. Whether 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. 30 TAC § 55.211(c)(2)(A). The issues listed above are issues of fact.

E. Issues Raised by the Affected Persons During the Comment Period

All of the issues were raised by the affected persons during the public comment period.

F. The Hearing Requests are Based on Issues Raised in Public Comments Which Have Not Been Withdrawn

The hearing requests are all based on timely comments that have not been withdrawn.

G. Issues That 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).

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. 1 is relevant and material to the Commission's decision on this application.

Water Quality and Health Effects

The Commission is responsible for the protection of water quality under TWC Chapter 26 and 30 TAC Chapter 307 and 309. These responsibilities include ensuring compliance with the Texas Surface Water Quality Standards. The purpose of these standards is to "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. Also, "[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. 2, 3, 4, and 6 are relevant and material to the Commission's decision regarding this application and are appropriate for referral to SOAH.

Nuisance Odors and Use and Enjoyment of Property

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. 30 TAC § 309.13(e). Furthermore, the wastewater permit does not allow the permit holder to create or maintain a nuisance that interferes with a landowner's use and enjoyment of their property. Therefore, Issue Nos. 5 and 7 are relevant and material.

Air Quality

As explained earlier for affected person analysis, other than nuisance odor, issues relating to air quality are not addressed by the statutes and rules that apply to this application. Therefore, Issue No. 8 is not relevant and material.

Property Values

TCEQ does not have jurisdiction to consider a proposed wastewater treatment facility's impact on property values. Therefore, Issue No. 9 is not relevant and material.

H. Issues Recommended for Referral

For the reasons discussed above, OPIC recommends referral of the following issues to SOAH for a contested case hearing:

1. Whether the draft permit complies with TCEQ's regionalization policy.
2. Whether the draft permit is protective of water quality and the uses of the receiving waters under the applicable Texas Surface Water Quality Standards.
3. Whether the draft permit would impact any nearby water wells.
4. Whether the draft permit is adequately protective of human health and safety.

5. Whether the draft permit adequately addresses nuisance conditions, including odor, in accordance with 30 TAC § 309.13(e).
6. Whether the draft permit includes appropriate provisions to protect against excessive growth of algae blooms.
7. Whether the draft permit contains adequate provisions to protect use and enjoyment of property.

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

For the reasons detailed above, OPIC recommends the Commission grant the hearing requests of Jonah Water Special Utility District and Lt. Col. Mark Shipman. OPIC further recommends the Commission refer the issues specified in Section III.H for a contested case hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By: Pranjal

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2023, 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
Pranjal M. Mehta

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TCEQ DOCKET NO. 2023-0386-MWD

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