

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
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Kelly Keel, *Interim Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 10, 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: **CITY OF HOUSTON (Applicant)**
TCEQ DOCKET NO. 2023-0556-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 cursive script that reads "Jennifer Jamison".

Jennifer Jamison, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-0556-MWD

APPLICATION BY CITY OF	§	BEFORE THE
HOUSTON FOR MAJOR	§	TEXAS COMMISSION ON
AMENDMENT TO TPDES	§	ENVIRONMENTAL
PERMIT NO. WQ0010495030	§	QUALITY

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 an application by City of Houston (Applicant) for a major amendment to TPDES Permit No. WQ0010495030. The Commission received a timely combined comment and request for a contested case hearing from Will Hickman. For the reasons stated herein, OPIC respectfully recommends the Commission find that Will Hickman is an affected person in this matter and grant his pending hearing request.

B. Description of Application and Facility

The TCEQ received City of Houston's application for a major amendment to TPDES Perrmit No. WQ0010495030 on October 22, 2021. If issued, this amendment would authorize the removal of the existing Sublethal Whole Effluent Toxicity (WET) limits and monitoring requirements from the permit pursuant to

the Environmental Protection Agency's WET policies, the Clean Water Act, and the Code of Federal Regulations. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 26.4 million gallons per day (MGD). The existing wastewater treatment facility serves an area in West Houston inside Harris County that includes residential and commercial development. The facility is an activated sludge process plant operated in the single stage nitrification mode. Treatment units include a bar screen, nine aeration basins, six final clarifiers, two chlorine contact chambers, and dechlorination chamber.

The effluent limitations in the draft permit, based on a 30-day average, are 10 milligrams per liter (mg/l) five-day carbonaceous biochemical oxygen demand (CBOD₅), 15 mg/l total suspended solids (TSS), 2.0 mg/l ammonia nitrogen (NH₃-N) (April - October), 4.0 mg/l NH₃-N (November - March), 63 colony forming units (CFU) or most probable number (MPN) of *Escherichia coli* (*E. coli*) per 100 milliliters (ml), and 6.0 mg/l minimum dissolved oxygen (DO). Per the existing permit, the effluent must contain a total chlorine residual of at least 1.0 mg/l after a detention time of at least 20 minutes (based on peak flow) and must be monitored daily by grab sample. Further, the permittee must dechlorinate the chlorinated effluent to less than 0.1 mg/l total chlorine residual and must monitor total chlorine residual daily by grab sample after the dechlorination process.

The plant site is located at 12901 Hermitage Lane, in the City of Houston, Harris County. The treated effluent is discharged directly to Buffalo Bayou Above Tidal in Segment No. 1014 of the San Jacinto River Basin. The designated uses for Segment No. 1014 are primary contact recreation and limited aquatic life use.

C. Procedural Background

City of Houston submitted its application for a major amendment of its TPDES (DEFINE TPDES) permit on October 22, 2021, and TCEQ declared it administratively complete on December 10, 2021. The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) on December 22, 2021, in the *Houston Chronicle* and in Spanish on December 22, 2021, in *La Voz de Houston*. The Applicant published the Notice of Application and Preliminary Decision (NAPD) in English on June 8, 2022, in the *Houston Chronicle* and in Spanish on June 8, 2022, in *La Voz de Houston*. The public comment period ended on July 8, 2022. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on October 11, 2022. The deadline for filing requests for a contested case hearing or reconsideration of the ED's decision on the application was November 10, 2022.

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 Texas Administrative Code § 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 must 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. ANALYSIS OF HEARING REQUEST

A. Whether the requestor is an affected person

Will Hickman

Mr. Hickman submitted timely combined comments and a hearing request on May 25, 2022. In his request, Mr. Hickman raises concerns odor and water quality, including his recreational use of the bayou. The request states that Mr. Hickman's property is located roughly 200 feet from the facility's fence line, and the map prepared by the Executive Director's staff confirms that the property is located 0.1 miles from the facility and outfall.

Mr. Hickman's concerns about water quality and odor, when combined with his proximity to the plant site, give Mr. Hickman a personal justiciable interest in this matter which is not common to the general public. Also, his concerns are interests protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of a wastewater treatment plant. Finally, the proximity of

his home increases any likelihood of impacts to his health, safety, and use of property. Therefore, OPIC finds that Will Hickman qualifies as an affected person.

B. Which issues raised in the hearing request are disputed

Mr. Hickman, as an affected person, raised the following disputed issues:

1. Whether water quality will be adequately protected;
2. Whether the application and permit will preserve air quality by preventing nuisance odor.

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. All issues raised by the affected person are issues of fact.

D. Whether the issues were raised during the public comment period

Issues 1-2 in Section III.B were specifically raised by the affected person during the public comment period.

E. Whether the hearing request is based on issues raised solely in a withdrawn public comment

The hearing request is based on timely comments that have not been withdrawn.

F. Whether the issues are relevant and material to the decision on the application

The hearing request raises 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 the State Office of Administrative Hearings (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 and Recreational Activities

Mr. Hickman raised concerns about adverse effects to water quality and impacts to the recreational activities his family enjoys on the bayou. The Commission is responsible for the protection of water quality under Texas Water Code (TWC) Chapter 26 and 30 TAC Chapters 307 and 309. The 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. According to § 307.6(b)(4) of the Standards, "[w]ater in the state must be maintained to preclude adverse toxic effects on aquatic life, terrestrial life, livestock, or domestic animals, resulting from contact, consumption of aquatic organisms, consumption of water, or any combination of the three." 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). Finally, 30 TAC § 307.4(e) requires that nutrients from permitted discharges or other controllable sources shall not cause excessive growth of aquatic vegetation which impairs an existing, designated, presumed, or attainable use. As Chapter 307 designates criteria for the regulation of water quality, the protection of human health and safety, and animal life, Issues No. 1-2 are relevant and material to the Commission’s decision regarding this application and are appropriate for referral to SOAH.

Nuisance Odor

Odor is specifically addressed by TCEQ regulations concerning the siting of domestic wastewater plants. 30 TAC § 309.13. Furthermore, a wastewater permit does not allow the permit holder to create or maintain a nuisance that interferes with the use and enjoyment of property. Therefore, Issue 3 is relevant and material.

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 State Office of Administrative Hearings (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

Having found that Will Hickman qualifies as an affected person in this matter, OPIC respectfully recommends the Commission grant his hearing request and refer Issue Nos. 1-2 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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Public Interest Counsel

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2023, 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 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.



Jennifer Jamison

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TCEQ DOCKET NO. 2023-0556-MWD**

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